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## Counterpoint — Introduction

### Non-Adjudicative?: You Be The Judge

PERRY ZIRKEL \*

In the January 1998 issue of J. L. & EDUC.,<sup>1</sup> Charles Berger, a Yale law student, discussed a lawsuit which challenged the constitutionality of Kansas' system for financing schools. The Kansas school financing system produced significant disparities among local districts. In his article, Berger discussed the novel approach to the case taken by a Kansas trial court judge, Judge Terry Bullock. Judge Bullock's approach involved issuing a preliminary legal opinion in a question and answer format<sup>2</sup> and convening a series of meetings between representatives of the legislature and the governor's office.<sup>3</sup> The result was a 1992 state

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1. Charles Berger, *Equity without Adjudication: Kansas School Finance Reform and the 1992 School District Finance and Quality Performance Act*, 27 J. L. & EDUC. 1 (1998).

2. *Id.* at 19, citing *Mock v. Kansas*, No. 91-CV-1009 (Shawnee County Dist. Ct., Oct. 14, 1991). This opinion, which started with a framework of legal principles based on the unique education article of Kansas' constitution and a comparative analysis of five recent school finance decisions in other states, amounted to dicta, i.e., "without precedential value," because judge Bullock had not issued a final decision. *Id.* at 21. The question-and-answer section anticipated and extended to second-order, implementation issues in the form of hypotheticals. *Id.* at 42. Moreover, this rhetorical format had the advantages of being "dramatic, easily comprehensible, and — perhaps most important of all — eminently quotable." *Id.*

3. *Id.* at 19. The first stage, a one-day summit conference, took place at the state supreme court, with the blessing of the chief justice, and was punctuated by presentations by state and national experts. *Id.* at 22. The second stage was a series of meetings of a task force of eight representatives of the legislature and an equal number of appointees of the governor, with input from expert witnesses, the attorney general's office, and local school administrators. *Id.* at 23. The third stage was another summit "pre-trial" conference at a critical, impasse juncture in the legislative process. *Id.* at 27.

statute that Berger praised as "one of the most sweeping and equitable school finance plans in the country."<sup>4</sup>

Although immediate suits resulted in a 1994 decision by the state supreme court upholding the constitutionality of the statute,<sup>5</sup> this "triumph of fiscal equity"<sup>6</sup> is not, Berger recognized, without flaws. First, he pointed to intervening action and inaction by the state legislature that illustrate the "danger of backsliding."<sup>7</sup> Second, the state supreme court's ducked defining the state's duty to provide adequate or equal education and ruled that education was not a fundamental right under Kansas' constitution.<sup>8</sup>

Berger characterized this approach to school finance reform as a "non-adjudicative model," because judge Bullock did not issue a final court judgment.<sup>9</sup> In Berger's estimation, the resulting "equity without adjudication" had the advantage of speed but at the possible expense of impermanence and injustice.<sup>10</sup> He also warned that this model may not be importable to political, demographic contexts that are not "conducive to the formation of a broad consensus on the issue at a particular point in time."<sup>11</sup>

In the accompanying Counterpoint, Lehigh doctoral candidate Ralph Puerta analyzes and evaluates Berger's approach by comparing Kansas' "non-adjudicative" experience with Pennsylvania's current school finance litigation.<sup>12</sup> Puerta conducts his comparison in terms of the purported Kansas advantages of speed and results as well as the potential disadvantages with regard to precision, power, and permanency. Pennsylvania's path not only is different but may be higher, including possible fundamental right, strict scrutiny underpinning. Thus, Puerta's overall conclusion is contingent; depending upon the anticipated decision of Pennsylvania's supreme court, the judicial model "may produce more enduring results than . . . the Kansas non-adjudicative experience."<sup>13</sup>

In examining Berger's and Puerta's respective analyses, the reader is also urged to consider other useful and pertinent sources. For example, several

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4. *Id.* at 2. The two features that he identified of this "dramatic success" were the virtual elimination of disparity between weighted per-pupil expenditures and an increase in total spending for education. *Id.* The basis for this result was a formula that "[fused] input- and outcome-based factors" and that represented a "broadly consistent and fairly theoretical foundation." *Id.* at 31.

5. *Id.* at 38, citing Unified Sch. Dist. No. 229 v. Kansas, 885 P.2d 1170 (Kan. 1994).

