ARTICLES

Let Our Parents Run: Removing the Judicial Barriers for Parental Governance of Local Schools

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Introduction

Historically, educational reform usually fails to achieve its goal.[1] This is because local school reform does not empower those who have the most important stake in improving education—the parents.[2] Reforms frequently overlook the problem or try to solve it using indirect methods. For example, "voucher" programs grant parents the right to choose their children's school. The theory is that the parents decide to which school to send their children, and the market system weeds out ineffective schools.

Other reforms continue to be implemented through the traditional public school model, which delegates power to a school board. Yet, these reforms will also fail. This is because school boards are no longer accountable to parents but to citizens, most of whom have no beneficial interest in the schools. Ethnic and generational splits are part of the reason. The majority of voters in some districts are elderly, and those

1. As Spring notes: "Reforming the schools is like adding another lane to a freeway. This eases the traffic problem for a short time but another jam will inevitably occur." *Deschooling as Social Revolution*, IN ROOTS OF CRISIS: AMERICAN EDUCATION IN THE TWENTIETH CENTURY (Karier, Violas, & Spring eds., 1973). For a history of school reform in America, see JOYCE ET AL., THE STRUCTURE OF SCHOOL IMPROVEMENT (1983); CALLAHAN, EDUCATION AND THE CULT OF EFFICIENCY (1964); CURTI, THE SOCIAL IDEAS OF AMERICAN EDUCATORS (1974).

2. See JOYCE, *supra* note 1, for a discussion of the failures of past reform efforts. The authors stress a method for improving public education. A central part of their plan is organizing "responsible parties." Their "responsible parties" are composed of administrators, teachers, parents, and community members. The role of responsible parties is to initiate change. These groups are merely advisory, however: they are not legislative. This method is known as "subdelegation." The problem arises because the "responsible parties" are not delegated power by the state legislature. It is the legislature that must set standards by which "responsible parties" will exercise their authority to change the contemporary school. Without such delegation, any school improvement is an academic exercise. For a discussion on "delegation of power," SCHWARTZ, ADMINISTRATIVE LAW §§ 2.13-.14 (1990).

with no children consistently resist tax increases even as they approve budget increases for police and fire departments.[3] In high immigration states like California and Texas, non-citizens, who constitute a significant segment of the school population, are denied an opportunity to vote.

The real problem is: Who decides? In school districts, rival interest groups compete to control public schools. These groups support policies that reflect their interests at any particular time. They support school board members who transfer school district resources from a rival group to their own, or from the public-at-large to themselves.

Parents are the true holders of the beneficial interest in public education. With a voucher system, parents vote with their feet, but decisions about the curriculum and teaching staff rest in the hands of the school's business office. President Bush's proposal for creating 535 "new schools," with at least one in each congressional district leaves the traditional school district in charge.[4] Under both of these solutions, parents are not empowered to decide what is in the best interest of their children.

Undaunted, educational reformers are testing new approaches.[5] This is particularly true of reforms seeking changes in the political power

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3. A classic example of this problem is the Holyoke, Massachusetts, schools. The town's mostly white, working-class voters, many aged and childless, are alienated from its mainly Puerto Rican public-school children. *See* William M. Bulkeley, *Hard Lessons: As Schools Crumble Holyoke Mass. Voters Reject Tax Increases*, WALL ST. J., Nov. 25, 1991, at 1.

4. David Shribman & Hilary Stout, *"Education President's" Ambitious Agenda Faces Formidable Obstacles Nationwide*, WALL ST. J., Apr. 19, 1991, at A16.

5. *See e.g.*,Chicago School Reform Act, ILL. REV. STAT. ch. 122, para. 34-1.1, -2.1, -2.2, -2.3, -2.3a, -2.4, -2.4a, -18 (amended 1991); California Assembly Bill No. 1263, Reg. Sess., 1991-92 California. *The Los Angeles Times*, editorial reports:

> In 1990, the Senate passed a bill, authored by Gary K. Hart (D-Santa Barbara) and supported by the California Business Roundtable, to establish demonstration programs for restructuring schools. The state received an unexpected 1,500 applications from schools that wanted to be among the 210 selected to share $6.3 million in planning grants to design their own reform programs.
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> Separately, school-based management programs are in progress in a number of school districts throughout California, including Los Angeles, San Diego and Fresno. Programs vary — one has ungraded classes, another full-day kindergarten.
>
> Some of the restructuring efforts are directed toward integrating the delivery of social services through schools. That's the goal of programs such as New Beginnings at San Diego's Alexander Hamilton Elementary School, where health care and other services are offered. And the California Business Roundtable has offered an intriguing proposal, already in operation in some private and lab schools, that would replace conventional kindergarten and first grade with a preschool program open to all children between ages 4 and 6.
>
> Local school control will involve more and more citizens, and people can be receptive to new taxes when they think they will do any good. Last year, 34 school districts had local funding measures on the ballot. Only 10 passed by a two-thirds vote. But 21 of the 24 defeated measures received solid majorities."

L. A. TIMES, Dec. 2, 1991, Home Edition p. 4.

base of the local school community.[6] They seek to replace the traditional top-down school organizations with "bottom-up school-site decision-making" systems.[7] An example that is currently working its way through the California Assembly would empower a local council of parents, business representatives, and teachers to control school operations.

These innovations face failure, though, because judicial regulation is a formidable barrier.[8] The courts have adopted interest group theories of statutory interpretation and are hostile to innovations.[9] *Fumarolo v. Chicago Board of Education*[10] dramatically exemplifies this hostility. Here, the Illinois Supreme Court held that the Chicago School Reform Act, utilizing innovative local school councils to improve accountability, violated the voting rights principle of "one person, one vote."[11]

In some ways, *Fumarolo* was a predictable decision. The United States Supreme Court and lower courts, since *Baker v. Carr*,[12] have been ready to make excursions into local government political reform and, with blunt tools of judicial construction, restrict innovation.[13] This does not mean that *Fumarolo* is a decision controlled by *Baker*; this only means that courts will act to regulate school reforms that empower parents to take charge of their schools.

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6. *See supra* note 2 and accompanying text.

7. Bottom-up school-site decision-making refers to decentralizing the control of the school system and imposing primary responsibility for local school governance on parents, the community residents, teachers, and school principals.

8. *See* Horton v. Meskill, 332 A.2d 113 (Conn. Super. Ct. 1974); State v. Haworth, 23 N.E. 946 (Ind. 1890). It has been noted that "[a] State cannot of course manipulate its political subdivisions so as to defeat a federally protected right . . . ." Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960). New innovations will face an old problem—states are not free to be innovative in changing the form of local representative government.

9. Some historic innovations that have been held unconstitutional are a New York law prescribing maximum hours for work in bakeries in Lochner v. New York, 198 U.S. 45 (1905); a Kansas statute outlawing "yellow dog" contracts in Coppage v. Kansas, 236 U.S. 1 (1915); and a federal statute fixing minimum-wage standards for women in the District of Columbia in Adkins v. Children's Hosp. of Dist. of Columbia, 261 U.S. 525 (1923).

10. 566 N.E.2d 1283 (Ill. 1990).

11. In *Fumarolo*, the plaintiffs maintained that the Chicago Educational Reform Act violated the equal protection guarantees of the United States Constitution under the Fourteenth Amendment, and Article I, Section 2, and Article III, Section 3, of the Constitution of Illinois. The Fourteenth Amendment provides that the State shall not "deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The court also held that the act violated Article I, Section 2 of the Constitution of Illinois, which provides that the state shall not deny any person "equal protection of the laws." Article III, Section 3 provides that "[a]ll elections shall be free and equal." Ill. Const. 1970, art. III, § 3. *Fumarolo*, 566 N.E.2d at 1290, 1300.

12. 369 U.S. 186 (1962).

13. *See generally* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987).

As a consequence, people are asking: How can we empower parents to run our public schools?[14] To answer this question, Part I of this Article describes the parental interest in governance and suggests that citizen and non-citizen parents hold a beneficial interest in governance. It reviews the judicial roots of the present predicament dealing with the problem of who may run and who may vote. It also summarizes the United States Supreme Court's development of the concept of fairness in representation. Part II describes the Chicago School Reform Act of 1989 and the judicial logic used to strike the Act. Part III reviews the California Plan for school reform. Part IV speculates on how legislatures may delegate power to parents and suggests a new direction for judicial regulation. What emerges from this Article is an understanding of the representative issues concerning school reform and judicial prospects when we "let our parents run."

I. The Parental Interest in Governance

A. The Myth of Educational Governance

A myth in educational governance avows that "through participation in the election of school board members, the parents influence, if not control, the direction of their children's education."[15] In fact, public school governance has followed the vision of Plato in THE REPUBLIC and in THE LAWS, in which government, not parents, meets the needs of children and no intermediate forms of association stand between the individual and the state.[16] This method of governing has some major problems as Aristotle's criticism of Plato's REPUBLIC suggests: "[E]ach citizen will have a thousand sons: they will not be the sons of each citizen individually: any and every son will be equally the son of any and every father; and the result will be that every son will be equally neglected by every father."[17] The following explores this myth and examines some of parents' constitutional interests.

B. Power to the Parents

To which group does a school board owe its first allegiance: parents

14. A similar question was posed by Justice Fortas in Avery v. Midland County, 390 U.S. 474, 497 (1968) (Fortas, J., dissenting).

15. Board of Educ. v. Pico, 457 U.S. 853 (1982) (Powell, J., dissenting).

16. This parallel was first suggested in Bowen v. Gillard, 483 U.S. 587, 632 (1987) (Brennan, J., dissenting) (citing 2 THE DIALOGUES OF PLATO 163 (B. Jowett trans., 1953)).

17. The problem was also suggested by Justice Brennan. *See Bowen*, 483 U.S. at 633.

or the community-at-large?[18] It would not be surprising to find that school board members feel their loyalty is to the community-at-large. The political science literature refers to this as the distinction between "passive" representation and "active" representation.[19] Passive representation is the degree to which representatives possess the same demographic characteristics as those they represent. Active representation is "acting in the interests of the represented."[20] For example, "if a trustee can represent [another], and a guardian [can represent] his ward, then parents 'really' represent their children, and anyone in charge of another, or making decision[s] that affect him, is his representative."[21] I believe parents want active representation.[22] What they are getting is passive

18. Historically, community colleges and vocational-technical schools find their roots in the public school districts. Some states establish a comprehensive community college, which provides for both vocational-technical training and the first two years of collegial academic preparation. In other states two different institutions emerged. In some states, these post-secondary schools are state controlled. In others, they are governed by local or regional districts of elected trustees. In most cases, their governance is traceable to two separate philosophies of schooling. One treats these schools as extensions of the high school. These colleges and vocational schools are usually controlled by local district or regional districts of elected trustees in much the same manner as public schools. The other philosophy treats these schools as junior colleges or extensions of four-year institutions. They usually have a state governance structure with appointed trustees. Regardless of the governance structure, the same question arises: To which group does the board of trustees owe its first allegiance: the users of the system or the community-at-large?

19. H. PITKIN, THE CONCEPT OF REPRESENTATION, 1967.

20. By active representation, I am referring to what Pitkin describes as

> acting in the interest of the represented, in a manner responsive to them. The representative must act independently; his actions must involve discretion and judgment; he must be the one who acts. The represented must also be (conceived as) capable of independent action and judgment, not merely being taken care of. And, despite the resulting potential for conflict between the representative and represented and what is to be done, that conflict must not normally take place. The representative must act in such a way that there is no conflict or if it occurs an explanation is called for. He must not be found persistently at odds with the wishes of the represented without good reason in terms of their interests, without a good explanation of why their wishes are not in accordance with their interest.

Id. at 209-10.

21. *Id.* at 120.

