

Pay-to-play: A Risky and Largely Unregulated Solution to Save High School Athletic Programs from Elimination

In reality, there are no Principal Skinners in schools across America gleefully launching, "Operation S.L.A.A.M.: So Long Athletics, Art and Music."¹ On the contrary, many schools have accepted pay-to-play programs as a bittersweet alternative. As a veritable Hobson's choice, pay-to-play programs on one hand "save" high school sports because they free athletic programs from "the mercy of local voters."² On the other hand, by charging students to participate, pay-to-play programs undermine the concept of free public education.³ The proliferation and pervasiveness of fees to fund sports and extra-curricular activities raises two questions: what services public schools should provide free of charge and whether state legislatures should reconsider the opportunities included in public education.⁴

I. INTRODUCTION

While \$350 dollars to play high school football in Massachusetts and \$630 dollars to play high school tennis in Ohio are near the high end of the pay-to-play spectrum, the national average—between \$75 and \$100 dollars—is nevertheless alarming to those who consider athletics a fundamental part of public high school.⁵ Despite sharp criticism, pay-to-play programs provide an alternate source of revenue for public schools in dire budgetary straits and often

1. *The Simpsons: The President Wore Pearls*, Fox Television Broadcast, Nov. 16, 2003 (referencing through parody forced budget cuts to school curriculums).

2. Victoria J. Dodd, *Recent Developments Education Symposium: A Critique of the Bush Education Proposal*, 53 ADMIN. L. REV. 851, 853 (2001) (explaining public school funding frequently local burden). *But see* Diane Rado, *Fees Stacking up at Illinois Schools*, CHI. TRIB., Aug. 31, 2001, at 1 (describing fees as favorite administrator tool because unregulated by state and no voter oversight).

3. *Pay-To-Play Costs Hit Families Harder*, HIGH SCH. SPORTS PUBLICATIONS, Aug. 18, 2004, [hereinafter *Pay-to-Play Costs*] (noting "once-sacred part of public school" now numbers—driven business) at HSSP Home Page, <http://www.hssp.cc> (last visited Nov. 1, 2004).

4. Carol Chmelynski, *As Budgets Shrink, More Districts are Turning to User Fees*, SCH. BD. NEWS, March 5, 2002, [hereinafter *As Budgets Shrink*] (suggesting legislatures must act to change status quo) available at <http://www.nsb.org/site/index.asp> (follow "NSBA Bookstore" hyperlink; then follow "School Board News" hyperlink; then follow "Archive" hyperlink; then follow "March 2002" hyperlink).

5. Ashburnham-Westminster Regional School District, *Final 04-05 Fall Sports Fees*, (listing 2004 participation fees for fall sports) at <http://www.awrsd.org/05%20Sports%20Fees/Final%2004-05%20Fall%20Sports%20Fees.htm> (last visited Nov. 3, 2004); Erik Brady and Ray Glier, *No Free Ride: Many Students Pay to Play Sports Must Pay*, USA TODAY, July 29, 2004, at 1A [hereinafter *No Free Ride*] (describing high school tennis participation fee in Fairfield, Ohio); Maureen Delany, *School Athletics for Elite?*, RIVERSIDE PRESS-ENTERPRISE, Nov. 5, 1992, at C1 (characterizing athletics as "intercurricular").

act as a last resort to save athletic programs from elimination.⁶ Charging students participation fees, however, raises equity issues among students and schools in a given district.⁷ Students unable to pay the fee risk being excluded from activities that may otherwise enhance their educational experience.⁸ Beyond the individual student's ability or inability to pay a fee, one school may offer more courses and activities than another school in the same district because a sufficient number of its students are able to pay associated fees and therefore preserve the course or program.⁹ Thus, pay-to-play programs may "save" football at one school, while the costs of charging students to play may eliminate football at another school, "turning a once-sacred part of public education into a numbers-driven business."¹⁰

The student fee discussion constitutes a small aspect of the larger school finance debate.¹¹ The struggle to fund public schools and the use of unpopular pay-to-play programs to cover funding gaps is not a phenomenon of the twenty-first century.¹² Rather, it is a recurring dilemma for communities facing economic shortcomings.¹³ During tough economic times, schools need funding solutions that do not result in cuts to curriculum and extra-curricular activities.¹⁴ Student fees provide one such solution and are presently an

6. National Association of State Boards of Education, Policy Update, *Student Fees*, Vol. 10, No. 2, [hereinafter *Student Fees*] (characterizing student fees as alternative revenue sources) at http://www.nasbe.org/Educational_Issues/New_Information/Policy_Updates/10_02.html; Darryl Maxie, *High School Players as Payers; Kids Bear Costs: Strapped Districts are Starting to Charge Athletic Participants, a Trend Georgia Resists*, ATLANTA J.-CONST., May 2, 2004, at 1E [hereinafter *Players as Payers*] (opining pay-to-play less painful than eliminating athletics); Erik Brady & Ray Glier, *In a Lot of Cases They Have No Other Choice*, USA TODAY, July 30, 2004, at 14C [hereinafter *No Other Choice*] (conveying frustration with user fees, but no available alternative).

7. *Student Fees*, *supra* note 6 (citing equity issues raised by fees).

8. *Student Fees*, *supra* note 6 (describing burden fees place on students). In some areas, pay-to-play limits participation. Dennis Semrau, *Rising Costs of Prep Sports: How Much is Too Much?*, MADISON CAPITAL TIMES, Sept. 21, 2004, at 1C (noting decrease in students participating in multiple sports); *see infra* notes 129-132 and accompanying text (discussing limited participation as problem associated with fees). *But see infra* Part II.C.4 (describing waivers as alternative to paying fee for qualifying families).

9. *Student Fees*, *supra* note 6 (demonstrating inequity among schools in same district).

10. *See Pay-to-Play costs*, *supra* note 3 (explaining how pay-to-play programs change school sports).

11. *Student Fees*, *supra* note 6 (considering student fees within larger debate on school finance). Likewise, pay-to-play programs are a sub-category of student fees. VICTORIA J. DODD, PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY 152 (2003) [hereinafter PRACTICAL EDUCATION] (placing fees for extracurricular activities within larger topic of student fees).

12. Mike Fanning and Donald Huff, *High Schools Turn to Athletic Fees—For Fiscal Fitness*, WASH. POST, Feb. 2, 1983, at C5 [hereinafter *Fiscal Fitness*] (critiquing athletic fees in early 1980s); *see also* E.M. Swift, *Why Johnny Can't Play; Because Athletic Budgets Haven't Kept Up With Costs, High School Sports Across the Nation are Threatened*, SPORTS ILLUSTRATED, Sept. 23, 1991, at 60 (tackling pay-to-play issue during 1991 recession); *see also* Justin Brown, *Will Pay-to-play Ruin School Sports?*, CHRISTIAN SCI. MONITOR, Sept. 20, 2002, at 12S (opining in 2002 whether pay-to-play would ruin sports in post September 11, 2001 world).

13. *See supra* note 12 (illustrating cyclical nature of pay-to-play programming).

14. *Players as Payers*, *supra* note 6 (presenting options facing schools either slash budgets or charge for sports).

unfortunate fact of life in many states.¹⁵

Palatable or not, fees for interscholastic athletics are constitutional in the majority of states.¹⁶ Pay-to-play programs do, however, raise other legal issues when placed in the school finance context.¹⁷ State courts nationwide require that school finance policies ensure equitable and adequate public education.¹⁸ Athletic fees raise the issue of whether a particular fee runs contrary to the state's constitutional responsibility to provide for free public education.¹⁹ Where the fee-imposed activity constitutes an integral part of a student's education, the fee may contradict the free school guarantee embedded in state constitutions.²⁰ Notwithstanding the legality of such fees, many commentators and school officials agree that the value of keeping students occupied after school, along with the intangible benefits flowing from participation in sports, outweigh their funding cost and make potentially exclusionary pay-to-play solutions impracticable.²¹

This note will explore the legal issues surrounding pay-to-play programs in American public high schools and their status as a viable solution to

15. *Student Fees*, *supra* note 6 (describing student fees as needed resource for schools confronted with fiscal limitations); *see also* *Players as Payers*, *supra* note 6 (conceding pay-to-play programs harsh reality in many states). Many parents agree to pay the fee in order to keep their kids involved and off the streets after school. *Fiscal Fitness*, *supra* note 13, at C5 (quoting one father's reasoning: pay to keep son involved); *see also* Doug Most, *What Are We Doing to Our Kids?*, BOSTON, Oct. 2003, at 112 (indicating no pay-to-play in urban Boston as crime avoidance effort); *cf. infra* Part II.C.4 (discussing waivers for qualifying families). *But see* Peter Brewington, *Budgetary Shortfalls Have Schools Courting Corporations, Parents*, USA TODAY, Nov. 2, 1990, at 12C (noting pay-to-play works in affluent districts, not poor districts).

16. *See* *Paulson v. Minidoka County Sch. Dist. No. 331*, 463 P.2d 935, 938 (Idaho 1970) (noting no constitutional prohibition of extra-curricular activity fees); *Kelley v. E. Jackson Pub. Sch.*, 372 N.W.2d 638, 640 (Mich. App. Ct. 1985) (recognizing legality of interscholastic activity fees because extra-curricular in nature). *But see* *Hartzell v. Connell*, 679 P.2d 35, 43 (Cal. 1984) (holding extra-curricular activity fee violative of free school guarantee of state constitution).

17. *Student Fees*, *supra* note 6 (indicating student fees raise equity and adequacy issues for education policymakers).

18. *See* *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989) (articulating state duty to provide adequate education); *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 606 (Mass. 1993) (imposing constitutional duty on executive and legislature to provide adequate education); *see also* *Student Fees*, *supra* note 6 (citing current standards required in school finance litigation); *infra* Part II.B.2 (addressing shift from equity to adequacy in school finance litigation).