6. Berger, *supra* note 1, at 32.

7. *Id.* at 33-34.

8. *Id.* at 39-41.

9. *Id.* at 2. His definition is not without ambiguity; elsewhere, he appears to attribute this characterization to the lack of a final judgment by the state's supreme court. *Id.* at 42.

10. *Id.* at 43-44. The injustice is the inclusion of possibly unconstitutional elements as a result of compromise. *Id.* at 44.

11. *Id.* at 45.

12. Ralph Puerta, *A Pennsylvania Perspective on Charles Berger's "Equity Without Adjudication,"* 28 J.L. & EDUC. 235 (1999).

13. *Id.* at 232.

scholars have comprehensively canvassed the school finance litigation across the country.<sup>14</sup> Moreover, Rebell's "dialogic approach"<sup>15</sup> has been subjected to Counterpoint analysis.<sup>16</sup> Finally, Brown-Nagin has analyzed and assessed the South Carolina's landmark education reform legislation as an illustration of another non-adjudicative approach, the "T-Formation" process model.<sup>17</sup> An examination of these alternate approaches reveals the fuzziness of Berger's characterization of Kansas' experience as a "non-adjudicative" model.<sup>18</sup> Although Judge Bullock's decision was indeed a "Mock"<sup>19</sup> opinion, it was both preceded and proceeded by state supreme court decisions, and his process was essentially a court-guided settlement.

In any event, the search for legal solutions to pressing educational issues beyond the traditional boundaries of court decision-making<sup>20</sup> is a necessary and appropriate endeavor well worth the consideration and participation of the J. L. & EDUC. community.<sup>21</sup>

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14. See, e.g., John Dayton, *An Anatomy of School Funding Litigation*, WEST'S EDUC. L. REP. 627 (1992); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995); William Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 WEST'S EDUC. L. REP. 19 (1993). For the stories of the school finance litigation in individual states, see, e.g., Michael Addonizio, Lyndon Furst & John Dayton, *Blowing Up the System: Some Fiscal and Legal Perspectives on Michigan's School Finance Reform*, 107 WEST'S EDUC. L. REP. 15 (1996); Mark Diefenderfer, *Riding the School Finance Litigation Wave: Alabama's Remedy May Not Be Enough*, 104 WEST'S EDUC. L. REP. 961 (1995); Helen Hazi, *Co-Rechting West Virginia's Schools*, 45 EDUC. LEADERSHIP 75 (1985); William Sparkman & Fred Hartmeister, *The Edgewood Saga Continues: The Texas School Finance System Is Constitutional*, 101 WEST'S EDUC. L. REP. 509 (1995); William Thro, *The Significance of the Tennessee School Dinance Decision*, 85 WEST'S EDUC. L. REP. 11 (1993).

15. Michael Rebell & Robert Hughes, *Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC. 523 (1996); Michael Rebell & Robert Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Educational Reform*, 14 YALE LAW & POL'Y REV. 99 (1996); Michael Rebell & Ann Murdaugh, *National Values and Community Values, Part II: Education Educational Opportunity for Limited English Proficient Students*, 21 J.L. & EDUC. 155 (1991).

16. Joanne Huston, *Inclusion: A Proposed Remedial Approach Ignores Legal and Educational Issues*, 27 J.L. & EDUC. 249 (1998).

17. Tomiko Brown-Nagin, "Broad Ownership" of the Public Schools: An Analysis of the "T-Formation" Process Model for Achieving Educational Adequacy and Its Implications for Contemporary School Reform Efforts, 27 J.L. & EDUC., 343 (1998). "T-Formation" refers to three distinct groups; in the South Carolina experience, the horizontal plane consisted of a blue ribbon committee of business, education, and legislative leaders side-by-side with another blue-ribbon committee of prominent but less elite business and political representatives, and the vertical plane consisted of grassroots forums. *Id.* at 364-66.

18. See *supra* note 9 and accompanying text.

19. See *supra* note 2.

20. For the limits of public law litigation, see, e.g., Doris Fine, *Just Schools, in School Days, Rule Days* (David Kirp & Donald Jensen eds., 1986); James Fishman, *The Limits of Remedial Power, in LIMITS OF JUSTICE: THE COURT'S ROLE IN SCHOOL DESEGREGATION* (Howard Kalodner & James Fishman eds., 1978)

21. For a current and comprehensive example, see generally LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL (Jay Heubert ed., 1998).