22. The *MacNeil/Lehrer NewsHour* reports:

> The Chicago School Reform Act is one of the boldest school reform measures ever attempted. In the public schools in Chicago, 540 in all, parents were elected to local councils to run the school. Overnight, power that had rested with Chicago's Central School Board was transferred to local parents, teachers, and community residents. Skeptics said the new reform would never work, that nobody would even bother to run. The skeptics were wrong. More than 17,000 candidates threw their hats into the ring. As the following comments show, parents want to be active in governing their schools:
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> DAN SILENZI, School Council Candidate: I always wanted to help. But being on the PTA or these other organizations never did anything. They never got anywhere. They were more coffee klatching kind, you know what I mean, and to me

representatives who are presiding over failing schools.[23] Thus, the development and improvement of public schools remains an empty dream unless there is an active representative. As Professor Pitkin observes:

> [I]nstitutions have been different at different times in history. But men have always striven for institutions that will really produce what the ideal requires; and institutions or individuals claiming to represent have always been vulnerable to the charge that they do not really represent. Application of the label "representative" seems to invite a critical appraisal: Is this a fiction, an empty formula, or is it really the substance of representation? Thus it has been argued "that representative government is the ideally best, for the very reason that it will not actually be representative in its character unless it is properly organized and conditioned. By its essential nature it is a system of trusteeship . . . . Institutions claiming to be representative can justify their character as such only to the extent that they establish and maintain such trusteeship."[24]

It is important to know the source of the problem.[25] In public school districts, parents with children attending school are a minority. Many of the voters are senior citizens who have financial trouble absorbing increases in their property taxes to support schools. Some voters have no children and have less commitment to schools; or their children attend parochial or private schools, and they are not interested in sup-

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that was a waste of precious time. Now they're giving us some type of power, the local school council, so hopefully we can make a change.

MARGARET SMITH, School Council Candidate: I decided to run because I would like to know what's going on with my children within the school system.

ANGELA HILL, School Council Candidate: I know this is my responsibility to my child and to the other children in this community, because if parents don't do it, no one is.

MacNeil/Lehrer Newshour (PBS television broadcast, Nov. 8, 1989) *available in* LEXIS, Nexis, transcript #3598.

23. Representation issues are as old as the nation. In the past two decades, most comparisons of representation were made at the aggregate level rather than directly between individual representatives. For example, the number of black school board trustees might be compared with the percentage of the black voters in the population. For a discussion of representation, see Weissberg, COLLECTIVE VS. DYADIC REPRESENTATION IN CONGRESS, 72 AM. POLITICAL SCIENCE REVIEW 535, 547 (1978); Welch & Karnig, *Representation of Blacks on Big City School Board*, 15 AM. POLITICS Q. 162, 172 (1978).

24. *Id.* at 240 (citations omitted).

25. When groups fight discrimination, it is important to know the sources of the problem. For racial discrimination, the problem is voter exclusion because of racism. As the readers shall see, the United States Supreme Court has recognized that racial deviations from strict equal population principles violate the United States Constitution. Reynolds v. Sims, 377 U.S. 533 (1964). In Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), the redrawing of supervisor districts in such a way as to scatter Latinos and deny them representation violated the Voting Rights Act, 42 U.S.C.A. § 1973(b) (as amended June 29, 1982).

porting some other child's education.[26]

Parental representation is important because parents are likely to make decisions that benefit parents. Their shared experience produces similar ways of looking at public school problems. If parent representatives share common political attitudes with their parent constituents, then as parent representatives pursue their own policy objectives, they will be simultaneously seeking policies that benefit their parent constituents.[27]

The current system of passive representation is indefensible for two reasons. First, the degree to which parents are no longer represented in policy-making positions contributes to the failure of public schools. Second, passive representation in the public schools cannot lead to active representation, because the current system of elected school boards requires a candidate to attract a majority of the votes. This type of election is detrimental to parental representation because in most school districts parents constitute a minority of the voting population.

C. Constitutional Interests in Parental Decision-Making

Courts have recognized parents' interests in controlling the education of their children under two constitutional doctrines. First, the Fourteenth Amendment's Due Process Clause protects the liberty of parents to control the education of their children. The best known cases are *Meyer v. Nebraska*[28] and *Pierce v. Society of Sisters*.[29] Under the substantive due process doctrine, parents have a fundamental liberty to make decisions with respect to the upbringing of their children. In *Meyer*, the United States Supreme Court held unconstitutional a state law that prohibited the teaching of foreign languages to young children.[30] The Court stated that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."[31] In *Pierce*, the Court found unconstitutional a statute requiring children to attend public schools and preventing them from attending private and parochial ones.[32] The decision was based on the "liberty of

26. *See* WALL ST. J., Nov. 25, 1991, at 1.

27. This socialization linkage of passive and active representative is the theme of most of the literature on representative bureaucracy. *See* Eulau & Karps, *The Puzzle of Representation: Specifying Components of Responsiveness*, 2 LEGIS. STUD. Q. 233, 254 (1977); Levitan, *The Responsibility of Administrative Officials in a Democratic Society*, 61 POL. SCI. Q. 562, 598 (1946); Long, *Bureaucracy and Constitutionalism*, 46 AM. POL. SCI. REV. 808, 818 (1952).

28. 262 U.S. 390 (1923).

29. 268 U.S. 510 (1925).

30. 262 U.S.at 390.

31. *Id.* at 400.

32. 268 U.S. at 510.

parents and guardians to direct the upbringing and education of children under their control."[33]

The second recognized constitutional interest is the First Amendment right of free exercise of religion and freedom from the establishment of a governmentally endorsed religious view.[34] This interest is important because states make school attendance compulsory. The Free Exercise Clause suggests there are constitutional interests of parents that outweigh the state's interest in compelling all youngsters to attend school.[35] The Establishment Clause supports the notion of a personal right not to be part of a community whose governmental agencies endorse religious views that might be in conflict with one's most fundamental beliefs.[36]

Both interests insure that parents will always have control over their children's education when it conflicts with religious tenets. For example, if school board *A* requires a child to attend an assembly where a religious invocation is given, the parents of the child would be free to withdraw the child from the assembly. Further, the more the prayer is denominational, the more likely it is coercive in that the government becomes engaged in religiosity.[37] Thus, in clear conflicts between state-sponsored public education and private values of parents, the Constitution protects those private values that are religious.

In sum, constitutional interests protect some types of parental decision-making. *Meyer* supports the notion that parents have a right to control the education of their children within the confines of compulsory attendance laws. The issues and cases that follow focus on the judicial barriers facing parents seeking to reform educational governance from passive to active representation.

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33. *Id.* at 534-35.

34. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

35. This includes the right of parents to control the religious education of a child. Chief Justice Burger in Wisconsin v. Yoder, 406 U.S. 205, 233 (1972), stated that "the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."

36. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1154-56 (2d ed. 1988).

37. The Court is considering this issue by granting certiorari to Lee v. Weisman, 111 S. Ct. 1305 (1991). The school board is urging the Court to abandon the three-part test established in Lemon v. Kurtzman, 403 U.S. 602 (1971), in favor of a coercion-of-religion test. The *Lemon* test holds that a governmental action violates the Establishment Clause of the First Amendment if it fails to satisfy any of three prongs: (1) the practice must have a secular purpose; (2) its principal effect must neither advance nor inhibit religion; and (3) it must not foster an excessive entanglement with religion. Wisconsin v. Yoder, 406 U.S. 205 (1992) protects parental decisions about the religious upbringing of their children in the absence of a compelling reason for state interference.

D. Background of Legal Precedents: The Search for a Fair Method of Empowering Parents

All state action relevant to the electoral process is subject to constitutional scrutiny.[38] This means that local school board elections must comply with federal standards of fair representation. We first turn to the judicial roots of this predicament.

i. Baker v. Carr*: Transformation from a Political Question*

Before 1962, parental empowerment might not have triggered judicial activism.[39] The Supreme Court consistently refused to adjudicate such claims on the grounds that they presented political questions. As Justice Frankfurter observed, "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people."[40] *Baker v. Carr*[41] reversed this course. The challenge in *Baker* was to the apportionment of the Tennessee Assembly. It had not been reapportioned in 60 years, despite a state constitutional requirement that representation be based on population, and despite significant population changes over the years. The Court reasoned that not all cases involving "politics" present non-justiciable "political questions." The court listed a catalogue of factors to consider in determining whether a true political question existed.[42] Each related in some way to the separation-of-powers doctrine. Enforcement of equal protection did not involve any of these non-justiciable is-

38. In United States v. Classic, 313 U.S. 299, 317-20 (1941), the Court held that an "election" in the constitutional sense occurs regardless of how small the universe of possible electors or candidates. The smallness of the universe is merely a possible argument for striking the whole procedures, not an argument for immunizing the scheme from constitutional scrutiny.

39. *See* Colegrove v. Green, 328 U.S. 549 (1946); although, federal equal protection did apply to local government. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), a San Francisco ordinance was held to violate the Equal Protection Clause. The ordinance barred the operation of hand laundries in wooden buildings, except with the consent of the Board of Supervisors. The board gave permits to all but one of the non-Chinese applicants, but to none of the nearly 200 Chinese applicants. Although the ordinance was neutral on its face, there was discrimination in its administration, and this discrimination violated equal protection. *Yick Wo*, 118 U.S. at 374.

40. *Colegrove*, 328 U.S. at 553-554.

41. 369 U.S. 182 (1962).

42. *Id.* at 198, 204, 209. The Court listed a catalogue of factors necessary to present a true political question. Each relates in some way to the separation of powers: (1) a "textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) a "lack of judicially discoverable and manageable standards for resolving" the issue; (3) the "impossibility of deciding [the issue] without an initial policy determination of a kind clearly for non-judicial discretion"; (4) the "impossibility of a court's undertaking independent resolution without expressing lack of respect due co-ordinate branches of government"; (5) an "unusual need for unquestioning adherence to a political decision already made"; and (6) the potential for "embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217.

sues. The Court concluded that the malapportionment of the Tennessee legislature violated the Equal Protection Clause and, in effect, drew a line around de jure apportionment schemes.[43]

ii. The Rule of "One Person, One Vote"

In *Reynolds v. Sims*,[44] the Supreme Court created the "one person, one vote" principle.[45] Here, the Court struck down Alabama's state legislative apportionment. In *Reynolds*, urban Alabama counties challenged the varied apportionment of both houses of Alabama's legislature.[46] To reach its decision, the Court drew several fundamental conclusions. First, the so-called federal analogy of an upper house on a geographical basis and a lower house on a population basis is inapplicable to state legislative apportionment matters.[47] The Court noted that the original constitutions of thirty-six of the states provided for representation in both houses of the state legislatures based, completely or predominantly, on population.[48] Second, the Court, citing Jefferson, held that "the Founding Fathers clearly had no intention of establishing a pattern or model for apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted."[49]

The rationale was that Alabama's scheme offended the norms of fairness. The efficiency of the vote cannot be outweighed or diluted on the basis of race. The Court stated that the Equal Protection Clause

43. In effect, the Court drew a line around de jure apportionment schemes. A de jure scheme is one where the legislature has refused to reapportion despite a state constitutional directive or where the legislature has acted in derogation of a state standard. In contrast a "de facto" scheme is one where the state constitution itself creates, or does not prohibit, malapportionment. For discussion, see James B. Atleson, *The Aftermath of* Baker v. Carr: *An Adventure in Judicial Experimentation*, 51 CAL. L. REV. 535, 536 (1963).

44. 377 U.S. 533 (1964).

45. *Id.* at 562-66.

46. Prior apportionment of state senatorial districts had left districts with a varied population from 15,417 to 634,864 residents. Constituencies of the state house varied from 6,731 to 104,767. A proposed modification would have ameliorated the disproportions in the Alabama House. The Supreme Court held both the current and the new plan invalid. *Id.* at 545-51.

47. *Id.* at 571-73.

48. *Id.* at 573 n.52 (citing REPORT OF ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, APPORTIONMENT OF STATE LEGISLATURE 10-11, 35, 69 (1962)).

49. *Id.* at 573. The Court stated in a footnote that

> Thomas Jefferson denounced the inequality of representation provided under the 1776 Virginia Constitution and frequently proposed changing the State Constitution to provide that both houses be apportioned on the basis of population. In 1816 he wrote that "a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns . . . by representation chosen by himself . . . ."

Id. at 573 n.53 (citing Letter from Thomas Jefferson to Samuel Kercheval, *reprinted in* 10 WRITINGS OF THOMAS JEFFERSON 38 (Ford ed., 1899).

requires that the seats of both houses of a bicameral state legislature be apportioned on a population basis. Although the people of Alabama had approved the voting system, the Court found it flawed. The Court stated that "[a]n individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate."[50] Thus, the majority cannot waive the rights of the minority.