19. *Student Fees*, *supra* note 6 (suggesting state's duty to provide free public education as grounds for lawsuit).

20. *As Budgets Shrink*, *supra* note 4 (applying integral element test to determine services included in free school provision). Right to play cases often use language lauding extra-curricular activities as "integral" to education. *Moran v. Sch. Dist. No. 7*, 350 F. Supp. 1180, 1184 (D. Mont. 1972) (holding right to play football integral to education); *Lee v. Macon County Bd. of Educ.*, 283 F. Supp. 194, 197 (M.D. Ala. 1968) (declaring athletics integral part of public education).

21. *No Other Choice*, *supra* note 6, at 14C (arguing benefits from school sports substantially outweigh costs to fund); *Pay-to-Play Costs*, *supra* note 3 (citing better socialization and higher grades among student athletes); *The Case for High School Activities*, NAT'L FED'N OF ST. HIGH SCH. ASSOC., 2004, [hereinafter *The Case for Activities*] (listing participation benefits: pride in community, self-discipline, teamwork, and physical and emotional development), available at <http://www.nfhs.org/scriptcontent/Index.cfm> (follow "About" hyperlink; then follow "Case for High School Activities" hyperlink).

insufficient school funding of sports and extra-curricular activities. Part II will examine the right to a public education, including its scope, the methods of funding public schools, and its cost in terms of student fees. The student fee discussion will survey the legal issues and problems associated with school fees generally, and then specifically explore the constitutionality of extra-curricular activity fees. Part III will weigh the positive and negative aspects of extra-curricular activity fees, analyzing both the majority and minority approaches. The analysis will conclude that interscholastic sports should not be subject to the “inevitably fluctuating financial health of local school districts,”²² but rather, should receive support from states and local communities through regulation of existing fees, adjustments in school financing schemes where possible, and innovative fundraising measures.²³

II. IS THERE A RIGHT TO PUBLIC EDUCATION? IF SO, WHO PAYS FOR IT AND WHAT DOES IT INCLUDE?

A. Public Education as a Local Issue

When the Supreme Court held in *San Antonio Indep. Sch. Dist. v. Rodriguez*²⁴ that Americans enjoy no fundamental right to an education under the Constitution, it relegated legal challenges to any public education issue to state court jurisdiction.²⁵ Logic dictates that because the Constitution does not protect public education, there can be no federal protection of the right to participate in school activities.²⁶ Where a suspect classification is used to

22. Hartzell v. Connell, 679 P.2d 35, 44 (Cal. 1984).

23. See *infra* Part III.C (suggesting viable alternatives to pay-to-play funding solutions).

24. 411 U.S. 1, 5-6 (1973) (challenging Texas school funding financing scheme, which left districts unequal on Equal Protection grounds).

25. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30-31, 35 (1973) (reasoning importance of education insufficient to establish it as fundamental right). But see Pauley v. Kelly, 255 S.E.2d 859, 864 (W. Va. 1979) (citing “an embarrassing abundance of authority” for education being fundamental right of every American). In *Rodriguez*, the Court leaves open the proposition that where education is denied absolutely, some quantum of education is constitutionally protected. *Id.* at 36-37. The Court, however, distinguished *Rodriguez* from such a case because at issue was the relative differences in spending levels, not the absolute denial of access to education. *Id.*; see also Plyer v. Doe, 457 U.S. 202, 224-30 (1982) (applying heightened scrutiny to invalidate denial of education to illegal aliens because denial absolute); Dodd, *supra* note 2, at 867 (noting case law containing “inklings” of fundamental parental right or liberty interest in public education). Professor Dodd suggests that “the Court should, and eventually will, overrule the *Rodriguez* decision and establish a fundamental right to an education.” Dodd, *supra* note 2, at 867. In reaching this conclusion, she highlights the historical importance of education to the American ethos, precedential support for a fundamental right to education notwithstanding *Rodriguez*, and the influence on the Court of a growing number of states that have recognized education as a fundamental state right. Dodd, *supra* note 2, at 863-67.

26. Albach v. Odle, 531 F.2d 983, 984-85 (10th Cir. 1976) (holding participation in athletics not constitutionally protected civil right); see also Marc D. Puntus, Note, *Education Fees in Public Schools: A Practitioner's Guide*, 73 B.U. L. REV. 71, 74-75 (1993) (reasoning no right to participate in athletics because athletics subsidiary of education). States similarly refuse to consider the right to participate in sports a fundamental right. *Ryan v. Cal. Interscholastic Fed'n-San Diego Sec.*, 114 Cal. Rptr. 2d 798, 810 (Cal. Ct.

preclude participation or exclusion raises a due process claim, however, federal courts have upheld the right to participate in interscholastic sports, finding them integral to public education.²⁷ While the California Supreme Court has reasoned that the California free school guarantee precludes fees for integral facets of education, fees to participate in integral yet unprotected activities create no federally cognizable harm.²⁸ It is therefore crucial to distinguish cases in which the court, in the context of a Fourteenth Amendment violation, lauds the opportunity to participate in sports from findings making extra-curricular activities integral to a free education.²⁹

States retain the power to educate because education falls outside the federal constitutional scope.³⁰ Accordingly, state law provides the source of any duty to offer public education in this country.³¹ Despite having no federal obligation to provide education, provisions for public education are present in every state's constitution and many provide for a free public education.³²

The education clause in a state's constitution is the source of the right to education and often defines that right as fundamental.³³ States that have not

App. 2001) (reasoning athletics merely one component of state right to education and not specifically protected); *Steffes v. Cal. Interscholastic Fed'n*, 176 Cal. App. 3d 739, 748 (Cal. Ct. App. 1986) (holding no state right to participate in athletics under California Constitution).

27. *See, e.g.*, *Moran v. Sch. Dist. No. 7*, 350 F. Supp. 1180, 1182-84 (D. Mont. 1972) (holding marital status discrimination violates state right to education, which includes right to play football); *Kelley v. Metro. County Bd. of Educ.*, 293 F. Supp. 485, 493 (M.D. Tenn. 1968) (finding sports fundamental ingredient of education and suspension without hearing violates procedural due process); *Lee v. Macon County Bd. of Educ.*, 283 F. Supp. 194, 197 (M.D. Ala. 1968) (declaring athletics integral part of public school and requiring desegregation of dual athletic leagues); *see also Hartzell v. Connell*, 679 P.2d 35, 42 (Cal. 1984) (relying on "integral to education" reasoning to invalidate extra-curricular activity fees); *infra* Part II.C.2 (examining *Hartzell's* minority view of extra-curricular activity fees).

28. *Hartzell*, 679 P.2d at 43 (holding all educational activities fall within free school guarantee); *see also supra* note 26 and accompanying text (noting no civil right to participate in sports because no federal right to education); *supra* note 27 and accompanying text (upholding right-to-play only if state Due Process or Equal Protection violated).

29. *Compare Moran*, 350 F. Supp. at 1181 (holding deprivation of right to play based on marital status impermissible), *with Hartzell*, 679 P.2d at 42-43 (reasoning extra-curricular activities integral and within free school guarantee).

30. U.S. CONST. amend. X (reserving to states powers not delegated to, or prohibited from, United States).

31. PRACTICAL EDUCATION, *supra* note 11, at 21 (noting American tradition of state and local control over education); *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (characterizing education as function of state and local government).

32. *See* ARIZ. CONST. art. XI, § 1 (2004); ARK. CONST. art. XIV, § 1 (2003); CAL. CONST. art. IX, § 5 (2004); COLO. CONST. art. IX, § 2 (2004); CONN. CONST. art. VIII, § 1 (2003); DEL. CONST. art. X, § 1 (2004); FLA. CONST. art. IX, § 1 (2003); GA. CONST. art. VIII, § 1 (2004); IDAHO CONST. art. IX, § 1 (2004); ILL. CONST. art. X, § 1 (2004); MICH. CONST. art. VIII, § 2 (2004); MISS. CONST. art. VIII, § 201 (2004); MO. CONST. art. IX, § 1(a) (2004); MONT. CONST. art. X, § 1 (2004); NEB. CONST. art. VII, § 1 (2004); N.M. CONST. art. XII, § 1 (2004); N.Y. CONST. art. XI, § 1 (2004); OKLA. CONST. art. XIII, § 1 (2004); S.C. CONST. art. XI, § 3 (2003); TENN. CONST. art. XI, § 12 (2004); VA. CONST. art. VIII, § 1 (2004). Thus, twenty-one states provide for a free public education in the above-listed education clauses of their respective state constitutions.

33. *See, e.g.*, *Serrano v. Priest*, 557 P.2d 929, 940 n.20 (Cal. 1977) (finding California Constitution

recognized education as a fundamental right still provide for some form of free public education in their constitutions.³⁴ Thus, the majority of states offer free public education, despite varying constitutional language among the states.³⁵

Once the right to an education is established, the issue becomes whether the activity subject to the fee constitutes an integral part of the educational experience.³⁶ If the activity is considered integral to education than it falls within the free education guaranteed under the state's constitution.³⁷ Whether an activity falls within a state's free public education guarantee, however, hinges on judicial interpretation of a state's education clause.³⁸ For example, the plain meaning of *free* public school is interpreted in some jurisdictions as

explicitly and implicitly protects child's right to education); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (interpreting education clause as establishing education as fundamental right); *Washakie Co. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980) (holding Wyoming Constitution provides education as fundamental interest). *But see* *Dodd*, *supra* note 2, at 866 (noting not all states have interpreted constitutions to include education as fundamental right); Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 437 (distinguishing states recognizing constitutional right to adequate education from those declaring education fundamental right). Part II.B.2 of this Note addresses the present trend towards adequacy in school finance litigation.