The *Reynolds* Court gave vote-weighing a specific meaning. The Court characterized it as deviating from the equal-population principle of legislative representation. The weight of an individual's vote could not depend on where he or she lived.[51] Alabama's classification of black voters was such that a citizen residing in an unfavored geographical location cast a vote of less worth than that of a fellow citizen residing in a favored location.

Under *Reynolds*, political fairness means that each voter is entitled to a vote equal in weight to that of every other voter. This concept is known as the "one person, one vote" rule.[52] The premise is that the right to vote is a fundamental right. Any classification defining the ability to exercise the right must meet a strict scrutiny review before the Court will sustain the measure as constitutional.[53] Other cases tested under the *Reynolds* standard involved voting taxes,[54] literacy tests,[55] residency requirements,[56] and racial restrictions.[57]

iii. Application to Local School Board Elections

In *Sailors v. Board of Education*,[58] the Court recognized that the precise meaning of fair representation in *Reynolds* might not serve as a guide in every instance.[59] In *Sailors*, the Supreme Court upheld an ap-

50. *Id.* at 569.

51. *Reynolds*, 337 U.S. at 567.

52. *Id.*

53. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); *Reynolds*, 377 U.S. at 533.

54. *Harper*, 383 U.S. 663.

55. Lassiter v. Northampton Election Bd., 360 U.S. 35 (1959).

56. In Carrington v. Rash, 380 U.S. 89 (1965), the Court held unconstitutional a Texas law preventing members of the armed services who moved to Texas from voting in state elections. In Dunn v. Blumstein, 405 U.S. 330 (1972), the Court invalidated Tennessee's durational residence requirement of one year.

57. The cases are commonly referred to as the White Primary Cases, which held that a state could not exclude a minority race from voting. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

58. 387 U.S. 105 (1967).

59. *Id.* at 111. One man, one vote mandate with respect to congressional districting is based on Article I, Section 2 of the Constitution. Apportionment in state elections or school boards is justified by the Equal Protection Clause of the Fourteenth Amendment.

pointive method of selecting county school-board members where each local school board appointed only one delegate and was allowed only one vote at a caucus convened to elect the county board.[60] The members of the local school board were chosen by popular election.

The Court distinguished between elected and non-elected boards.[61] It could not find a constitutional reason why officers of a non-legislative local board could not be chosen by the governor, legislature, or by some other appointive means rather than by a direct popular election.[62] The Court noted that local school boards were elected by a disproportionate population and were not required to reapportion. This meant that one district with a population of over 200,000 could send one delegate to the caucus selecting the county school board, while another district could have fewer than 100 people and still have one delegate.

The Court also discussed administrative versus legislative functions.[63] The Court found that the county board exercised administrative, not legislative powers. The county school board appointed a county school superintendent, prepared an annual budget and levied taxes, distributed delinquent taxes, furnished consulting or supervisory services, conducted cooperative education programs, employed special education teachers, and operated the juvenile home.[64] The most sensitive function was the transfer of areas from one school district to another.[65] Essentially, the county board performed important functions that were not legislative in the classical sense.[66] The Court noted that the state legislature may combine or separate elective and appointive systems, and delegate separate or combine legislative or administrative functions. In this case, members of the local school boards were chosen by popular election and performed legislative functions, while members of the county school board were chosen by local board delegates and performed administrative functions.[67] There was no constitutional question present because the county board was appointed not elected and performed administrative functions. This type of board is exempt from the principle of "one

60. Each school board sent a delegate to a biennial meeting, and from candidates nominated by popular election, the delegates elected a county board of five members, who were not required to be members of the local boards. *Sailors*, 387 U.S. at 106-07.

61. *Id.* at 109-10.

62. The method of selection of the board was by elected local boards. *Id.* at 106-07.

63. *Id.* at 110.

64. *Id.* at 110 n.7.

65. *Id.* This issue gave rise to the litigation.

66. *Id.* at 110.

67. *Id.*

person, one vote."[68] Thus, in the Court's view, *Reynolds* did not apply.[69]

It is worth noting that the Court suggested a preference for appointed school boards. The elected local school board had ultimate authority over an appointed county board. In this manner, the reform plan reflected a hierarchical authority structure where those ultimately in authority were elected according to the "one person, one vote" model. But as elections are the focus of the rule, it does not matter whether the board is legislative or administrative, and it does not matter which board is the ultimate source of the delegated power. This leads to a kind of paradoxical development—that appointed officials are preferred over elected officials. In making governmental reforms, is appointed representation the best we can hope for? Is elected representation a dangerous ideal? *Sailor* seems to suggest a constitutional preference for non-democratic forms of local government.

In *Avery v. Midland County*,[70] the Court held that the one vote rule was applicable to elections of local governmental bodies with general governmental powers. In *Avery*, the Court found unconstitutional the redistricting of single-member county commissioner seats of substantially unequal population.[71] The county commissioners exercised general governmental powers over the entire geographic area served by the body and were popularly elected by districts according to population. The Court stated that when the "state delegates law-making power to local government and provides for election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to [an] equally effective voice in election process."[72] The Court noted that the "Constitution does not require that a uniform straitjacket bind citizens in devising mechanism[s] of local government suitable for local needs and efficient in solving local problems."[73] Thus, there seems to be a narrow exception to the "one person, one vote" rule for *Sailors* administrative boards that employ an essentially appointive

68. *Id.* at 111. In a sense, the jurisprudence coined by Chief Justice Warren, "fair and effective representation for all citizens," works for those who are isolated by race in only selected situations. The only relevant limitation is that a state may not fashion its political institutions to place a burden on racial minorities within the election process. *Id.*

69. *Id.* The rationale demanding vote-weighing did not exist. This is the requirement that a direct or indirect intent to discriminate be shown before the plan is struck. The Court states that the "state cannot manipulate its political subdivision so as to defeat a federally protected right . . . by realigning political subdivisions as to deny a person his vote because of his race." *Id.* at 108.

70. 390 U.S. 474 (1968).

71. *Id.* at 484-86.

72. *Id.* at 480.

73. *Id.* at 485.

scheme, but not for *Avery* elected units of government with general powers over an entire area.[74]

In *Hadley v. Junior College District*,[75] the Court fashioned a new test and abandoned the distinction between administrative and legislative powers. In *Hadley*, the challenge focused on the constitutionality of the scheme for electing trustees to sit on the board. Kansas City was one of eight separate school districts that constituted a consolidated junior college district and elected six trustees to govern that district. Under the plan, the Kansas City school district was allowed to elect only fifty percent of the trustees even though it had sixty percent of the students in the district. As in *Avery*, the *Hadley* trustees had significant government powers. They could levy and collect taxes, issue bonds, employ and terminate teachers, perform other activities, and, in general, manage the junior college district.[76] The governing board in *Avery* maintained the county jail, set the tax rate, built and managed hospitals, airports and libraries. As in *Avery*, the *Hadley* Court distinguished legislative and administrative boards. The Court found governmental powers general enough and of sufficient impact to justify the "one person, one vote" rule. However, the Court went on to suggest that while there are differences between administrative and legislative powers, such differences are of no consequence. This does distinguish the purpose of the election, and for the courts it leaves an "unmanageable principle since government activities cannot easily be classified in neat categories favored by civics texts."[77] The Court concluded: "[t]he consistent theme . . . is that the right to vote in an election is protected by the United States Constitution against dilution or debasement."[78]

This was the crucial factor in *Hadley*. The officials were elected by popular vote. The Court felt that if it was important enough for the state to make the official an elected official, then that strongly indicated that the choice was an important one. If it is important, then each qualified voter must be given an equal opportunity to participate in the election. When members of an elected body are chosen from separate districts, each district must be established on a basis that insures, as far as practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.[79]

74. *Id.*
75. 397 U.S. 50 (1970).
76. *Id.* at 51-55.
77. Avery v. Midland County, 390 U.S. 474, 494 (1968).
78. *Id.* at 794.
79. *Hadley*, 397 U.S. at 56.

In sum, with race as a factor *Reynolds* applied the "one person, one vote" rule to state legislatures. In *Sailors*, race was not a factor and the Court held that if the state chooses to select representatives by appointment rather than by election and the fact that each official does not "represent" the same number of people does not trigger a constitutional analysis. *Avery* extended the "one person, one vote" rule to various kinds of local government but left open whether certain elected administrative units may escape constitutional scrutiny. *Hadley* closed the door on this possible exception and suggested that all elected units of local government must comply with the "one person, one vote" methodology. As a consequence, a "staggering number" of local governmental units including any "special-purpose" governmental units came under constitutional scrutiny. Has, as Justice Harlan in his dissent points out, local government lost the flexibility in its design that is needed to preserve its specialized function?[80] The rational is once a state decided to "use the process of popular election and 'once the class of voter is chosen and their qualifications specified,' " the Court saw no way to avoid applying the "one person, one vote" principle.[81]

iv. Restricting the Ballot to Interested Voters

At any given time, there are rival interest groups[82] competing for laws or regulations that best reflect their interests. The clash of these groups and the vulnerability of school districts to judicial intervention is easily illustrated by *Kramer v. Union Free School District*.[83] Here, the Supreme Court examined a New York law requiring school district voters to own or lease taxable property or to have children enrolled in the district's schools before they could vote in school district elections. This particular method of restricting the vote was unconstitutional because it

80. *Id.* at 797 (Harlan, J., dissenting).

81. *Id.* at 797.

82. Professor Pitkin notes that some commentators confuse the term "interest" in interest groups with the psychological "finding something interesting." She notes:

> They write as if what one finds interesting were exactly equivalent to what one considers to be one's interest. They define the interest of an individual as that which "seriously enlists his attention," but when they turn to group interest this leads to confusion. For a group as such has no psychological attention that can be enlisted or aroused. As a group, it can only engage in certain activities or pursue certain goals. So the interest of a group becomes "the object which it chiefly seeks." The interest of a group is not an attitude or any shared "psychological feeling or desire." "The interest is the equivalent of the group . . . . The group and the interest are not separate. There exists only the one thing, that is, so many men bound together in or along the path of certain activity."

PITKIN, *supra* note 19, at 160-61.

83. 395 U.S. 621 (1969).

violated the Equal Protection Clause. The fundamental right to vote "required a strict adherence to structural fairness to preserve basic civil and political rights."[84] The Court stated that "careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government."[85] Thus, the Court reverted to its equal protection analysis.[86]

The Court followed its own logic. The *Kramer* school board was legislative. The Court knew it was legislative because it maintained "significant control over the administration of the local school district affairs and had basic responsibility for local school operation." A legislative board requires an equal and undiluted vote. Thus, the scheme was malapportioned and there was no compelling state interest sufficient to justify it.

The state argued a compelling state interest.[87] The legislative purpose was to preserve a "community of interest." Most states, like New York, fail to define the phrase. It is roughly synonymous with "recognition and maintenance of patterns of geography, social interaction, trade, political ties, and common interests." In practice, provisions that require preservation of communities of interest are hard to interpret.[88] The Court did not find this argument convincing. Furthermore, the Court rejected the companion justification of restricting the ballot to interested voters on the basis of property ownership. It did not accept the argument that property taxpayers and parents of the children enrolled in the district's schools were those "primarily interested" in school affairs.[89]

The dissent focused on the contradictions in the majority position, pointing out that the school district was fairly represented because school districts were limited special districts created by a generally elected legislature. In such a representative scheme, the voter is fully able to participate in the processes that change the requirements for school district voting.[90] The voter is not locked into any self-perpetuating exclusion status as was found in *Carr* or *Reynolds*.[91]

The dissent observed:

84. *Id.* at 626-28.
85. *Id.* at 626.
86. *Id.* at 621.
87. *Id.* at 630-31.
88. *See* Carstens v. Lamm, 543 F. Supp. 68, 91-93 (D. Colo. 1982).
89. Kramer v. Union Free Sch. Dist., 395 U.S. 621, 632-33 (1969).
90. *Id.* at 639-40.
91. *Id.* at 640.

> The voting qualifications at issue have been promulgated, not by Union Free School District No. 15, but by the New York Legislature, and the appellant is of course fully able to participate in the election of representatives in that body. There is simply no claim whatever here that the state government is not "structured so as to represent fairly all the people including the appellant."[92]

In sum, *Kramer* is a decision about "who votes." It is a decision about what the Court feels is the correct meaning of fair representation. But who is in the best position to determine what representing as an activity means—the Court or the legislature? One needs to know who is right. And why did the Court and the New York legislature disagree? The conflict comes down to what each thinks is best (for the constituents); what they want (as best for themselves) does not arise. It seems to me farfetched to imagine voters making decisions motivated by anything but their own self interest. Voting decisions depend on self interest, not on an informed consideration of what is good for others. In *Kramer*, the Court uses the language of fair apportioned elections to objectively define the outcome of the case. But the real political fact is that this is a decision about which interest group gets to vote. "Structural fairness" is a choice between interest groups. In *Kramer*, there are the property owners and parents of the school district, on the one hand; and on the other hand, a bachelor who neither owns nor leases taxable real property. The irony is that the Court favors the latter over the former by permitting a dilution of voting power. Thus, the Court presupposes that it can make a better "normative" or "value-laden" decision about which interest groups to empower than the legislature.

v. An Exception to the Rule: Special Boards[93]

In *Sayler Land Co. v. Tulare Lake Basin Water Storage District*,[94] the United States Supreme Court found the *Kramer* tautology of fairness[95] too broad. The major premise of *Kramer* was that it was unfair to restrict the ballot only to interested voters.[96] In *Sayler*, the legislature restricted the ballot for the district water board to local landowners and weighted the votes according to the amount of property the individuals

92. *Id.* at 639.

93. The specialized district is used to provide services for which those outside the district do not want to pay. Fire protection, water supply, sewage disposal, street lighting, and parks are examples of such services.

94. 410 U.S. 719 (1973).

95. *See supra* notes 82-91 and accompanying text.

96. In *Kramer*, the Court noted that there are some situations in which a state could limit an election to interested voters. Such a law would have to restrict the election precisely to those voters that would be primarily affected by the election. *Kramer*, 395 U.S. 632.

held.[97] The specialized water board had powers to contract for projects, to staff projects, to condemn property, and to issue bonds. However, this did not amount to general governmental authority.[98] Recognizing that this special board dealing with special issues was different, the Court created the limited-purpose/disproportionate-effect test. If the Court finds that the governmental unit for which elections are being held has a limited purpose that disproportionately affects only one group, the franchise may be limited to that group. The Court noted that the district had an extremely limited purpose in delivering water for farm use, and landowners were affected disproportionately. The landowners received nearly all the benefits and bore all the burdens, which included potential liens against their land for unpaid debts by the district.

In *Ball v. James*,[99] the Court broadened its characterization of a special board. It refused to apply the strict scrutiny test to a system for electing directors of a water reclamation and power district. The district performed activities that affected the entire community. The district's basic purpose was to protect against water overflow and dispose of water, sewage, and other drainage. Because the district's electric power functions were "incidental" to the district's water functions and because these water functions were "relatively narrow," the Court deemed the district to be essentially a "business enterprise."[100] The Arizona legislature limited voting eligibility to landowners in the district and apportioned voting power according to the amount of land owned by each voter. The rule was "one acre, one vote."[101] The fact that the state legislature did create the district as a public entity in order to obtain bond financing was not enough to transform it into the type of governmental body for which the Fourteenth Amendment demands a "one person, one vote" system of elections.[102] Apparently, the disproportionate effect of the district's impact on non-landowners was no longer a part of the analysis.[103]

These cases illustrate an important accommodation in the "one person, one vote" paradigm. The Court permits mere-rationality review when the district's governmental functions are of a narrow, special sort. The franchise can be limited to the class of voters primarily burdened

97. *Sayler*, 410 U.S. at 724-25.
98. *Id.* at 728-29.
99. 451 U.S. 355 (1981).
100. *Id.* at 368.
101. *Id.* at 371.
102. *Id.*
103. Four of the dissenting Justices argued that the district was exercising a substantial governmental function and had a wide effect on non-voters. The Justices argued that *Sayler* was not a case to be used on point and the strict scrutiny test was appropriate. *Id.* at 377-80, 385-89 (White, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting).

and/or benefitted by the activity of the political unit.[104] The applicability of "one person, one vote" to school reform depends on whether the Court recognizes the school-site councils as "special districts."[105] The functions of a *Sayler* water storage district are more specialized than a school district. But the exception was broadened in *Ball*, in which the Arizona Salt River District financed its water operations by selling electricity to thousands of Arizona residents.[106] It is an open question whether school district school-site councils are analogous. Further, neither *Sayler* nor *Ball* addresses the issue of whether residents outside the service area, whose inclusion in the franchise dilutes the votes of the residents, have interests that justify allowing them some participation in the election of representatives.

This Article next discusses the Illinois Supreme Court tests of the "one person, one vote" paradigm on a model school reform. It discusses improving local school autonomy with a "narrow, special sort" of innovation in which parents play a central role, called school-site council.

II. Judicial Regulation of Parental Power: *Fumarolo v. Chicago Board of Education*[107]

In Chicago, a central part of educational reform involved empowering the local school officials. The process was known as subdelegation,[108] a sometimes complicated process of ballot restrictions, special qualifications for candidates to the local site boards, and reapportionment of school boundaries comprising the local school-site boards. The state or local school board transferred responsibility for operating the local school to a local community group. [109] The problem was that group was made up of such competing interest groups as administrators, teachers,

104. *Id.* at 368.

105. *Id.* at 365.

106. *Ball*, 451 U.S. at 369-71.

107. 566 N.E.2d 1283 (Ill. 1990), *reh'g denied* (1991).

108. *See* SCHWARTZ, Administrative Law §§ 2.13-.14 (1990).

109. The elected members are: six parents of currently enrolled students who are elected by parents, two residents of the attendance center served by the school who are elected by the residents of that area, and two teachers of the school who are elected by the school staff. *Id.* at 1287. Despite *Fumarolo*, the legislature kept the same composition of the board:

> Local School Councils—Composition—Terms:
>
> Local School Councils—Composition—Terms. (a) A local school council shall be established for each attendance center within the school district. Each local school council shall consist of the principal of the attendance center, 2 teachers employed at the attendance center, 6 parents of students currently enrolled at the attendance center except that the parents shall not be employees of the Board of Education, and 2 community residents residing within the attendance area established for the attendance center served by the local school council except that the community residents shall not be employees of the Board of Education, and in each

parents, and community members.[110] Their role was to supervise the local school and improve school performance. Electors for the local school-site board were restricted by geographical or parental involvement in the local school. The goal was to place local school improvement in the hands of those parties with the greatest interest in seeing the school succeed. But the reform unleashed a power struggle. The following is a detailed outline of the Chicago plan and the Illinois Supreme Court's holding.

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secondary attendance center, one full-time student who shall serve as a non-voting student member of the local school council of the attendance center.

Within 7 days of the effective date of this amendatory Act of 1991, the Mayor shall appoint the members and officers (a Chairperson who shall be a parent member and a Secretary) of each local school council for terms ending the sixth week of the 1991-2 school year and during such terms, local school council members and officers may not be removed by the Mayor. Members so appointed shall have all the powers and duties of local school councils as set forth in this amendatory Act of 1991. The Mayor's appointments shall not require approval by the City Council. On or before July 1, 1991, the General Assembly shall enact procedures for the election of local school council members. The procedures adopted by the General Assembly pursuant to this Section for the election of local school council members shall maintain the composition and not diminish the powers of the local school councils as set forth in this amendatory Act of 1991. The procedures shall maintain the voter eligibility requirements established in Public Act 85-1418 provided that such requirements are consistent with the decision of the Illinois Supreme Court in *Fumarolo v. Chicago Board of Education.*

ILL. REV. STAT. ch. 122, para. 34-2.1 (1991).

110. United Press International reports:

The Chicago Principals Association Friday said it plans to file a class-action suit, seeking back pay for public school principals dismissed by unconstitutionally elected local school councils. Association President Bruce Berndt said the suit would be filed within a month, seeking restitution for 400 principals either dismissed or who lost tenure because of local school council actions. "Every principal who earned (but was denied) tenure was, in our eyes, denied due process," Berndt said.

UNITED PRESS INTERNATIONAL, Sept. 6, 1991, Friday, BC cycle, Regional News.

Thomas Hetland, Director of Educational Relations, TEACH America reports:

In her letter of June 29, 1991, Jacqueline Vaughn, president of the Chicago Teachers Union, effectively states the need for teachers to continue to select their own representatives on each Local School Council. She says, "If the decision is given to parents and community members, the teachers become political pawns and shared decision making is a sham."

I couldn't agree with her more. Self-interest drives each of us to want to select our own representation in every arena of life. We resent being controlled by the imposition of plans and programs, even by very well-meaning people.

I hope that Ms. Vaughn is equally willing to support the importance of another area of self-interest, this time student self-interest as promoted by educational self-determination, by educational choice. Ms. Vaughn is certain that most teachers want to select their own representatives on the Local School Councils. Recent studies report that parents, especially minority parents, would like to select their own schools, either government or non-government, on behalf of their children. It is this choice that will protect them from being pawns on someone else's game board.

CHI. TRIB., July 15, 1991, at 12; Voice of the people (letter), Thomas Hetland, Director, Educational Relations.

A. Factual Background

In 1987, the Chicago public schools were labeled the worst in the nation.[111] Statistics showed that only fifteen percent of Chicago high-school students graduated and read at or about the national average for twelfth graders.[112] As concern mounted, numerous studies attempted to find solutions.[113] In 1988, the Illinois Legislature, after numerous courses of study and with the advice of leading researchers and educational policy analysts, passed the Chicago School Reform Act by a nearly unanimous vote.[114] The goal was to make the local school accountable to the local community.

The creative response to the goal was an experimental design in representative government.[115] The act created local school councils, which would exercise general government powers, for each grammar school and each high school of the 539 schools in the system.[116] Although the councils could not tax, issue bonds, or contract, the court held they were essential units of educational governance, empowered to make important budgetary, educational, and administrative decisions regarding the public school system.[117]

The reform plan combined appointive and elective systems. The local council was composed of the school principal and ten elected members.[118] The elected members were six parents of currently enrolled students who were elected by parents of currently enrolled students, two residents of the attendance area served by the school who were elected by the residents, and two teachers elected by the school staff.[119] Each school council appointed the principal, who served for a contract period of four years, and could retain the principal for another four-year period when the contract expired. Should the principal be fired, the local school

111. Fumarolo v. Chicago Bd. of Educ., 566 N.E.2d 1283, 1318 (Ill. 1990).

112. *Id.*

113. *See Designs for Change, The Bottom Line: Chicago's Public Schools and How to Save Them* (1985); G. ORFIELD, THE CHICAGO STUDY OF ASSESSMENT AND CHOICE IN HIGHER EDUCATION, 134-36 (1984); and Chicago Tribune, *Chicago Schools: Worst Schools in America: An Examination of the Public Schools that Fail Chicago* (1988).

114. *Fumarolo*, 566 N.E.2d at 1318.

115. In theory the first step in school improvement is to organize "the responsible parties" by local school councils. This ensures continued efforts to make education more effective. These are people drawn from several sources including: representatives of the general public, site administrators, and representatives of the school district administration, teachers, technical consultants, and patrons of the school. These councils help define the three stages of school improvement: refinement, renovation, and redesign. JOYCE, *supra* note 2.

116. *Fumarolo*, 566 N.E.2d at 1295-96.

117. *Id.* at 1292.

118. *Id.* at 1287.

119. *Id.*

council selected a replacement.[120]

The act created eleven subdistrict councils in which parents played a central role.[121] Each local school council elected one of its parent or non-parent resident members to sit on a subdistrict council. The subdistrict councils performed advisory functions such as promoting and coordinating communication among local school councils, promoting and coordinating training of local school councils, electing and evaluating a subdistrict school superintendent, and electing one of its members to sit on the school-board nominating commission.

Membership on the Chicago School Board did not involve an election. The school-board nominating commission was composed of eleven members elected from each subdistrict council and five members appointed by the mayor.[122] The nominating commission, in an open public forum, interviewed candidates for seats on the board of education and presented the mayor with a slate of three qualified candidates for each vacant seat on the board. The mayor selected one of the candidates for each seat. There were to be fifteen members on the board of education. The board's powers and responsibilities were substantially altered.[123]

The local school bureaucracy was decentralized. The principal of each school was made responsible for administering and supervising the educational operation of the school.[124] He or she also developed the school's budget and improvement plan. As noted, the principal's contract was reviewed by the local school council.[125]

B. The Plaintiffs

The plaintiffs were classic examples of a rival interest group. In Chicago, principals and one of the subdistrict superintendents filed a complaint challenging the constitutionality of the act.[126] The focus of their complaint was the local school council. They contended that the act violated the Equal Protection Clauses of the state and federal constitutions because it denied an equal vote in local school council elections to large portions of the electorate. They also contended that they had permanent tenure. The Reform Act eliminated their tenure and thereby impaired their contract rights.