34. *See* *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 365-66 (N.Y. 1982) (applying rational basis review for state action implicating free, public education). The New York Court of Appeals held that even though access to public education is an important governmental interest and guaranteed in the state constitution, public education is not a fundamental right and does not, therefore, beckon strict scrutiny analysis. *Id.* at 366; *see also* Julie K. Underwood, *School Finance Adequacy As Vertical Equity*, 28 U. MICH. J.L. REF. 493, 511 (1995) (defining education clause as statement of state's role in public education); *Nyquist*, 439 N.E.2d at 368-69 (reasoning equality not required in free school guarantee, but only minimal sound education).

35. Patricia M. Harris, Note, *Student Fees in Public Schools: Defining the Scope of Education*, 72 IOWA L. REV. 1401, 1402 (1987) (noting over half of states require free public school system); *see also* Underwood, *supra* note 34, at 511 (noting variations among state education clauses). In describing state education clause variations, Dean Underwood notes, "[s]ome states merely pronounce the importance of education, while others mandate a 'system' or free public education. Still others qualify the term 'system' with such phrases as 'thorough and efficient,' 'uniform,' or 'general and uniform.'" Underwood, *supra* note 34, at 511. While state education clauses are often grouped according to similar phrasing, the courts of each state are the final arbiters of the breadth of education their respective constitutions require. John Herbert Roth, *Education Funding and the Alabama Example: Another Player on a Crowded Field*, 2003 BYU EDUC. & L. J. 739, 747-48 (2003) (noting state courts have final say as to breadth of education clauses); *see also* Underwood, *supra* note 34, at 511 (commenting on categorization of education clause by similar language). Dean Underwood suggests that education clauses defy categorization because they are "peculiar to the state's constitutional history and its judiciary's own method of interpretation." *Id.* Accordingly, Dean Underwood concludes that attempts to group them based on similar constitutional language "are not particularly clear or useful." *Id.* *But see* *Pauley v. Kelly*, 255 S.E.2d 859, 866 (W.Va. 1979) (researching constitutional history of other states using same "thorough and efficient" language for instruction). Contrary to Dean Underwood's argument, the Supreme Court of West Virginia synthesized case law and constitutional debates from other states using terms of art to describe the type of school system mandated by their state's education clause. *Pauley*, 255 S.E.2d at 876.

36. PRACTICAL EDUCATION, *see supra* note 11, at 259 (framing issue).

37. *Id.*

38. *See, e.g.,* *Hartzell v. Connell*, 679 P.2d 35, 43 (Cal. 1984) (including all extracurricular activities within California "free" school clause); *Paulson v. Mimidoka County Sch. Dist. No. 331*, 463 P.2d 935, 938 (Idaho 1970) (holding "uniform" system includes only elements necessary to school activity); *Hamer v. Bd. of Educ.*, 265 N.E.2d 616, 622 (Ill. 1970) (holding free textbooks not mandated in "thorough and efficient" system).

only applying to tuition.³⁹ In other jurisdictions, *free* extends to required courses.⁴⁰ Still others interpret *free* to include only credit-worthy courses.⁴¹ Finally, at least one jurisdiction considers free public school to include extra-curricular activities.⁴² Because the scope of free public school is state specific, the validity of a school fee depends, in part, on whether the activity or service falls within the minimum public education mandated in, and protected under, that state's constitution.⁴³ Accordingly, pay-to-play programs are upheld unless a state court determines they violate the state's free education provision.⁴⁴

B. Financing Public Schools

In order to better appreciate the issues surrounding pay-to-play programs, a discussion of public school finance is necessary. The trend in school finance litigation to impose a minimum quality standard in public education opens the door to arguments that an education lacking in the arts and after-school activities is inadequate and in breach of the state's constitutional duty to provide public education.⁴⁵

39. *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 808 N.E.2d 1221, 1230 (Ind. 2004) (interpreting plain language in constitution as mandating free tuition); *Sneed v. Greensboro*, 264 S.E.2d 106, 112 (N.C. 1980) (concluding free school provision requires providing basic tuition-free education); *Dowell v. Sch. Dist. No. 1*, 250 S.W.2d 127, 129 (Ark. 1952) (noting tuition charge contravenes constitutional guarantee of gratuitous instruction). States differ, however, in what services are included in a free tuition. *Hamer*, 265 N.E.2d at 621 (excluding textbooks from "free" school guarantee); *Nagy*, 808 N.E.2d at 1230 (noting schools not tuition-free if students subject to fees for everything except teacher salaries).

40. MINN. STAT. § 123B.37(1)(a)(5) (2003) (limiting prohibition on instruction fees to courses required for graduation); TEX. EDUC. CODE § 11.158(b)(4) (2004) (specifying board may not charge fee for required courses); *Norton v. Bd. of Educ.*, 553 P.2d 1277, 1278-79 (N.M. 1976) (interpreting "free" school as required courses and upholding fee for elective courses).

41. *Paulson*, 463 P.2d at 938 (holding extracurricular activity fees not within "free" school guarantee); *Kelley v. E. Jackson Pub. Sch.*, 372 N.W.2d 638, 639 (Mich. Ct. App. 1985) (interpreting "free" to exclude extracurricular activities); *Granger v. Cascade County Sch. Dist. No. 1*, 499 P.2d 780, 786 (Mont. 1972) (characterizing "free" as including activities reasonably related to recognized academic goal); *see also Harris*, *supra* note 35, at 1421 (opposing fees for credit-worthy courses, including textbooks and supplies required to complete such courses).

42. *Hartzell*, 679 P.2d at 43 (extending California's "free" school clause to include extra-curricular activities).

43. *Puntus*, *supra* note 26, at 77 (listing relevant factors used to determine validity of fee). In addition to constitutional language, framers' intent and constitutional mandates of free public school as relevant factors to determine the validity of a school fee, *Puntus* also considers the language of state education statutes, the purpose and reasonableness of the fee in question, and whether waiver provisions are available. *Id.*; *see also infra* notes 111-120 and accompanying text (discussing waivers); *infra* notes 158-166 and accompanying text (evaluating reasonableness of factor's effectiveness); *infra* notes 167-174 and accompanying text (analyzing adequacy of waivers).

44. *Puntus*, *supra* note 26, at 75 (noting pay-to-play claims restricted to state courts); PRACTICAL EDUCATION, *supra* note 11, at 259 (defining issues raised by school-imposed fees on athletics).

45. *See Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211 (Ky. 1989) (requiring equal opportunity for adequate education); *Mcduffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 606 (Mass. 1993) (recognizing Commonwealth's duty to provide education of quality consistent with *Rose* factors); *see also*

I. A school funding primer

Public schools have three sources of funding: the federal government, state governments, and local cities and towns.⁴⁶ Of the three sources, the federal portion is the smallest and typically dictates specific uses.⁴⁷ The bulk of the school funding burden falls squarely on state governments and local communities.⁴⁸

In some states, state contribution to public education outweighs the local contribution as the largest source of revenue for public education.⁴⁹ Beyond recognizing the state's duty to provide public education, school finance decisions could invalidate a state's finance scheme and call for adjustments to the state's school funding model.⁵⁰ School finance litigation generally steers state funding models to compensate for disparities in local funding despite the differing structures of public school funding from state to state.⁵¹

States traditionally equalize state funding among school districts.⁵² California employs this model and disburses funds to school districts based on average daily attendance figures.⁵³ A more recent approach is known as the foundation budget.⁵⁴ Massachusetts uses this approach, which involves calculating a minimum spending level for each public school district based on per-pupil allowances in various spending categories, multiplied by the district's

Most, *supra* note 15, at 116 (suggesting negative impact of fees on students left out of activities).

46. See PRACTICAL EDUCATION, *supra* note 11, at 65 (listing general sources of public school funding).

47. See PRACTICAL EDUCATION, *supra* note 11, at 65 (noting federal funds come with specific use requirements). The No Child Left Behind Act of 2001, for example, increased federal aid to education, but required states to develop a series of assessment tests in math and reading. See Dodd, *supra* note 2, at 856 (describing requirements of No Child Left Behind funding).

48. See PRACTICAL EDUCATION, *supra* note 11, at 65 (noting size of state contribution to public education).

49. *Id.* (comparing school funding sources).

50. See, e.g., *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1976) (invalidating school funding structure and recognizing education as fundamental right); *Rose*, 790 S.W.2d at 212 (interpreting constitutional duty on state to provide adequate education); *McDuffy*, 615 N.E.2d at 606 (imposing constitutional duty on executive and legislature to provide adequate education); see also *infra* Part II.B.2 (discussing shift from equity to adequacy requirements in education).

51. See PRACTICAL EDUCATION, *supra* note 11, at 87 (describing states' goal to level out local funding gaps).

52. See PRACTICAL EDUCATION, *supra* note 11, at 130 (noting traditional equalization approach to fund education).

53. See PRACTICAL EDUCATION, *supra* note 11, at 87, 130 (describing equalization approach); see also Democratic Policy Committee, *Significant Federal Investments in Education are Critical*, [hereinafter *Budget Cutbacks*] (attaching National Education Association report: Californian schools try boosting attendance to obtain more funding), available at <http://democrats.senate.gov/dpc> (search by issue area: EDUCATION; then follow "Significant Federal Investments in Education are Critical" hyperlink). Anecdotal information from the NEA shows that some parents in Sonoma County, California bring sick children to school for roll call or to pick up homework so that the school may collect that child's daily per student allowance. *Budget Cutbacks*, *supra* note 53.