120. *Id.* at 1287.
121. *Id.*
122. *Id.*
123. The central board could levy taxes appropriate funds, enter into contracts, issue bonds, acquire property, and set basic educational policy at the district level. *Id.* at 1296.
124. *Id.* at 1287.
125. *Id.*
126. *Id.* at 1286.

The Reform Act meant getting rid of ineffective control over education. To some, the reforms reflected a basic fear that more community involvement would lead to the loss of jobs. The search for permanent job security led to the courts. The courts, trapped within a strict constitutional methodology, obligingly declared the act unconstitutional.[127]

C. The Majority Opinion

In *Fumarolo*, there were two challenges. The first was the claimed denial of equal protection—of an equal vote—to large portions of the electorate in local school-council elections. The other challenge was that the plaintiffs, the principals, and subdistrict superintendent, had vested contract rights under preceding statutory law and board policy, which the act eliminated, depriving them of property without due process of law.[128]

The majority said the vote-weighing scheme violated the Equal Protection Clause. Even though the scheme limited both "Who may be elected"[129] and "Who may vote,"[130] the court focused on the latter issue. The court noted that the local school councils were elected by citizens who had different voting powers.[131] This triggered the "one person, one vote" rule announced in *Avery v. Midland County*,[132] *Hadley v. Junior College District*,[133] and *Kramer v. Union Free School District No. 15*.[134] The court's finding was that the "one person, one vote" rule applies in elections of governmental bodies or units that exercise general governmental powers. Equal protection analysis examines the purpose of the statute and remoteness of the classification scheme from that purpose. If the statute involves a fundamental right, equal protection analysis demands that any distinctions between groups be strictly related to the object of the statute.[135]

The high court took exception to the trial court's special district rationale. The trial court had held that the act's local councils were simi-

127. Using equal protection analysis, the Reform Plan was also found to violate Article I, Section 2, of the Constitution of Illinois. *Id.* at 1300.

128. *Id.* at 1283.

129. *Id.* at 1299-1301, 1309.

130. *Id.* at 1301-02.

131. *Id.* at 1291.

132. *See supra* notes 67-75 and accompanying text.

133. *See supra* notes 76-81 and accompanying text.

134. *See supra* notes 82-92 and accompanying text.

135. *Fumarolo*, 566 N.E.2d at 1292-93.

lar to the districts in the agricultural water districts in *Salyer* and *Ball*.[136] The Illinois Supreme Court noted "the local school councils are the cornerstone, in a real sense, of the operation of the city's schools and they play a significant role in the Act's scheme to improve education in the City of Chicago. They have important and multiple powers that affect the whole community."[137]

In *Fumarolo*, the court dealt with a unique vote-weighing provision. Voter eligibility was limited. Only parents of students enrolled at the school could elect the parent members of the board.[138] The staff employed at the school voted for the teachers to be elected. Only community residents within the attendance area could vote for the community resident board members.[139] If it was a multi-area school, only the parents of students at the multi-area school, the staff, and the community residents serving that multi-area school could vote.[140] The plaintiffs argued that this was a differentiated allocation of votes. It interfered with their fundamental right to have an equal voice in an election involving a governmental matter of general interest—the operation of local schools.[141]

The court held that unequal weighted voting violated the equal protection guarantees of the federal and state constitutions. The court found that the trial court erred in applying the rational basis test, rather than strict scrutiny. The trial court's conclusion was that "the absence of a power to tax, issue bonds, and similar considerations" made the local school councils advisory bodies, not legislative. Applying the rational basis test, the trial court concluded the act was rationally related to the legislature's stated goal— improving the quality of education in the City of Chicago. Giving parents a weighted vote was therefore not a violation of equal protection.[142] The Illinois Supreme Court used strict scrutiny to condemn the legislative reform scheme.[143] Ample precedent supports the idea, however, that the legislative classification meets equal protection demands if it rests on a rational basis, by refering to the purpose of the legislation to completely restructure public education in Chicago to

136. *See supra* notes 91-101 and accompanying text. The trial court had held the local school councils were special limited-purpose bodies, which disproportionately benefited parents of children currently attending the public schools. *Fumarolo*, 566 N.E.2d at 1294.

137. *Fumarolo*, 566 N.E.2d at 1298.

138. *Id.* at 1287.

139. *Id.* at 1290-91.

140. *Id.*

141. *See supra* note 11 and accompanying text.

142. *Fumarolo*, 566 N.E.2d at 1294.

143. *Id.* at 1291-92.

improve schools.[144]

The court majority examined the act using the strict scrutiny standard of review. The court stated, "When the means used by a legislature to achieve a legislative goal impinges upon a fundamental right, such as the right to vote, a court will examine a claim that there was a violation of the constitutional right to equal protection under a standard of strict scrutiny."[145] This means the stated goal must advance a compelling state interest and the legislature must narrowly tailor the least restrictive reform plan to achieve that goal.

On the other hand, the right to be a candidate on the local board was not addressed by the court.[146] The act limited board candidacy to the principal of the attendance center and ten elected members: six parents of students currently enrolled, two are community residents residing within the attendance area, and two teachers employed at the school. The rationale was to insure broad community representation.[147]

D. The Dissent's Case

The dissent took exception to the majority's use of *Hadley*.[148] It was in *Hadley* that the Supreme Court had applied the "one person, one vote" rule whenever persons were chosen by popular election to "perform governmental functions," whether or not those governmental functions were "general" ones.[149] To the dissent, the *Fumarolo* case fell into an exception to the "one person, one vote" rule set out in *Hadley*. The

144. In *Avery v. Midland County*, the Supreme Court suggested the possibility for an exception to the "one person, one vote" rule. The Court reversed judgment on whether the rule applied to "special purpose units of government affecting a definable group of constituents more than other constituents." 556 N.E.2d at 1312 (citing *Avery*, 390 U.S. at 483-84). In *Hadley v. Junior College District*, the Court alluded to an exception in the "one person, one vote" rule suggesting there might be some cases in which a state elects certain functionaries whose duties are so removed from normal governmental activities as to disproportionately affect different groups that a popular election might be required. 397 U.S. at 56 (1970); *see also* Ball v. James, 451 U.S. 355 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973)

145. *Fumarolo*, 566 N.E.2d at 1291.

146. The Constitution contains no express provision that guarantees the right to become a candidate. The states are free to create restrictions. However, the Supreme Court has suggested that this area is reviewable as the ability to be a candidate for office is intertwined with the freedom of access to the ballot. A court must review the basis for the legislation to insure that ballot access restrictions are reasonable, nondiscriminatory means of promoting an important state interest. *See* Anderson v. Celebrezze, 460 U.S. 780 (1983); Clements v. Flashing, 457 U.S. 957 (1982).

147. *Fumarolo*, 566 N.E.2d at 1290 (quoting ILL. REV. STAT., ch. 122 para. 34-2.1(a)(1989)).

148. *Id.* at 1311 (Clark, J., dissenting).

149. *Hadley*, 397 U.S. at 57-58.

dissent noted that in *Hadley*, the "one person, one vote" rule was not applicable to special purpose units of government assigned to perform functions affecting definable groups of constituents more than other constituents.[150]

To the dissent, the "one person, one vote" analysis did not apply. The minority opinion adopted the trial court's position, which found that the site councils were special boards that lacked the power to tax and to issue bonds.[151] This suggested that the Chicago local-site councils, like the water district in *Salyer*, had an extremely limited purpose. In effect, the dissent adopted the *Salyer* and *Ball* limited-purpose test.[152]

The dissent also adopted *Salyer*'s narrower disproportionate-effect test.[153] The school-site councils, like the water district, affected a certain group of people disproportionately. The parents, teachers, and administrators in the special school-site districts, like the landowners in the water district, received nearly all the benefits and bore all the burdens and liabilities. The majority argued that the decisions of the local school council "affect[ed] virtually every resident."[154] The dissent suggested that this rationale was flawed because the crucial factor was whether the decision of the local school council would affect the parent in the public schools *more than* other residents in the attendance area.[155] Thus, if the functions of the unit site council affected "definable constituents more than other constituents, then the exception to the 'one person, one vote' rule applied."[156]

The dissent argued that the Chicago Reform Act fit the mere rationality standard of review. The dissent concluded that in elections where the government body involved does not exercise "general government authority" and where its actions disproportionately benefit those granted the weighted vote, a plaintiff's equal protection claim will be considered under the rational basis standard rather than under the strict scrutiny standard required under the "one person, one vote" rule.[157]

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150. *Fumarolo*, 566 N.E.2d at 1312 (Clark, J., dissenting).

151. *Id.* at 1313.

152. *See supra* notes 93-106 and accompanying text.

153. *Fumarolo*, 566 N.E.2d at 1315 (Clark, J., dissenting).

154. *Id.* at 1298.

155. *Id.* at 1317 (Clark, J., dissenting).

156. *Id.* The dissent ignored the broadened exception for special purpose districts developed in Ball v. James, 451 U.S. 355 (1981).

The key fact is that the functions of the site councils are of a "narrow, special sort." The magnitude of the site councils' impact on the rest of the school district is not an important part of the equation.

157. *Fumarolo*, 566 N.E.2d at 1317 (citing Ball v. James, 451 U.S. 355 (1981)).

The minority distinguished the Supreme Court's *Kramer* holding. In *Kramer*, the Court addressed an election scheme that limited the school district's elections to property owners or parents of the district's children.[158] The *Fumarolo* dissent asserted that the Chicago "local school council is not vested with any authority to set the basic educational policies for the Chicago public school system." The board of education retains this power and "it is the function and duty of the local school council to merely 'advise,' 'recommend,' or 'evaluate.' "[159]

III. The California Plan: New Wine in an Old Bottle

A. Delegation: The Formula for the New School

State legislatures have plenary power over local schools.[160] The legislature broadly delegates to school districts, through the school board, the power to operate.[161] Except for personal rights, state delegations do not raise federal constitutional grounds.[162] State courts are not bound by federal delegation decisions.[163] Supreme Court Justice Scalia suggests that broad delegation "is the hallmark of the modern administrative state."[164] According to *Mistretta v. United States*, delegation law must meet the need for an "intelligible principle" to govern exercises of the power delegated.[165] In *Mistretta*, the issue was whether the mandatory guidelines promulgated by the U.S. Sentencing Commission, established by Congress to control federal judges imposing criminal sentences, was an excessive legislative delegation. The Court held it was not and recognized that all Congress needed to do was to lay down an "intelligible principle" to which the delegate is directed to conform.

The intelligible-principle test is applicable to state school reform

158. *Id.* at 1316 (citing Kramer v. Union Free Sch. Dist., 395 U.S. 629, 633 (1969)).

159. *Id.* at 1316.

160. *See* Horton v. Meskill, 332 A.2d 113 (Conn. 1974); State *ex rel.* Clark v. Haworth, 23 N.E. 946 (Ind. 1889). But the Supreme Court noted that "a state cannot manipulate its political subdivisions so as to defeat a federally protected right." Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960).

161. School boards possess executive, legislative, and judicial functions. They have the power to affect the rights of private parties through either adjudication or rule-making. The authority to issue rules and regulations that by their general nature apply to the future is rule making. Adjudication applies to a specific individual and involves inquiry into the past. United States v. Florida E. Coast Ry., 410 U.S. 224 (1973).

162. *See* SCHWARTZ, *supra* note 2, at § 2.13 (1991).

163. *Id.* at 65.

164. Justice Scalia asks: "What legislated standard . . . can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?" Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

165. *Id.* at 372.

delegations empowering parents.[166] Statutes containing very broad school reform delegations should be upheld. The legislature in its education reform is not confined in its grant " 'to that method of delegation which involves the least possible delegation of discretion.' "[167] The key factor is the specification of criteria guiding the delegate, not the level of discretion conferred. Under the Chicago Act, the board of education retained its general administrative powers and responsibilities,[168] but the legislature placed increased authority for individual school decision at the individual school level. The act provided for the creation of a local school council for each grammar school and each high school. Because of the size of the Chicago system, the act created subdistrict councils to coordinate the local school councils and to nominate members of the permanent board of education. The board of education remained a central authority with a defused management structure. The Chicago Board had authority to control the local site councils. As stated in the act, "the Board shall exercise general supervision and jurisdiction over the public education of the public school system of the city . . . ."[169] The board retained the authority to levy taxes and issue bonds; establish and approve system-wide curriculum objectives and standards; prescribe the duties and compensation and terms of employment of its employees; erect, purchase, or implement condemnation proceedings for any school purposes; acquire real estate by purchase; take control of and manage all public playgrounds for the moral, intellectual, and physical welfare of the children; and divide the city into subdistricts and apportion pupils to several schools.[170] In other words, the Chicago School Board held general governmental powers, and the local school councils participated in the scheme in a remote and indirect manner by delegation. The local school council had a delegated voice in the operation of the board. The problem was that parents had to share power with other interest groups. This set off a power struggle among the interest groups, resulting in an adverse court decision.

The California plan is also based on a delegation scheme.[171] In the strategic plan, the governing board is delegated the authority to decen-

166. But as Schwartz notes, states may adopt a stricter approach to delegation. The difference in judicial of state courts might be that "state laws cover a smaller area and may be aimed at simpler problems, particularly in rural parts of the country." SCHWARTZ, *supra* note 2, at 64-65.

167. *Mistretta*, 488 U.S. at 379 (1989) (quoting Yakus v. United States, 321 U.S. 414, 425-26 (1944)).

168. *Fumarolo*, 566 N.E.2d at 1286.

169. *Id.* at 1315 (citing ILL. REV. STAT. ch. 122, para. 34-18 (1989)).

170. *Id.* (citing ILL. REV. STAT. ch. 122, para. 34-1 (1989).

171. California Assembly Bill No. 1263, Reg. Sess., 1991-92 California at 13.

tralize district decision-making by assigning authority over school operations to the school management team for each school in the district. The school district staff reserves only the authority to provide support and assist the schools. The strategic plan describes the authority assigned to the school management team and estimates time lines for achieving decentralization.[172]

As in the Chicago plan, a school management team is elected. The principal, the certificated employees of each school, the classified employees of each school, the parents of students attending the school, and the members of the local business community jointly select a school management team for that school representing those entities. The problem with the California plan is that parents are not given the central governing role. The method of election is determined in each strategic plan. This will produce rival interest groups competing to transfer the resources of the school district from other groups to themselves, or from the public at large to themselves.

To the extent feasible under the plan, parent or guardian representatives on the school management team must reflect the multi-cultural diversity of the school's pupil population. At each high school, the school management team must include an enrolled student. Each school management team must petition the school district board for its approval of its strategic plan, which must include the election procedure.

Unlike the Chicago Act, the school board retains control over the school-site board. With school board approval, the school management team develops a plan. It describes the action the school proposes for improving pupil achievement and for decentralizing decision-making.[173]

172. The long-term plan includes the following: (1) a statement of the district's goals for decentralization and pupil achievement; (2) guidelines for each school management team for devising a school strategic plan; (3) performance goals to be included in each school strategic plan; (4) restrictions on the composition of the school management teams; (5) criteria that will be used by the governing board in evaluating and approving school strategic plans; (6) a description of the training in management and budgetary practices, and in multi-cultural differences that will be provided to administrators and teachers to help implement decentralization; (7) a description of how the governing board will monitor and evaluate the implementation of the school strategic plans and each school's success in meeting the goals identified in the school strategic plan; and (8) performance goals for the support and assistance functions to be provided at the district level, including the use of technology in the classroom, training, financial management, and curriculum improvement. *Id.* at 14.

173. The local school plan includes, but is not limited to, all of the following: (1) the pupil performance goals the school expects to meet within the subsequent three years; (2) the long-term goals for improving pupil achievement at the school, based on the particular needs of the pupils who attend, or who are likely to attend, the school; (3) proposed methods for improving pupil achievement; (4) proposed methods for improving the employment skills of pupils; and (5) a schedule of workshops for the members of the school management team and other inter-

Each school is governed by these guidelines. This results in a paradox. The very problem the reform attempted to attack is left unresolved: The school boards, which are one of the reasons why schools fail, are left in charge of the schools. Parents, who are the holders of the true beneficial interest of public education, are not the ultimate decision-makers.

Still, the local school-site management team is far from being simply advisory. The school management team does exercise general government authority over the school. Each school management team adopts curricula, organizes and schedules instruction, elects and purchases instructional materials and equipment, designs and implements an annual budget, and devises a plan to manage programs within that budget funded by the school board. The management team takes on more than a mere advisory role because it can hire and evaluate certificated and classified employees. Just as in the Chicago plan, the California school-site management team handles budgetary planning, curriculum selection and personnel matters.

Building effective schools requires responsible parties in the community to initiate change. The California plan builds a collaborative and complicated scheme of local governance. The key is a strategy that involves everyone concerned with the school through the school board.[174]

B. Parental Control and Accountability

Today's public education system is dominated by the corporate model requiring hierarchical accountability. Voters elect school board members who have the formal legal power to manage and allocate the resources of the school district and are accountable to the voters. School administrators and teachers may be labeled "agents" of their schools and are subject to the fiduciary duty of agents.[175] The school board holds them accountable for the performance of their job. The principal is accountable to the school board for his or her performance. Placing teachers on a school board gives them the power to supervise administrators.

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ested parties designed to improve school management skills and communication skills to facilitate the understanding of cultural differences. *Id.* at 15-16.

174. "The object of organizing the 'responsible parties' is to build a community that can continuously relink the purposes of the school, select its primary mission, choose its most appropriate means, evaluate how they work, make adjustments, and over time, repeat the cycle." JOYCE, *supra* note 1, at 86.

175. The law of agency applies. The conventional description is that a school principal or teacher has two types of authority: actual authority and apparent authority. Actual authority is itself divided into two types: express and implied. The acts of an agent who lacks both actual and apparent authority may nevertheless be legally effective if they are properly ratified by appropriate representative of the school board.

This makes any accountability impossible as no one is ultimately accountable for the school's performance.

The logic for including teachers and administrators on a board is to promote collective consensus-building. There is something compelling about this logic; once it has been articulated the critics have accepted it. Thus, they are forced into an admission that seems damaging to their cause: parental representation must be sacrificed.

Yet, we know from organizational theorists that consensus decision making is not an accurate reflection of how a governing board operates. Consensus decision making atomizes opinion, multiplies political groupings, increases the violence of factions, and prevents the formation of a stable board majority. Hence, it prevents the board from governing. Consider the following example:

> IT BEGAN as a simple get-together in the office of Hedges East principal Steven Hara to schedule the next meeting of the local school council. It ended with school-council president German Gonzalez holding down the hapless principal so that school-council secretary Beatrize Lepe could get in a punch to his face. Though Mrs. Lepe and Mr. Gonzalez were charged with battery, the Hispanic community's activist group, United Neighborhood Organization (UNO), was immediately assured by Chicago public-schools superintendent Ted Kimbrough that an investigation would be mounted into charges that Hara provoked the attack by failing to implement a school budget approved by the local school council and by his allegedly condoning the distribution of an inflammatory flier attacking Hispanics.
>
> While Hara's face has recovered, Mrs. Lepe's punch struck all 540 schools in Chicago's district. Over and over, Chicagoans ask, "Is this any way to reform our schools?"
>
> Instead of turning to individual parental choice, however, the reformers opted for collective power, in the form of local school councils made up of parents, neighborhood residents, teachers, and principals. They placed their faith in collective consensus-building, not in a free market's ability to spur excellence.
>
> The school councils were given the responsibilities of hiring and negotiating employment contracts with principals, specifying the school's educational goals, approving curriculums and budgets, and making recommendations on hiring and firing. With 5,400 school-council members, all working for the goal of better education in Chicago, hopes were very high indeed.
>
> Within months of their election, two Hispanic-dominated councils had been sued for racial discrimination in their firings of non-Hispanic principals. Half a dozen teacher and/or student boycotts occurred when councils dissolved into factional fighting. Further, council members reported hostility from the school-board headquarters and the superintendent's office—some councils had

> to haggle with the central office to get something as simple as approval to change dead lightbulbs. The teachers' union also threw a monkey wrench into the reform plans, battling councils that tried to discipline or fire incompetent teachers.
>
> Placing parents in greater control of their children's education was the original aim of the movement, and yet, at every step of the way, the power of parents has been reduced—by community groups intent on building their own power base, by a centralized management determined to hold onto power, by a teachers' union trying to save its own neck, and, now, by the Illinois Supreme Court.
>
> Where reform advocates seem to have veered off course is in the assumption that parents can best make decisions for their children by meeting with other parents and forming a consensus. By placing faith in collective action instead of individual choice in a free market of educational alternatives, school reformers did not hold true to their original premise that parents are the people most interested in their children's education.[176]

The consequence of consensus building is obvious. It sacrifices one of the most important components of effective government—"unity of action." Consensus-building boards of teachers, administrators, parents and students are paralyzed and unable to act. They are not able to represent. Thus, a representative board must first above all things be capable of effective action. Will parental control of the school boards engender interference with teacher-pupil relations? Most of the proposals for parental control assume the parent board will have primary authority to shape the content of the school program and to exercise editorial power in selecting what is to be included and excluded as part of the official school program. The question is, what right if any, do teachers have to express their ideas, beliefs, opinions, and attitudes toward the school?

The answer to the question is couched in one of the variants of free speech: academic freedom. However, cases have not developed a doctrinal body of law that adequately addresses the issue. Under today's school governance system, teachers are not free to teach other than what the school district intends them to teach.[177] A recent Supreme Court opinion has held that teachers "have no constitutional right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education."[178]

The protection of the teacher from parental abuse of power will

176. Presser, NAT'L REVIEW, Oct. 7, 1991 at 20. Mrs. Presser is a freelance writer and a parent in Chicago.

177. See Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973).

178. Minnesota State Bd. of Community Colleges v. Knight, 465 U.S. 271, 283 (1985).

come from traditional sources.[179] First, the teacher has the protection of a contract. Mid-term discharges and tenured teachers have a "property interest" or stronger "liberty interest." Second, most school districts are represented by collective bargaining agreements that will include additional protection for teachers.

Political motivation for teacher abuse raises a mixture of constitutional concerns. In *Mt. Heathy City School District Board of Education v. Doyle*,[180] the Supreme Court indicated that a school board decision to discharge a teacher for expression might still be upheld if the board would have made the same decision for other, constitutional reasons. At least, it seems that the protection afforded teachers will not decrease under the parent governance model.

Parental control has its limits. Too much interference with the teacher's contract duties may be a breach of "good faith and fair dealing." But more importantly, it will interfere with teacher decision-making, leading to poor schooling. A parent board member will be accountable to other parents for their actions. Individual parent board members have no authority as individuals. They have authority only when acting as a board. If Teacher *X* gives child *A* a bad grade and child *A*'s parent is a parent board member, then that parent board member cannot act without the approval of the other board members.[181] Further, if the parent does act through the board, this is a breach of the duty of loyalty to the school district. To breach the duty of loyalty may subject the district and the board member individually to a private action by the teacher or other parents. It may seem odd to reflect on the wrongfulness of such self-dealing. Everyone agrees that fraud is wrong. The basic objection to unfair self-dealing is that it constitutes a unilateral taking of a special benefit or an additional compensation to which the parent board member is not entitled. Behind this notion is the ancient prohibition against a trustee's taking property from a beneficiary. The property in this situation is a child's legal right to an education.

The real problem with the California plan is that the parental voice on the management council is not hierarchial. Teachers and administrators are placed on the board. They will compete for political control of the schools. These are the very people who must be held accountable. Parents should control the individual and organizational school behav-

179. Government is restrained from acting arbitrarily when there exists an interest in liberty or property. Board of Regents v. Roth, 408 U.S. 564 (1972). *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, 522-530 (1978).

180. 429 U.S. 274 (1977).