54. See PRACTICAL EDUCATION, *supra* note 11, at 130 (identifying foundation program as a developing approach).

current enrollment.⁵⁵ The state contribution under this approach is the difference between the local share and the foundation budget.⁵⁶ Massachusetts school districts must not adopt the specific allocations set forth in the foundation budget, but rather, may allocate funds according to the local school district's determination.⁵⁷ School districts, however, should not spend less than the minimum per-pupil expenditure determined in the foundation budget.⁵⁸

Local funding often comprises the principal source of school funding, especially when economic downturns decrease state aid to public schools.⁵⁹ The most common method of funding is tied to local property values through property taxes.⁶⁰ As a result, laws limiting property taxes can negatively impact public schools.⁶¹

During economic recessions, states are often forced to reduce state aid to public schools, "leaving [the funding of] public schools to the mercy of local voters."⁶² Due to what one commentator labeled as "nationwide taxpayer

55. Jeff Wulfson, *School Finance: Chapter 70 Program; Reauthorization of the Chapter 70 School Finance Formula: Some Technical Issues for Discussion*, Massachusetts Department of Education, (describing chapter 70 formula and calculation), available at <http://finance1.doe.mass.edu> (follow "Chapter 70 Programs" hyperlink; then follow "Background Discussion Paper—Technical Issues Related to the Reauthorization of the Chapter 70 Formula"); see also *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 618 (Mass. 1993) (listing seven factors of adequate education) (quoting *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)). The Massachusetts legislature responded to *McDuffy* with the Education Reform Act of 1993, which laid out a seven-year funding proposal. Wulfson, *supra* note 55 (describing public education reforms in Massachusetts). The proposal brings spending in Massachusetts schools up to a minimally adequate floor called the foundation budget. Wulfson, *supra* note 55; see also *Final Chapter 70 Aid and Net School Spending Requirements for FY05* (breaking down Massachusetts foundation budget into nineteen categories for all of Commonwealth's public schools), available at <http://finance1.doe.mass.edu> (follow "Chapter 70 Programs" hyperlink; then follow "Final Chapter 70 Aid and Spending Requirements for Y05" hyperlink; then download "formula spreadsheet").

56. Harold Lane, JOINT COMMITTEE ON EDUCATION, ARTS AND HUMANITIES CHAPTER 70 SCHOOL FINANCE REPORT 38 (1999) (subtracting local share from foundation budget to determine amount of state aid).

57. MASS. GEN. LAWS ch. 70, § 8 (2004) (authorizing school districts to disregard foundation budget calculation categories); see also MASS. GEN. LAWS ch. 70, § 3 (2004) (describing foundation budget calculation categories as interpretive guidelines).

58. See Lane, *supra* note 56, at 9 (requiring localities meet foundation budget spending, but permitting additional spending); see also MASS. GEN. LAWS ch. 70, § 3 (2004) (delegating task of determining foundation budget guidelines to state board of education). Despite local school district freedom to allocate funds, the state board of education identifies the components of the foundation budget. MASS. GEN. LAWS ch. 70, § 3 (2004). The board uses these components to calculate the cost of funding a minimally adequate education in Massachusetts. MASS. GEN. LAWS ch. 70, § 3 (2004).

59. See Dodd, *supra* note 2, at 853 (noting public schools frequently left to mercy of local voters).

60. See PRACTICAL EDUCATION, *supra* note 11, at 66 (indicating local property tax primary source of local funding). The local contribution under the foundation approach is based on local property values. See Wulfson, *supra* note 55 (noting local contribution to school funding requires complex calculation).

61. Jerry Crowe, *Pay to Play: From "Donations" to "Transportation Fees," or Whatever High School Districts Want to Call Them, Athletes Are Being Asked to Pay a Big Price Just to Make the Team*, L.A. TIMES, April 20, 1985, at 24 (indicating Proposition 13 drastically reduced property taxes and revenue for public schools in California); Bill White, *Price to Play: In Massachusetts, Some High Schools Have Put a Price on Playing Sports*, TAMPA TRIB., Sept. 29, 1995, at S1 (indicating Proposition 2 1/2 in Massachusetts limits annual property tax increases and hurts school budgets).

62. See Dodd, *supra* note 2, at 853 (noting precarious position of schools during bad economies).

curmudgeonliness,” school budgets suffer in times of recession because local tax proposals covering the decreased state funding fail.⁶³ Schools are faced with choosing between laying-off teachers and discontinuing funding for non-academic activities.⁶⁴ Current solutions to bridge the funding gap include distasteful pay-to-play programs, innovative professional sport ticket taxes, enterprising corporate sponsorship, and traditional booster club fundraising measures.⁶⁵

2. *The shift from equity to adequacy: the state’s duty to provide an “adequate” education*

In addition to steering funding models, school finance cases gave state courts the opportunity to interpret their constitutions and impose on the states an affirmative duty to provide public education.⁶⁶ Beginning with the Kentucky Supreme Court’s landmark decision in *Rose v. Council for Better Educ.*,⁶⁷ courts began interpreting their state constitutions as imposing a particular quality standard in education.⁶⁸ In *Rose*, the court held that children in Kentucky have the right to an *adequate* education.⁶⁹ The Kentucky Supreme

63. See Swift, *supra* note 13, at 60 (describing reluctance of taxpayers to pay for schools). Tax increase opponents consider threatened staff and program cuts to be mere scare tactics, when in fact student fees increase as a result of failed tax increases. See also Cheryl Meyer, *District 220 Spares Teachers, Programs*, CHI. TRIB., Apr. 18, 2001, at M1 (describing tax opponent rationales for voting down tax increase).

64. Maureen Delany, *School Athletics For Elite?; Day May Soon Come When Students Must Pay to Compete in Sports*, RIVERSIDE PRESS ENTERPRISE, Nov. 5, 1992, at C1 (illustrating tough choices facing schools); see also Swift, *supra* note 13, at 60 (describing choices schools face during recessions); *infra* note 72 (noting NFHS prefers term co-curricular activities, believing them inherently educational).

65. Brewington, *supra* note 15, at 12C (surveying fundraising efforts including raffles, car washes, bake sales and bingo); Michael Hiestand, *High Schools Innovate Within Reduced Budgets*, USA TODAY, Oct. 15, 1992, at 10C (highlighting Indiana’s success with corporate sponsorship); Steve Morrison, *A Corporate Pitch For Athletics*, SCH. ADMINISTRATOR (WEB ED.), Nov. 1998, (encouraging corporate sponsorship as new revenue source for schools), available at http://www.aasa.org/publications/sa/1998_11/Morrison.htm (last visited Oct. 25, 2004); see also Massachusetts Governor Mitt Romney, State of the Commonwealth Address (Jan. 13, 2005) [Hereinafter *State of the Commonwealth*] (indicating support for longer school day), transcript available at http://www.vote-smart.org/speech_detail.php?speech_id=76983&keyword=&phrase=&contain= (last visited Oct. 4, 2005); Swift, *supra* note 13, at 60 (describing professional sport ticket taxes as alternative to pay-to-play); Paul Woody, *Pay-to-Play High School Athletics an Evil and Unnecessary Roadblock*, RICH. TIMES DISPATCH (Virginia), June 23, 1996, at D4 (noting unlikelihood of corporate sponsorship in some areas). Extending the school day to include sports raises a question beyond the scope of this Note: whether pay-to-play programs would be legal under a system that includes sports as part of the actual school day.

66. See *McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516, 548 (Mass. 1993) (interpreting constitutional language as imposing duty on Commonwealth to educate all of its children); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211 (Ky. 1989) (recognizing constitutional mandate on General Assembly to provide public education).

67. 790 S.W.2d 186 (Ky. 1989).

68. *Id.* at 212 (imposing adequacy standard); see also *McDuffy*, 615 N.E.2d at 554 (imposing enforceable constitutional duty to educate, leaving precise standard to legislature); *Campaign for Fiscal Equity v. New York*, 801 N.E.2d 326, 331-32 (N.Y. 2003) (requiring “basic sound education”).

69. *Rose*, 790 S.W.2d at 212 (finding equalized finance scheme system constitutionally deficient and enunciating adequacy standard). Scholars place *Rose* in the third wave of the finance reform rubric because its decision enunciated a minimum quality of education, rather than equal expenditures. William R. Thro,

Court also articulated seven characteristics to serve as minimum goals in providing an adequate system of education.⁷⁰

Commentators consider the shift from spending equal amounts of money on school districts, to emphasizing the quality of education that a state provides, as the future of legal challenges to school finance systems.⁷¹ The quantitative to qualitative funding shift is significant to opponents of extra-curricular activity fees because state legislatures could opt to include school sports or other extra-curricular activities as integral components of a minimally adequate education.⁷² States implement legislation responsive to their duty to adequately educate their children and have the power to revise it as necessary.⁷³

Symposium: Issues in Education Law and Policy: Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model, 35 B.C. L. REV. 597, 603 (1994) (describing characteristics of third wave school financing cases); *see also* Underwood, *supra* note 34, at 498-502 (applying wave theory of finance reform).

70. *Rose*, 790 S.W.2d at 212 (characterizing seven capabilities as minimal to adequate education). The seven capabilities are often cited and referred to simply as the “*Rose* factors.” They include:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id. at 512.

71. *See Thro*, *supra* note 69, at 604 (concluding quality standard litigation represents future of school finance reform).

72. *See As Budgets Shrink*, *supra* note 4 (noting legislatures in control of determining opportunities required in public school); *The Case for Activities*, *supra* note 21 (supporting inclusion of extra-curricular activities as integral to education). The NFHS employs the term “co-curricular” instead of extra-curricular to convey its belief that such activities “support the academic mission of schools and are inherently educational.” *The Case for Activities*, *supra* note 21.