181. It is interesting that teachers under the current system of governance experience a lack of support from administrators for their grading policies.

ior.[182] Parents should be in a position to hold the administrators and teachers accountable. Teachers and administrators should not be on local school boards, because they should work for the parents, not for themselves. This is the best method to assure accountability and effective schools. Parents should prevail over all rival interest groups.

Two institutional patterns are prevalent in our public schools: professional occupational life and bureaucratic administration. Both involve a high degree of specialized skills, with decision-making and actions based on rational methods and knowledge. There is no doubt that parents must recognize that the professional status of the teachers and administrators is achieved by those individuals' capabilities and performance. The bureaucracy, however, must be clearly within the parents control. The bureaucracy must accept that the professionalism of teachers and administrators is geared to self-restraint and colleague control. Thus, school reform, such as the California plan, must carefully blend bureaucratic parental control with the self-imposed professional standards of excellence and peer-group surveillance.

A final critical element is missing. Non-citizen parents are not invited to vote.[183] They are like stockholders who are never invited to the annual shareholders meeting. They are permanent residents, but because

182. The word "control" has several meanings. Here, it means: (1) to check or verify, (2) to regulate, (3) to compare with a standard, (4) to exercise authority over (direct or command), or (5) to curb or restrain. *See* Bellman, *Control Theory*, 9 SCI. AM. 184 (1964).

183. Roberto Rodriguez, a Washington writer and columnist for Los Angeles' *La Opinion* in an article entitled, "Should non-citizens have the right to vote?," observes:

> The Los Angeles Board of Education is scheduled to decide that Tuesday. Board member Leticia Quezada has proposed that parents of school children, regardless of citizenship status, be allowed to vote in the '93 school board election.
>
> While some may flinch at the idea of non-citizens voting, LA's action would not be the first. In New York since 1968 and Chicago since 1989, all parents have been able to vote and run for local school councils.
>
> Takoma Park, Md., has gone further, allowing non-citizens to vote in municipal elections. As a result, a move is afoot to grant non-citizens the right to vote in local elections in neighboring Washington, D.C., and others.
>
> District of Columbia Councilman Frank Smith will ask his council later this month to grant permanent residents the vote. "As a civil rights veteran and as a black, we want Latinos to have full rights," he says. "Granting permanent residents the right to vote will accelerate the drive of Hispanics to become citizens."
>
> Pedro Aviles of Washington's Latino Civil Rights Task Force supports the right to vote "for all who pay taxes."
>
> While even critics acknowledge the practice is constitutional, many are opposed— particularly if it means allowing undocumented residents to vote. "Granting the right to vote to those who haven't pledged allegiance to the country is a gross mistake," says Dan Stein, executive director of the Federation for American Immigration Reform.
>
> The nation's history is replete with examples of citizenship not being a requirement for voting nor a guarantor of the right to vote. In an earlier era, only white

they are not U.S. citizens, they cannot vote. California is a high-immigration state, and non-citizen parents pay taxes to support the schools.

C. The Courts and Decision-Making by Delegation

Cantwell v. Hudnut[184] illustrates delegation of government functions in a local government with undisputed power over those functions. Here, the Indiana legislature created a "uni-government" statute unifying the local governments of Indianapolis and Marian County. The plan created special police and fire service districts, each of which consisted essentially of the area of the old city of Indianapolis but which left services in certain other cities in the county, which were excluded from the new consolidated government, to the police and fire departments of those cities, and the rest of the county to the sheriff. Each service district had its own council made up of twenty of the twenty-nine city-county council members.[185] The local councils had the power to levy taxes and make appropriations for the districts and to approve the budget for districts, which were prepared by the Director of Public Safety and ultimately subject to veto by the mayor. The question before the court was whether the Indiana legislature, which gave some added voice to citizens particularly affected by particular governmental functions, also gave them autonomy with respect to those functions. If the special districts were autonomous,

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male landowners, regardless of citizenship, were permitted to vote; Indians, blacks and women, regardless of citizenship, were denied the vote.

Those denied the right to vote gained it through constitutional amendments and federal laws, whereas citizenship generally became a prerequisite for voting as a result of anti-immigrant hysteria at the turn of the century.

The drive to grant non-citizens the right to vote will not be smooth sailing. In Los Angeles, Quezada's proposal has encountered opposition from the school district's Black Education Commission, among others, which sees it as an affront to the black community.

As the movement spreads, opposition will doubtless spring from many quarters. At issue will be not the constitutionality of extending the franchise but the political propriety and political consequences.

USA TODAY, Feb. 17, 1992, at 10A.

184. 566 F.2d 30 (7th Cir. 1977).

185. The system of representation is based on the residence of the council member and the size of the special district. It is possible for several special districts to cover council districts. If the population of the special district is over 60%, then the council member will have a seat on the special district. These small population districts are represented in the special districts by the council members at large. The court describes the procedures as follows: "Of the 29 members of the city-county council, one is elected from each of 25 councilmanic districts and four are elected from the county at large. Twenty councilmen serve on each special service district council. Of this number, sixteen councilmen represent 60 percent of the population of a special district wholly within their districts. Nine of these are wholly within. Seven are partly within and partly without. Three councilmanic districts are partly within and partly without the special service districts but are not represented on the latter districts' councils because less than 60 percent of their populations are within the districts." 566 F.2d at 32.

then the "one person, one vote" rule applied. Residents who lived in unincorporated areas, having only forty-seven percent of the population but ninety-five percent of the property taxes and receiving ninety-five percent of the services, would find their votes unconstitutionally diluted. The Court, however, held that the special districts were not autonomous. The Court viewed the problem as "simply a delegation of governmental functions within a local government with undisputed power over those functions."[186] In such a manner, local schools could be governed by parents.

IV. Letting Parents Govern: New Direction for Judicial Regulation

Will the "new schools" with their parent boards and parent voters, both citizen and non-citizen, succeed? The answer is: probably not. There is a recurring scenario: If the legislative reform has any impact on the franchise, regardless of how it may improve local governance, judicial precedent tends to label the innovation unconstitutional. School reformers must clearly understand what the courts and competing interest groups are about. Courts consistently protect the right to vote over the right to control local schools, when the two rights conflict. School reformers must ask: Can we determine who may govern our schools, consistent with the goals of current judicial regulation?[187] Are there alternatives to the current judicial methodology? Do these judicial strictures apply to alternative formulations of school-site legislation?

A. Fair Representation as the Ultimate Goal

This task is restating the fairness argument of "one person, one vote." In *Reynolds v. Sims*, Chief Justice Warren suggested that "fair and effective representation for all citizens is concededly the basic aim of legislative apportionment."[188] The principle is that representatives in each of the legislative districts represent equal numbers of people. For successive jurists, the vague phrase "fair and effective representation" has prohibited any legislative district from diluting the voting strength of voters.

The problem is that voting strength cannot be characterized as diluted unless there is something that is agreed to be *normal* voting strength. What constitutes normal, and how does a court recognize it

186. 566 F.2d at 37.

187. A similar question was posed by Justice Fortas in Avery v. Midland County, 390 U.S. 474, 497 (1968) (Fortas, J., dissenting).

188. 377 U.S. 533, 565-66 (1964).

when it sees it? To find meaning, courts must distinguish between normal and abnormal examples of voting strength dilution. There should be some result-oriented inquiry. If the result is a fair election by beneficial voters, then fairness has been served.

The *Fumarolo* case shows that courts fail to assess plans on a result-oriented basis. To find meaning in the "one person, one vote" concept, courts focus on a classification methodology. Their concern is whether the decision-making board is "legislative" or not. The *Fumarolo* court stated,

> Considering the whole Act, and the local school councils in particular, we hold that the local school councils are essential units of educational governance empowered to make important budgetary, educational and administrative decisions regarding the Chicago public school system, and that the statutory scheme which denies or dilutes the vote of certain citizens must therefore be necessary to advance a compelling State interest.[189]

The fact that the election system was a fair way to empower people to run their schools was of no consequence. Thus, the court ignored any result-oriented analysis, which would have shown no racial motives, but rather a desire to allow those with a beneficial interest in their schools to govern.

We must be clear about what task the courts must assume. The best move is not to play or to refrain from judicial activism. But if the courts are to be active in the process of political reform, they should adopt a result-oriented analysis for political questions. This puts courts in the position of making descriptive, analytical decisions. The norm of neutral, unbiased, and "outcome-blind" in the current "one person, one vote" rule, is hostile to innovative reform of local government. In fact, with the "one person, one vote" norm, courts will protect structures of local governments that have failed. The public schools are an example.

Court decisions frame the political struggle in the state legislature. In our system of government, the legislature should design the structure of government as a compromise of the political struggle. As the regulators of politics, their normative role vetoes legislative efforts to structure a fair and responsive system of local government. The courts' normative rule of "one person, one vote" is legislative as it functions to determine the essential fairness of representational government. A result-oriented analysis accepts the fact of judicial activism and puts courts in the position of making decisions based on what is fair. For example, assume the legislature passes a school reform bill that creates local parent boards

189. *Fumarolo*, 566 N.E.2d at 1295.

that prevents blacks or women from voting or serving on the board. The bill is not race-neutral and therefore is unconstitutional. But, if the legislature passes a school reform bill that creates local boards of parents that does not discriminate against race or sex, then the statute, barring other problems, should be constitutional.

The current judicial thinking is without the justification that was pivotal to the *Reynolds* decision.[190] According to the court in *Fumarolo*, "[b]ecause the local school councils are inherently involved in school operation . . . the entire Act must be declared unconstitutional."[191] There is no discussion of specific voting manipulation or racial discrimination. This is no analysis of how one vote is unfairly advantaged over another. There is no accepted definition of normal voting strength to compare to school-site voting levels. In short, the "one person, one vote" rule is not employed to distinguish fair from unfair. Judicial regulation is almost axiomatic. Since *Kramer*, the Court requires all school boards' election schemes be carefully scrutinized to determine whether the scheme is necessary to promote a compelling state interest.[192] Under this approach, the door is open for the courts to review any school-site plan on a pretext of population inequality, no matter how careful the legislature is in developing the plan.

The *Sayler* and *Ball* decisions are judicial contortions. These cases are what Justice Harlan would classify as "an experiment in venturesome constitutionalism."[193] Their rationale is that the "one person, one vote" rule is grounded in the right of collections of voters with common interests to "effective group representation," not the right of an individual to an equal vote. They suggest a limited-purpose and disproportionate-effect test for "narrow, special sorts" of boards.

Historically, this reflects an old division. In the original *Baker* decision, six of the Justices were for a strict equal population district system; two Justices, Stewart and Clark, were for more flexible standards preserving majority rule and avoiding crazy-quilt boundaries; Justice Harlan was for a complete hands-off approach.[194] Thus, today as in the past, the goal of fair representation is not fixed.

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190. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

191. *Fumarolo*, 566 N.E.2d at 1303.

192. The majority in *Fumarolo*, 566 N.E.2d at 1303, observed: "No particular racial or ethnic group is govern particular advantage in the election process."

193. Reynolds v. Sims, 377 U.S. 533, 625 (1964) (Harlan, J., dissenting).

194. Justice Harlan comments: "Courts are unable to decide when it is that an apportionment originally valid becomes void because the factors entering into such a decision are basically matters appropriate only for legislative judgment. Baker v. Carr, 82 S.Ct. 691, 774 (Harlan, J., dissenting).

B. Redefining Judicial Regulation

Fairness requires elected board representatives to be in proportion to the number of people represented.[195] In school districts, this would be the number of voting citizen and non-citizen parents. The complexity arises with the question, How does a court know fairness when it sees it? Voters participate in our democracy by residence. There are numerous racial, ethnic, and economic groups who are voting residents within a school service area. Judicial regulation requires a judge to weigh fairness according to some formula fair to each. Fairness is not a problem when the voting residents are all parents. Further, there are some alternatives to judicial regulation.

i. Consider Parental Empowerment as a Non-Justiciable Political Question[196]

Parental empowerment may be considered a political question involving two principles: the separation of powers, where a court will not decide matters committed by the Constitution to other branches of government; and also prudential considerations that may cause a court not to decide a case even if unconstitutional. In *Baker v. Carr*, Justice Frankfurter argued that the malapportionment of state legislatures was a "Guaranty Clause claim masquerading under a different label."[197] The clause provides that "[t]he United States shall guarantee to every State of this Union a Republican form of Government."[198] Such questions, Justice Frankfurter claimed, "are non-justiciable political questions" and plaintiffs' claims that their votes had been "diluted" by malapportionment could not be adjudicated unless the Court "first defined a standard

195. *See supra*, note 11 aqnd accompanying text; *see also* Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 633 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); and Baker v. Carr, 369 U.S. 186 (1962).