73. *See generally* Lane, *supra* note 56 (examining Massachusetts education reform legislation). The Massachusetts Education Reform Act of 1993 attempted to fulfill the duty the Supreme Judicial Court imposed in *McDuffy v. Secretary of the Executive Office of Education*, by establishing a foundation budget approach to funding public school. *Id.* A 1999 review of the system, however, revealed that special education was underfunded. *Id.* As a result, the Massachusetts Legislature enacted a special education reimbursement program whereby state funds reimbursed municipalities for the costs of educating special needs students in addition to foundation aid. MASS. GEN. LAWS ch. 71B, § 5A (2000); 603 CODE MASS. REGS. § 10.07(9)(c) (2004) (implementing regulations for reimbursement program).

C. “Welcome to twenty-first century public school education, where your taxes will cover everything that goes on inside a school while classes are in session—but anything outside those walls, or after the final bell, will cost you extra.”⁷⁴

Despite constitutional language guaranteeing free public education in more than half of the states, the costs of public school funding is an enormous expenditure.⁷⁵ Fees ranging from the cost of attending school,⁷⁶ to fees for textbooks,⁷⁷ driver’s education programs,⁷⁸ and extra-curricular activities burden students and families in public schools across America.⁷⁹ Authority for imposing school fees, proscription against certain fees, and the manner by which fees are applied in public school is located in statutes and case law interpreting the state’s constitutional provision for education.⁸⁰

74. See Most, *supra* note 15, at 116 (describing pay-to-play programs in Massachusetts).

75. See *supra* note 32 (listing state constitutions containing free education language); PRACTICAL EDUCATION, *supra* note 11, at 65 (describing school funding as “extremely significant undertaking,” sometimes largest item in state budget).

76. Vincent v. County Bd. of Educ., 131 So. 893, 894 (Ala. 1931) (upholding matriculation fee by distinguishing “liberal system” from free schools). The Alabama Supreme Court reasoned that framers of its state constitution would have used the word “free” if they intended to impose the duty to provide a free public education. *Id.* It is important to note, however, that authority to collect the matriculation fee involved in *Vincent* came from the Alabama legislature in section 467 of the School Code of 1927. *Id.* at 893; see also Bryant v. Whisenant, 52 So. 525, 525 (Ala. 1910) (upholding reasonable incidental fee for heating and lighting of schoolroom). But see Dowell v. Sch. Dist. No. 1, 250 S.W.2d 127, 129 (Ark. 1952) (finding registration fee unconstitutional given “gratuitous instruction” and “free school” mandate in constitution).

77. COLO. REV. STAT. § 22-32-110(1)(o) (2004) (authorizing board discretion to charge textbook rental fee); MINN. STAT. § 123B.36(b)(3) (2000) (authorizing school board collection of security deposit for materials); Caprio v. Tuscon High Sch. Dist. No. 1, 524 P.2d 948, 949-50 (Ariz. 1974) (upholding textbook fee as to high schools); Marshall v. Sch. Dist. Re No. 3, 553 P.2d 784, 785 (Colo. 1976) (concluding no constitutional mandate of free books to all students); Hamer v. Bd. of Educ., 265 N.E.2d 616, 622 (Ill. 1970) (validating textbook rental fee because framers’ intent for free schools did not include textbooks); Bd. of Educ. v. Sinclair, 222 N.W.2d 143, 148 (Wisc. 1974) (following *Hamer* and upholding textbook rental fee).

78. MASS. GEN. LAWS ch. 71, § 13D (2000) (granting school committees discretion to assign reasonable fee to evening driver education course); MINN. STAT. § 123B.36(1)(b)(6) (2000) (empowering school boards with discretion to require fees for driver education program); N.D. CENT. CODE § 15.1-09-36(2)(h) (2003) (authorizing fee for behind-the-wheel driver’s education instruction); TEX. EDUC. CODE ANN. § 11.158(a)(11) (2004) (providing authority for driver training fee); Parsippany-Troy Hills Educ. Assoc. v. Bd. of Educ., 457 A.2d 15, 19 (N.J. Super. Ct. App. Div. 1983) (upholding bifurcation of behind-the-wheel driver training with associated fee from free classroom component). But see 71 Op. Atty. Gen. Wisc. 209 (1982) (concluding public schools may not charge fees for cost of providing driver education program).

79. COLO. REV. STAT. § 22-32-117(2)(IV) (2004) (authorizing fee for school sponsored activity not within academic portion of educational program); MINN. STAT. § 123B.36(1)(b)(2) (2003) (granting school boards authority to require fee for extra-curricular activities); MISS. CODE ANN. § 37-7-335(1)(c) (2004) (giving legislative countenance to school board imposed fee for extracurricular activities); N.D. CENT. CODE § 15.1-09-36(2)(d) (2003) (authorizing school board to implement fee for extra-curricular activities); TEX. EDUC. CODE § 11.158(a)(2) (2004) (establishing authority for board of trustees to impose fee for extra-curricular activities); Paulson v. Minidoka County Sch. Dist. No. 331, 463 P.2d 935, 938 (Idaho 1970) (upholding fee for extra-curricular activities because not necessary elements of school); Kelley v. E. Jackson Pub. Sch., 372 N.W.2d 638, 640 (Mich. Ct. App. 1985) (validating fee for interscholastic extra-curricular activities under *Paulson* theory).

80. See Arcadia Unified Sch. Dist. v. Salazar, 825 P.2d 438, 443 (Cal. 1992) (noting no statutory authority for extra-curricular activity fees, but authority for transportation fee). For example, California

Many states justify extra-curricular activity fees based on *voluntary* participation.⁸¹ Most states consider extra-curricular activities outside the curriculum, and therefore, subject to fees, while required or credit-worthy courses and activities are not.⁸² States with statutes authorizing the collection of fees typically have clearly established standards and procedures for collecting fees.⁸³ States without statutes authorizing school boards to collect fees, however, must interpret their particular state education provision in order to adjudicate legal challenges to activities fees.⁸⁴

1. Fees upheld: Paulson and its progeny

*Paulson v. Minidoka County School District, No. 331*⁸⁵ represents the majority view of states that uphold extra-curricular activity fees despite the presence of free school guarantee provisions in their constitutions.⁸⁶ The

interpreted its education clause as invalidating an extra-curricular activity fee, but looked to a statute to uphold a transportation fee. *Hartzell v. Connell*, 679 P.2d 35, 43 (Cal. 1984) (invalidating extra-curricular activity fees according to free school guarantee in constitution); *Arcadia*, 825 P.2d at 443 (upholding transportation fee promulgated by statute).

81. *E.g.*, COLO. REV. STAT. § 22-32-117(2)(IV)(b)(1) (2004) (authorizing voluntary fee collected as condition of participation); MINN. STAT. § 123B.36(1)(b)(2) (2000) (allowing extra-curricular activity fee where attendance is optional); N.D. CENT. CODE § 15.1-09-36(2)(d) (2003) (granting school board discretion to charge extra-curricular activity fee if attendance is optional); OR. REV. STAT. § 339.155(5)(b) (1999) (allowing charges for extra-curricular activities where pupil attendance is optional); TEX. EDUC. CODE § 11.158(a)(2) (2004) (authorizing dues and charges for extra-curricular activities if voluntary membership).

82. MINN. STAT. § 123B.35 (2000) (grouping extra-curricular activities with non-curricular activities to education program); MISS. CODE ANN. § 37-7-335(1)(c) (2004) (establishing fee for activities school board fails to designate as part of valid curriculum); *Paulson v. Minidoka County Sch. Dist. No. 331*, 463 P.2d 935, 938 (Idaho 1970) (finding “extra-curricular” activities outside school curriculum by definition); *see also* *Bailey v. Bd. of Educ.*, 321 S.E.2d 302, 305 (W. Va. 1984) (distinguishing nonacademic extra-curricular activities like athletics from academic extra-curricular activities such as theater). The *Bailey* court limited an academic eligibility requirement to nonacademic extra-curricular activities such as athletics and cheerleading based on the theory that theater, music, and math extra-curricular activities are complementary to the academic curriculum. *Bailey*, 321 S.E.2d at 305. *But see Bailey*, 321 S.E.2d at 319 (Harshbarger, J., dissenting) (criticizing majority’s overly narrow focus on academics and condemnation of important extra-curricular activities); National Federation of State High School Associations, *The Case for High School Activities*, [hereinafter *Activities*] (adopting “co-curricular” term because activities inherently educational and supportive of academic mission), at <http://www.nfhs.org/ScriptContent/Index.cfm> (follow “About” hyperlink; then follow “Case for High School Activities” hyperlink).

83. *See* COLO. REV. STAT. § 22-32-117(2)(IV)(a) (2004) (authorizing extra-curricular activity fee if conditioned on voluntary participation); COLO. REV. STAT. § 22-32-117(2)(IV)(c) (2004) (establishing clear reporting procedures); MINN. STAT. § 123B.36(b)(2) (2000) (legalizing fees if optional and same for all participating students); MISS. CODE ANN. § 37-7-335(1)(c) (2004) (allowing reasonable fees if activity not designated as valid curricular education objective); TEX. EDUC. CODE § 11.158(2) (conditioning fee authorization on voluntary nature of membership or attendance in extra-curricular activity).

84. *See, e.g.*, *Hartzell v. Connell*, 679 P.2d 35, 43 (Cal. 1984) (relying on state constitutional provision to invalidate fee); *Paulson*, 463 P.2d at 938 (noting constitutional mandate includes free textbooks, but not extra-curricular activities); *Kelley v. E. Jackson Pub. Sch.*, 372 N.W.2d 638, 639-40 (Mich. Ct. App. 1985) (upholding constitutionality of extra-curricular activity fee because activity optional and fee reasonable).