196. A "justiciable controversy" is real and substantial, and appropriate for judicial determination. BLACK'S LAW DICTIONARY 777 (5th ed. 1979).

197. Baker v. Carr, 369 U.S. 186, 297 (1962) (Frankfurter, J., dissenting). In Luther v. Borden, 48 U.S. 1 (1849), the Court declined to determine whether two competing Rhode Island governments was the legitimate government. Rhode Island did not, like other States, adopt a new constitution, but continued the form of government established by the charter of Charles II. In 1841, a portion of the people of the state adopted a new constitution. The new constitution was adopted by a majority of the voters in the state. But the charter government did not acquiesce in these proceedings. It passed stringent laws, and finally declared a state of martial law. The Court based its decision in part on a lack of criteria by which a court could determine which form of government was republican.

198. *Baker*, 369 U.S. at 300, 323 (Frankfurter, J., dissenting).

of reference as to what a vote should be worth."[199] To do this, the Court must make the same decisions as the Founding Fathers did at the Constitutional Convention. Frankfurter observes:

> It would be ingenuous not to see, or consciously blind to deny, that the real battle over the initiative and referendum, or over a delegation of power to local rather than state-wide authority, is the battle between forces whose influence is disparate among the various organs of government to whom power may be given. No shift of power but works a corresponding shift in political influence among the groups composing a society.[200]

This is a decision committed by the Constitution to other branches of government.

This position has a solid judicial foundation. Justice Rutledge, in the decisive opinion in *Colegrove v. Green*, held that a case may be justiciable but that the Court should "decline to exercise its [equity] jurisdiction."[201] In *Colegrove*, the validity of state congressional district apportionment was at issue. While the majority held that federal courts will not take jurisdiction, Justice Rutledge noted that the Court has power to afford jurisdiction in a case of this type as against the objection that the issues are not justiciable:

> As a matter of legislative attention, whether by Congress or General Assembly, the case made by the complaint is strong. But the relief it seeks pinches this Court into delicate relation to the functions of state officials and Congress, compelling them to take action which heretofore they have declined to take voluntarily . . . .[202]

However, the cases that follow *Baker* suggest that the Court has followed a different route. The reason is suggested in one recent decision:

> The cases are based on the propositions that in this country the people govern themselves through their elected representatives and that "each and every citizen has an inalienable right to full and effective participation in the political processes" of the legislative bodies of the Nation, state or locality as the case may be." Since "[m]ost citizens can achieve this participation only as qualified voters through the election of legislators to represent them, "full and effective participation requires that each citizen have an equally effective voice in the election of his . . . legislature." As Daniel Webster once said, "the right to choose a representative is every man's portion of sovereign power." Electoral systems should

199. Frankfurter notes: "One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth." *Id.* at 300.

200. *Baker*, 369 U.S. at 299.

201. 328 U.S. 549, 565 (1946) (Rutledge, J., concurring).

202. *Id.* at 1209.

strive to make each citizen's portion equal.[203]

The price for judicial activism which limits parental empowerment is high. Intervention may contribute to parental apathy and tax rebellions. The vitality of our political system is weakened by reliance on the judiciary for political reform. In time, a complacent body politic may result.[204] It is easy to understand parental reluctance to support higher taxes to improve education if the parents cannot thereby remedy the problems that created poor schools in the first place. Judicial ruling induces sharp political reactions from communities dependent on legislative changes to solve the dire educational morass.

There are other fundamental effects of court activism. Activist courts, not the legislature, determine the structure of school governance. Courts acting as super-legislatures harm the vigor of state government in solving the problems facing public education. They, in effect, transfer political power from the legislature to themselves.

ii. "One Person, One Vote" in Broader Terms Than Necessary for Parental Empowerment

The Chicago School Reform Act based the school governance structure on communities of interest. The *Sailor* Court noted the delegation principle.[205] Members of the local school boards were chosen by popular election, but members of the county school board were chosen by local board delegates.[206] No constitutional question was presented concerning elections of the local school boards because the county board operated under authority delegated to it by the local boards. Organizationally, the higher-level position was on the local school boards. They had ultimate

203. Here, the membership of New York City's board of estimate consisting of three elected citywide officers and each of the City's five boroughs was held unconstitutional. Board of Estimate of City of New York v. Morris, 109 S.Ct. 1433 (1989).

204. Justice Harlan's opinion in *Reynolds v. Sims* would dismiss all reapportionment of state legislatures as "an experiment in venturesome constitutionalism." 377 U.S. 533, 625 (1964) (Harlan, J., dissenting). However, our discussion here is limited to subdelegation to specialized boards by legislatures that have complied with Court mandates.

205. There is a distinction between the delegation of true legislative power and the delegation to a subordinate of authority to execute the law. The former involves discretion as to what the law shall be; the latter is merely an authority or discretion as to its execution, to be exercised under and in pursuance of the law. A school board cannot delegate its legislative powers to determine what the regulations and fundamental policy should be. However, it may delegate to others the authority to do those things the legislature might properly do but cannot do as understandingly or advantageously. The Constitution merely requires that *intelligible* standards be set to guide the local site council charged with enforcement of board policy, and the precision of permissible standards must necessarily vary according to the nature of the ultimate objective and the problems involved. Yakus v. United States, 321 U.S. 414, 444 (1944).

206. *Sailors*, 387 U.S. at 106.

authority over the county board.[207] In this manner, the schools reflected a hierarchical authority structure where those ultimately in authority were elected according to the "one person, one vote" model.[208] The California plan follows the same approach. Structure means the pattern of relationships among the many school and community components. Past educational and political attempts at reform treated the school as a puzzle of separate entities. In contrast, the Illinois legislature took the advice of experts and developed a holistic view of schooling. They took the position that community responsibility for improving the quality of schools resides in a combination of "responsible parties" composed of teachers, parents, administrators, and community representatives, acting together in local school councils.

Political restructuring should be justifiable. Courts should be cautious in ruling on constitutionality particularly when there is no demonstrated attempt to impose racial restructuring. Where there is an elected legislative body that delegates authority to local school councils or committees of parents, the "one person, one vote" model should not apply.

There are a number of reasons for this view. First, the people in the political jurisdiction did not have their votes diluted, nor are they disenfranchised. Second, it is a fundamental tenet of administrative law that for representative government to be responsive to the will of the electorate, delegated decision-making must occur. Third, the central purpose advanced by the Supreme Court in justifying its intervention in the 1960s was the need to insure "fair and effective representation."[209] This is achieved by reliance on a school board elected by parents who have the beneficial interest in seeing their school succeed. Voting distributions that increase the opportunity for effective participation at the school-site level cannot be said to "make one man's vote . . . worth as much as another's."[210]

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207. *Id.* at 106.

208. *Id.* at 109 n.6.

209. *See* Baker v. Carr, 369 U.S. 186, 258 (1962) (Clark, J., concurring).

210. Reynolds v. Sims, 377 U.S. 533, 559 (1964) (citing Wesberry v. Sanders, 376 U.S. 1 (1963)).

David C. Rudd, an education writer, and Harlin Ellin, a reporter for the CHICAGO TRIBUNE, report:

> The number of reported candidates for seats on the local councils that govern educational policies at each Chicago public school more than doubled Tuesday. But school officials and reform groups still expressed concern about apathy among parents, community representatives and teachers.
>
> The school system reported 2,974 candidates Tuesday evening, compared with 1,281 on Monday. School officials reported the sharp increase after a power failure

iii. A Fresh Approach: One Step at a Time, and as Part of an Evolving Scheme

Looking to the future, the dire condition of public schools will force a restructuring of public education. The Supreme Court has allowed electoral reform to take place "one step at a time."[211] Reform affected by statute may take "one step at a time," addressing itself to a phase of the problem that seems most acute to the legislative mind, selecting one phase and neglecting others, without amounting to legislative classification violative of equal protection.[212] The Court gives deference to an evolving scheme. The legislature, not the courts, balances advantages and disadvantages of new statutes. The mere rationality test is an adequate test for parents seeking to operate their own schools.[213]

Conclusion

This Article ends as it began—with questions. How does a republican form of local government, such as a public school district, respond to a changing society demanding better in performance of our schools? On what basis do the courts regulate the change? The reality is that these questions are far from being answered. Whatever the scheme of representation, the problem will always be the relationship that exists between the representative and the represented.

The cases and illustrations in this Article demonstrate that school reform is a political problem as well as a legislative one. Any legislative

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at the system's central office temporarily disabled the computer system that gives the updated tally of candidates.

Officials attributed the increase to stepped-up efforts to promote the local school council elections, to be held Oct. 9, 1991.

Of the nearly 3,000 reported candidates, 1,808 are parents, 557 are community representatives, 568 are teachers, and 41 are high school students. Parents and community representatives are elected to the councils, and teachers and high school students are appointed by the board.

CHI. TRIB., Sept. 25, 1991, at 7.

211. In *Clements v. Flashing*, the Supreme Court held the "resign-to-run provision of the Texas Constitution, i.e., that holders of certain offices automatically resign their positions if they become candidates for any elected office unless unexpired portion of their current term is less than one year, does not violate equal protection and may be upheld under the rational basis test as consistent with the 'one step at a time' approach as it is a creature of state's electoral reforms . . . , absent invidious purposes, the sort of malfunctioning of the state's lawmaking process forbidden by the equal protection clause." 47 U.S. 971.

212. Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

213. *See* Clements v. Flashing, 457 U.S. 957 (1982). The highly differential mere-rationality standard of review applies to social welfare legislation, so long as a fundamental constitutional right is not impinged. *See also* Whalen v. Roe, 429 U.S. 589 (1977) (patient identification requirement is reasonable and is the product of a rational legislative decision; it does not impinge on an individual privacy interest).

plan must show an adequate awareness of the complexity of representative government. It must achieve fair representation by selecting representatives by voting procedures that reflect the beneficial interests involved. Parents are the true holders of the beneficial interest in quality education. They must be the only interest group to dominate representative school reform formulas. Reformers should not place rival interest groups in power who can transfer resources to themselves.

Yet on what basis does anyone evaluate or criticize this approach? Perhaps John Rawls, in his book *A Theory of Justice*, poses a solution.[214] Rawls would base a notion of fairness on the notion of the "original position."[215] This is a device to determine the content of justice. Under this formula, rational people who are initially equal must choose basic social rules to organize a just society. Rawls argues that the concepts of justice chosen would be more reasonable than if selected in another way. Principles of fairness can be defined by considering the rules that rational individuals would choose for society if they were obliged to choose such rules behind a "veil of ignorance" that concealed from them what their individual endowments, both natural and social, would be.

Rawls creates a social contract in which free, equal, and rational persons agree on the terms of their future cooperation by choosing principles of justice. Behind a veil of ignorance, they choose the least bad or safest alternatives. Because no one can be sure of not ending up with a loss of liberty or at the bottom of the ladder, one is compelled by rationality to insure against the worst alternative. The outcome is a set of principles that protect the interests of the least advantaged and the basic liberties of all.

Why would parents standing behind a veil of ignorance prefer to govern their own schools? First, it may attract them into the schools. Increasing their sense of ownership increases their attention to politics. More importantly, self-governance may promote an effective method to insure accountability in a decentralized system. Ultimately, such a system would improve the school's performance.

Why would non-parent citizens standing behind a veil of ignorance prefer parents to govern their own schools? Citizens may prefer effective schools to ineffective schools. Effective schools produce citizens that contribute to society. They work and produce taxes. Senior citizens, one element of this community, want this to insure the stability of social security. Single citizens want less crime and unemployment. By facilitating parents to govern their schools, non-parents enjoy a bonus of helping

214. JOHN RAWLS, A THEORY OF JUSTICE (1971).
215. *Id.* at 19-21.

to solve the fundamental structural problems in the American economy. In a Rawlsian sense, parents and non-parents who are rational might conclude that there are benefits from parental governance.

Perhaps it is possible for citizens and their legislators to stand behind a veil of ignorance and make an approximation of fairness. This, however, requires an independent court to facilitate, not limit, their vision.