85. 463 P.2d 935 (Idaho. 1970).

86. *Id.* at 938 (finding fee constitutional). The education clause in Idaho’s constitution requires “free common schools.” IDAHO CONST. art IX, § 1.

Paulson court discussed the nature of a “necessary element” test, reasoning that extra-curricular activities are supplementary to the regular school curriculum.⁸⁷ Ultimately, the *Paulson* court invalidated the disputed fee as imposed on all students because it amounted to an impermissible charge on attendance.⁸⁸ In doing so, the court noted that Idaho’s Constitution would permit a fee system equivalent to a pay-to-play program.⁸⁹

While *Paulson* enunciated the “necessary element” test in dicta, the Michigan Appeals Court applied it to *Kelley v. E. Jackson Public Sch.*,⁹⁰ upholding extra-curricular activity fees.⁹¹ The *Kelley* court followed the Michigan Supreme Court’s *Bond v. Ann Arbor Sch. Dist.*⁹² decision, which directed Michigan courts to apply the *Paulson* “necessary element” test and the *Bond* “integral fundamental part of . . . education” test.⁹³ In *Kelley*, the court upheld a finding that interscholastic sports were unnecessary to a school’s activity and not an integral fundamental part of public education.⁹⁴ In addition, the *Kelley* court reasoned interscholastic sports were optional and that waiver provisions were in place for indigent students.⁹⁵ Furthermore, the court suggested that the fees were reasonable because they were non-excessive and properly used.⁹⁶

2. Fees struck down: *Hartzell v. Connell*

The California Supreme Court in *Hartzell v. Connell*⁹⁷ rejected the majority view that activities fall within the free school constitutional guarantee only if

87. *Paulson*, 463 P.2d at 938 (noting extra-curricular activities not necessary to high school education); see *Norton v. Bd. of Educ.*, 553 P.2d 1277, 1278 (N.M. 1976) (upholding reasonable fees for elective courses because supplementary to constitutionally guaranteed education).

88. *Paulson v. Minidoka County Sch. Dist. No. 331*, 463 P.2d 935, 938 (Idaho 1970) (holding fee contravenes constitution’s free school mandate).

89. *Id.* at 938 (noting Idaho constitution allowed extra-curricular activity participation fees if limited to participating students).

90. 372 N.W.2d 638 (Mich. Ct. App. 1985).

91. *Kelley*, 372 N.W.2d at 639-40 (upholding extra-curricular activity fee because optional and not necessary part of school curriculum).

92. 178 N.W.2d 484, 488 (Mich. 1970) (applying “necessary element test” and “integral fundamental part” test to invalidate textbook fee).

93. *Kelley v. E. Jackson Pub. Sch.*, 372 N.W.2d 638, 639-40 (using *Bond* legal framework). The *Kelley* Court applied *Bond*’s tests to determine what must be provided at no cost to public school children. *Id.* at 639.

94. See *id.* at 639-40 (finding extra-curricular activities fail both “necessary element” and “integral fundamental part” tests).

95. See *id.* (reasoning activities optional and waiver available); see also *supra* notes 81-82 and accompanying text (discussing statutory authorization of extra-curricular activity fees); *infra* notes 111, 114, 120, 167-174 accompanying text (evaluating and analyzing hardship waivers as alternative to fee); cf. *Pay-to-Play Benching Some Athletes*, CHI. TRIB., Apr. 5, 1991, at 11 [hereinafter *Pay-to-Play Benching*] (discussing effects of fees on participation in interscholastic sports).

96. *Kelley*, 372 N.W.2d at 640 (noting no allegation of excessive or improperly used fees); see also *infra* notes 158-166 and accompanying text (analyzing reasonableness requirement). But see *Rado*, *supra* note 2, at 1 (noting pay-to-play unregulated tool and out of voter’s hands).

97. 679 P.2d 35 (Cal. 1984).

they are necessary elements to a school's activity or an integral fundamental part of the curriculum.⁹⁸ The *Hartzell* court held that extra-curricular activities, including interscholastic sports, drama, and music constituted educational activities integral to public education.⁹⁹ Accordingly, the court concluded that all educational activities are within the free school guarantee, making the \$25 dollar participation fee at issue unconstitutional.¹⁰⁰

The financial constraints of affected school districts were not lost on the *Hartzell* court.¹⁰¹ Nevertheless, the court refused to allow financial hardships to compromise the free school guarantee.¹⁰² The court reasoned that access to public education and to all of the associated opportunities therein, "is not contingent upon the inevitably fluctuating financial health of local school districts."¹⁰³ The court therefore concluded that charging participation fees to students was an unconstitutional solution to school funding woes.¹⁰⁴ Instead, the court highlighted the political process as an alternative constitutional solution to financial difficulties.¹⁰⁵

98. *Id.* at 42 (rejecting proposition of extra-curricular activities being supplementary and not integral to school curriculum).

99. *Id.* (finding extra-curricular activities integral to public education). The *Hartzell* court applied the integral fundamental part of education test from *Bond*. *Id.* at 39. The *Hartzell* court also cited *Bond* for the proposition that the Michigan Supreme Court struck down extra-curricular activities fees as unconstitutional. *Id.* at 39. In fact, because the athletic fee issue was not specifically raised before the *Bond* court, the Michigan Supreme Court upheld the lower court's injunction on interscholastic athletic fees. *Id.* But, merely one year after *Hartzell* the Michigan Appeals Court in *Kelley* came to a contrary conclusion, upholding extra-curricular activity fees under the *Bond* tests. See *supra* notes 91-95 and accompanying text (discussing *Kelley* court's application of *Bond* tests). The *Hartzell* court relied on ample precedent in recognizing extra-curricular activities as an integral component of education. See, e.g., *Moran v. Sch. Dist. No. 7*, 350 F. Supp. 1180, 1184 (D. Mont. 1972) (noting many courts recognize extra-curricular activities as fundamental to educational process); *Lee v. Macon County Bd. of Educ.*, 283 F. Supp. 194, 197 (M.D. Ala. 1968) (finding "without question" athletic programs integral part of Alabama public school system); *Kelley v. Metro. County Bd. of Educ.*, 293 F. Supp. 485, 493 (M.D. Tenn. 1968) (recognizing sports as fundamental ingredient of educational process).

100. *Hartzell v. Connell*, 679 P.2d 35, 43 (Cal. 1984) (holding curricular and extra-curricular activities fall within free school guarantee).

101. *Id.* at 44 (recognizing schools operate under difficult limitations on taxation and spending).

102. *Id.* (upholding free school guarantee despite financial hardships).

103. *Id.*

104. *Hartzell*, 679 P.2d at 44 (requiring alternative solution to financial difficulties). But see *Hartzell*, 679 P.2d at 61 (Richardson, J., dissenting) (emphasizing saving programs from elimination practical reason for sustaining activity fee); Crowe, *supra* note 61, at 24 (recounting California school districts reactions to *Hartzell* ruling); Richard Ramus, *Claremont Surviving Pay-to-Play*, RIVERSIDE PRESS ENTERPRISE, Nov. 5, 1992, at C7 (describing transportation fees and voluntary donations as one solution to funding woes); *infra* Part III.A (critiquing *Hartzell* ruling).

105. *Hartzell*, 679 P.2d at 44 (suggesting political process as possible solution to financial difficulties). The *Hartzell* court did not suggest any specific solution, but made clear that the California constitution forbids school fees as a means of solving financial difficulties. *Id.*; see also *infra* Part III.C (suggesting alternatives to pay-to-play including state run reporting mechanism of fees levied).

3. Pay-to-play never adjudicated: are such fees legal?

There are a number of states where pay-to-play programs exist, yet no court has ever adjudicated their legality. Some such states have statutes providing authority for local school boards to charge extra-curricular activity fees.¹⁰⁶ In other states, courts have interpreted the state education clause in the context of another type of school fee, which places extra-curricular activities outside any free school guarantee.¹⁰⁷ Finally, because only twenty-one states constitutionally guarantee free public schools, potential challenges to school fees in some states enjoy no constitutional support.¹⁰⁸ For example, in Massachusetts, the education clause does not guarantee a free education.¹⁰⁹ Thus, despite the lack of support for, or prohibition against extra-curricular activity fees, pay-to-play programs exist in school districts throughout Massachusetts.¹¹⁰

106. COLO. REV. STAT. § 22-32-117(2)(a)(IV) (2004); KAN. CONST. art. VI, § 6 (2003); MINN. STAT. § 123B.36(b)(2) (2003); MISS. CODE ANN. § 37-7-335(1)(b)-(c) (2004); N.C. GEN. STAT. § 115C-47(6) (2004); N.D. CENT. CODE § 15.1-09-36(2)(d) (2003); OR. REV. STAT. § 339.155(5)(b) (2003); TEX. EDUC. CODE ANN. § 11.158(a)(2) (2004). In Tennessee, however, pay-to-play programs are legal because they fall outside the state's definition of a school fees. *Student Activity Funds—Fees*, TENNESSEE.GOV (interpreting State Board Rules and Regs. 0520-1-3-.03 Part 14 d) available at <http://www.tennessee.gov/education/locfinstdfeeintmemo.htm>. The fact that sports fees are not considered a school fee in Tennessee is significant in light of Tennessee's fee statute:

The school shall not require any student to pay a fee to the school for any purpose, except as authorized by the board of education, and no fees or tuitions shall be required of any student as a condition to attending the public school, or using its equipment while receiving educational training.

TENN. CODE ANN. § 49-2-110(c).

107. See, e.g., *Paulson v. Minidoka County Sch. Dist. No. 331*, 463 P.2d 935, 938 (Idaho 1970) (noting extra-curricular activities not necessary element of high school); *Norton v. Bd. of Educ.*, 553 P.2d 1277, 1279 (N.M. 1976) (upholding reasonable fee for elective courses); *Bd. of Educ. v. Sinclair*, 222 N.W.2d 143, 148 (Wis. 1974) (upholding textbook rental fee).

108. See *supra* note 32 (listing twenty-one states providing for free public education in constitution).

109. MASS. CONST. pt. 2, ch. 5, § 2 (2004) (lacking "free" education language). The Massachusetts education clause mentions public schools without any discussion of whether they ought to be free. *Id.*

110. See, e.g., Bridgewater-Raynham Regional School District, *Athletic User Fee Policy and Procedure for 2004-2005 School Year*, (requiring flat \$500 fee for participation, but fee good for three sports per year), available at <http://www.bridge-rayn.org/athletic.htm> (last visited Nov. 1, 2004). Annual user fees for the 2005-2006 school year in the Bridgewater-Raynham Regional School District were reduced by half to \$250. Bridgewater-Raynham Regional School District, *Athletic User Fee Policy and Procedure for 2005-2006 School Year*, available at <http://www.bridge-rayn.org/> (follow "Sports Corner" hyperlink; then follow "Athletic Activity User Fee Policy" hyperlink); Clinton High School, *Athletic Fees—2004-2005 School Year*, [Hereinafter *Clinton High School Fees*] (setting fees at \$100 for one sport, \$175 for two, and \$225 for three) available at <http://skipper.mecnet.net/~clinton/> (follow "Clinton High School" hyperlink; then follow "Athletics/Sports" hyperlink); Cohasset High School, *Interscholastic Athletics*, (establishing \$150 for first sport, \$150 for second, and \$100 for third) available at <http://www.cohassetk12.org/hschool/CohassetAthletics/index.html> (follow "Activity fee" hyperlink); Duxbury Public Schools, *Student Handbook*, at 30, (establishing 2005 user fee of \$125 per year) available at <http://www.duxbury.k12.ma.us/Documents/DHSHandbook.pdf>; see David Connolly, *Bridgewater Schools Losing Art, Music; Sports Cost Will Soar*, ENTERPRISE AT SOUTHOFBOSTON.COM, Aug. 3, 2003, (describing rising sports fees in Bridgewater to cover entire athletic budget) available at

4. Fee waivers

Most states that employ school fees also implement waiver policies for underprivileged students.¹¹¹ The existence of waiver provisions in *Kelley* served as an additional factor in persuading the Michigan Appeals Court to uphold the extra-curricular activity fee.¹¹² Similarly, in *Pacheco v. School District No. 11*,¹¹³ the Colorado Supreme Court exempted indigent students from a fee imposed for activity cards because they would suffer financial hardship if forced to pay the fee.¹¹⁴

Despite ample support for waivers as safety nets to the constitutionality of school fees, contrary authority also exists.¹¹⁵ In *Granger v. Cascade County School District No. 1*,¹¹⁶ the Supreme Court of Montana characterized a waiver system as a financial solution separate and distinct from the constitutionality of

<http://enterprise.southofboston.com/articles/2004/08/03/news/news/news02.txt> (last visited Oct. 5, 2005); *Shortchanged Students*, BOSTON GLOBE, July 15, 2004, at A10 (arguing Commonwealth should provide adequate aid so after-school activities available at no charge); White, *supra* note 61, at 1 (citing Massachusetts' situation as most difficult in country); see also *Romney Favors Proposal to Eliminate School Activity Fees*, NORTH ANDOVER CITIZEN, Aug. 20, 2004, [hereinafter *Romney Proposal*] (suggesting help may be on way because Governor opposes fees available at <http://www2.townonline.com/northandover/localRegional/view.bg?articleid=70629&format=> (last visited Sept. 9, 2004); *State of the Commonwealth*, *supra* note 65 (suggesting longer school day for special help, study hall, and sports); Pricilla Pardini, *Extended School Days*, SCH. ADMINISTRATOR WEB EDITION, August, 2001 (using Boston after school initiative as example of successful extended school day program) available at http://aasa.org/publications/sa/2001_08/pardini2.htm (last visited Oct. 25, 2004). One commentator suggests Boston public schools do not establish extra-curricular activity fees as a means of curbing after school juvenile crime. Most, *supra* note 74, 112 (evaluating state of education in Massachusetts ten years after Education Reform Act). *But see* MASS. GEN. LAWS ch. 71, § 47 (2004) (placing athletic programs within school committee supervision and control). MASS. GEN. LAWS ch. 71, § 47 does not specifically provide for school committees to charge fees, but gives the committees full control over athletics and makes reference to pay-to-play programs as follows:

All receipts by the committee in connection with the conduct of activities provided for under this section or any other activity not expressly provided for in this chapter but sponsored by the school committee in which participation is contingent upon the payment of a fee by the participant, shall be deposited with the treasurer of such town.

Id. (emphasis added).

111. See, e.g., MINN. STAT. § 123B.36(6) (2003) (allowing waiver of student fees based on need); N.D. CENT. CODE § 15.1-09-36(3) (2003) (giving school board discretion to waive fee if student's family unable to pay); TEX. EDUC. CODE § 11.158(f) (2004) (ordering school district adoption of waiver procedure if student or parent unable to pay). Qualification for a waiver is typically determined by the student's status for receiving free or reduced cost school lunch. *Student Fees*, *supra* note 6 (noting method for determining waiver eligibility); see also *Clinton High School Fees*, *supra* note 110 (tying waiver and reduced fee to free and reduced lunch eligible students).

112. *Kelley v. E. Jackson Pub. Sch.*, 372 N.W.2d 638, 639-40 (Mich. Ct. App. 1985) (including waiver provisions in reasoning to uphold fee).

113. 516 P.2d 629 (Colo. 1973).

114. *Id.* at 631 (concluding exemption from fee due to indigency, not because unconstitutional as to all students).

115. See *infra* notes 116-120 and accompanying text (examining authority critiquing waiver policies).

116. 499 P.2d 780 (Mont. 1972).

the fee in question and therefore not legally justifiable.¹¹⁷ The *Hartzell* court similarly invalidated the school district's waiver defense, but based the decision on the stigma and degradation accompanied with applying for a waiver.¹¹⁸ One commentator suggests that the methods employed for determining who qualifies for a fee waiver exacerbate the risk of stigmatizing the student.¹¹⁹ The methods used range from teacher referral and parental application to the student's eligibility for free lunch programs.¹²⁰

5. Existing problems associated with pay-to-play programs

Practical and philosophical problems exist in the implementation of pay-to-play programs beyond the constitutionality of a particular fee.¹²¹ For example, despite interscholastic sports being constantly in jeopardy of elimination, the percentage of a school's overall budget that funds them is quite small.¹²²

117. *Id.* at 786 (denying defense of waiver as constitutionally sufficient to uphold fee).

118. *Hartzell v. Connell*, 679 P.2d 35, 44 (Cal. 1984) (discussing stigma with respect to participation conditioned on waiver). The *Hartzell* majority used Thaddeus Stevens' response to an 1835 proposal for teachers to keep a list of "poor scholars" as authority for the proposition that keeping track of needy students is stigmatizing. *Id.* Stevens responded, "Sir, hereditary distinctions of rank are sufficiently odious; but that which is founded on poverty is infinitely more so. Such a law should be entitled 'an act for branding and marking the poor, so that they may be known from the rich and proud.'" *Id.*; see also *Student Fees*, *supra* note 6 (noting student and family reluctance to apply for waiver due to identifying selves as poor). Mississippi Code section 37-7-335(2)(a) addressed concerns, which waiver critics put forth through statutory construction, as follows:

All fees authorized to be charged under this section . . . shall be charged only upon the condition that the school board of each school district shall adopt a financial hardship waiver policy that shall be kept in the strictest of confidence with all files and personal disclosures restricted from review by the general public. The board shall insure that a pupil eligible to have any such fees waived as a result of an inability to pay for said fees, shall not be discriminated against nor shall there be any overt identification of any pupil who has received a financial hardship waiver by use of special tokens or tickets, announcements, posting or publication of names, physical separation, choice of materials or by any other means. In no case shall any school district's procedures expose any pupil receiving a hardship waiver to any type of stigma or ridicule by other pupils or school district personnel.

MISS. CODE ANN. § 37-7-335(2)(a) (2004).

119. See *Harris*, *supra* note 35, at 1420 (arguing lack of guidelines for fee waiver programs exacerbates stigma). *Harris*' argument against fee waiver programs is limited to fees for creditworthy courses and a student's right to a basic education. *Harris*, *supra* note 35, at 1420.

120. *Marshall v. Sch. Dist.* RE No. 3, 553 P.2d 784, 785 (Colo. 1976) (relying on teacher referral for waiver of textbook fee); *Sneed v. Greensboro City Bd. of Educ.*, 264 S.E.2d 106, 110 (N.C. 1980) (citing no uniform waiver policy, but case-by-case determination of waivers). The *Sneed* court invalidated a fee waiver policy that required a principal to determine whether the fee should be waived. *Sneed*, 264 S.E.2d at 114. At the time, no mechanism existed for students to apply anonymously to the principal for a waiver, but rather required students be referred. *Sneed*, 264 S.E.2d at 114. The referral system was flawed both because students might suffer from a stigma of being so referred and also because students or their families may be ignorant of the waiver system as an option. *Sneed* 264 S.E.2d at 114; see also *Student fees*, *supra* note 6 (noting waiver eligibility linked to free lunch program eligibility).

121. See *infra* Part II.C.5 (outlining major logistical and philosophical problems associated with pay-to-play programs).

122. See *Swift*, *supra* note 13, at 60 (describing sports and activities as minor budgetary elements).

Athletics and extra-curricular activities constitute merely one to three percent of a school's overall budget.¹²³ With an average of sixty to seventy percent of students participating in such activities, the "bang for the buck in sports is immense" and the utility of using fees as a general funding solution is minimal.¹²⁴

A major problem with pay-to-play solutions and a source of equity issues is that fee-based programs do not work well in every school.¹²⁵ Pay-to-play programs thrive in affluent communities because enough students are able to pay the fees to enable the schools to field teams.¹²⁶ In poorer areas, however, pay-to-play programs are not a viable option because few students can afford to pay the fees.¹²⁷ Urban district administrators express concern that imposing fees may cause students to forego participating in school activities and head to the streets after school.¹²⁸

Even in communities where pay-to-play programs generally fund athletics successfully, fees limit participation.¹²⁹ The Michigan High School Athletic Association's study of 558 Michigan High Schools revealed that fees up to \$100 cause a ten percent decrease in participation, while fees up to \$200 affect a twenty percent decline.¹³⁰ Participation rates and affluence of the district correlate and accordingly, participation rates in affluent districts have remained high despite the fees.¹³¹ Decreases in participation occur more frequently, however, among multi-sport athletes who choose to play only one sport and among younger siblings who sit out while their older sibling plays.¹³²

Another concern associated with pay-to-play programs is the potential for parents to involve themselves with the amount of their child's playing time.¹³³

123. *The Case for Activities*, *supra* note 21 (arguing activity programs one of best bargains around).

124. *See No Other Choice*, *supra* note 6 (cautioning against using athletic department money to solve budget woes).

125. Brewington, *supra* note 15, at 12C (recognizing successful pay-to-play program in affluent Connecticut county may fail in less-affluent Detroit); Most, *supra* note 15, at 116 (suggesting fees less worrisome in affluent communities than in poor and urban communities).

126. Brewington, *supra* note 15, at 12C (noting pay-to-play programs thriving in affluent Connecticut); Most, *supra* note 15, at 116 (describing fees in affluent communities as "less of a worry"). *But see* Brown, *supra* note 13, at 12S (indicating even in affluent districts not every family can afford to pay).

127. Brewington, *supra* note 15, at 12C (citing Detroit administrator's opinion that Detroit parents cannot afford pay-to-play fees); Most, *supra* note 15, at 116 (noting kids in poor towns more likely to avoid activities).

128. *See* Most, *supra* note 15, at 116 (citing increased crime rates during after-school hours because kids on streets).

129. *Pay-to-Play Costs*, *supra* note 3 (noting pay-to-play programs cause decreased participation).

130. *Pay-to-Play Costs*, *supra* note 3 (reporting MHSAA survey results correlate fees with participation decline).

131. *See* Swift, *supra* note 13, at 60 (commenting participation in affluent areas remains high).

132. *See* Semrau, *supra* note 8, at 1C (suggesting multi-sport athletes becoming "dinosaurs" due to financial pressures); *Pay-to-Play Costs*, *supra* note 3 (warning participation in multi-sports sacrificed and younger siblings sitting out).

133. *See* Brown, *supra* note 13 (reporting parents feel they have right to control amount child plays after paying fee); *Players as Payers*, *supra* note 6 (suggesting parental control over play could increase with pay-to-play); *Pay-to-Play Benching*, *supra* note 95, at 11 (noting pay-to-play amplifies playing time concerns).

If all students pay the same fee, parents may be upset to see their children sit on the bench while other children play.¹³⁴ Similarly, coaches may hesitate to suspend or dismiss students who have already paid for the privilege to pay, thereby compromising their disciplinary abilities.¹³⁵

Beyond the various logistical problems that implementing pay-to-play programs present, many administrators and coaches oppose fees on philosophical grounds.¹³⁶ They contend that pay-to-play solutions send the alarming message to students that they can now buy coveted spots on varsity teams, once earned through hard work and talent.¹³⁷ Not surprisingly, some coaches have defected from schools implementing pay-to-play programs citing philosophical objections to the practice.¹³⁸

PART III: ANALYSIS

A. Jurisdictional analysis of the majority and minority approaches: Paulson and its progeny versus Hartzell

The *Hartzell* holding that extra-curricular activities are vital components of a free education is an idyllic view of public education, appealing to athletic enthusiasts and student-athletes alike.¹³⁹ The holdings in *Paulson* and *Kelley*, however, illustrate the unfortunate reality that funding constraints necessarily limit the breadth of a free public education.¹⁴⁰ Despite the *Hartzell* majority's inspiring language that "[a] curriculum must be as wide as life itself," the dissenting opinion aptly emphasized that forbidding student fees could lead to the elimination of sports and extra-curricular activities entirely when school

134. See *Pay-to-Play Benching*, *supra* note 95, at 11 (illustrating parental frustration when child sits after paying large fee to participate).

135. See *Players as Payers*, *supra* note 6 (considering disciplinary result for coaches after parent paid fee).

136. See *Pay-to-Play Benching*, *supra* note 95, at 11 (noting pay-to-play contrary to many coaches' philosophy).

137. See *Brown*, *supra* note 13 (arguing spot on team no longer earned, but costly privilege); *Players as Payers*, *supra* note 6 (considering message sent to kids when parents paying their way onto team).

138. See *Pay-to-Play Benching*, *supra* note 95, at 11 (recounting boys track coach quitting because he did not believe in pay-to-play). Other organizations, including the National Federation of State High School Associations (NFHS), are also against pay-to-play programs. See *Swift*, *supra* note 13, at 60. They argue that sports are inherently educational and ought to be funded like any other course offering in public school. See *Swift*, *supra* note 13, at 60 (listing opposition to pay-to-play programs).

139. See *Hartzell v. Connell*, 679 P.2d 35, 43 (Cal. 1984) (holding all educational activities fall within free school guarantee); *The Case for Activities*, *supra* note 21 (making case for preserving activities due to inherent educational value); *Pay-to-Play Costs*, *supra* note 3 (citing Michigan High School Athletic Association's critique of pay-to-play programs).

140. See *Paulson v. Mimidoka County Sch. Dist. No. 331*, 463 P.2d 935, 938 (Idaho 1970) (noting extra-curricular activities as unnecessary elements of public school); *Kelley v. E. Jackson Pub. Sch.*, 372 N.W.2d 638, 639 (Mich. Ct. App. 1985) (upholding extra-curricular activity fees and applying *Paulson* test); see also *supra* notes 85-95 and accompanying text (addressing *Paulson* and *Kelley* reasoning).

budgets cannot sustain their funding.¹⁴¹ The *Hartzell* majority undoubtedly intended to maintain the vitality of extra-curricular activities as part of public education.¹⁴² And yet, the right to participate in interscholastic sports is not protected under the California Constitution and Californian communities are free to eliminate sports entirely.¹⁴³

As a result of the *Hartzell* ruling, some California school districts opted to simply change the name of the charge from “fee” to “donation,” making the charge appear voluntary.¹⁴⁴ Some schools, however, strong-armed students and families into paying the donation.¹⁴⁵ Such policies dictated that unless 100% of the team paid the “donation,” the school would eliminate the sport or activity.¹⁴⁶ While not all California schools engaged in such coercion, pay-to-play programs that covered the cost of extra-curricular activities were pervasive throughout California even after *Hartzell*.¹⁴⁷ California schools employed transportation fees or “voluntary” donations in order to preserve extra-curricular activities.¹⁴⁸ *Hartzell*’s illegalization of extra-curricular activity fees in California did not relieve the financial burden on students.¹⁴⁹ Instead it forced schools to engage in disingenuous labeling practices to save the very programs *Hartzell* deemed integral.¹⁵⁰ The California experience suggests

141. *Hartzell*, 679 P.2d at 42 n.12 (categorizing breadth of public education); *id.* at 61 (Richardson, J. dissenting) (forecasting *Hartzell* opinion’s detrimental effect on extra-curricular activities).

142. *Id.* at 43 (holding extra-curricular activities fall within free school guarantee).

143. See *Ryan v. Cal. Interscholastic Fed’n—S.D.*, 114 Cal. Rptr. 2d 798, 810 (Cal. Ct. App. 2001) (finding no property interest in components of right to free education); *Steffes v. Interscholastic Fed’n*, 222 Cal. Rptr. 355, 361 (Cal. Ct. App. 1986) (holding constitutional protection for right to education not extended to right to play sports). The *Ryan* court described participation in interscholastic sports as a single “stick in the bundle . . . [that is] the educational process.” *Ryan*, 114 Cal. Rptr. 2d at 810. The bundle as a whole enjoys constitutional protection, but the *Ryan* court noted, “an entitlement, like the state right to a free public education, does not necessarily create a property interest in each of its constituent parts.” *Ryan*, 114 Cal. Rptr. 2d at 810.

144. See Crowe, *supra* note 61, at 24 (illustrating post-*Hartzell* policies in California school districts).

145. See Crowe, *supra* note 61, at 24 (noting family perception of policies after *Hartzell* made pay-to-play unconstitutional).

146. See Crowe, *supra* note 61, at 24 (describing mandatory donation program).

147. See Crowe, *supra* note 61, at 24 (explaining continued existence of fees under different name after *Hartzell*); Delany, *supra* note 5, at C1 (citing transportation fee as tool for preserving athletic programs in California); Ramus, *supra* note 104, at C7 (demonstrating after *Hartzell* fees in California called transportation fees and voluntary donations).

148. *Arcadia Unified Sch. Dist. v. State Dep’t. of Educ.*, 825 P.2d 438, 445 (Cal. 1992) (upholding transportation fee because transportation not educational activity); see also Ramus, *supra* note 104, at C7 (noting voluntary donation and transportation fee imposed on athletes to prevent elimination of sports). Ramus notes that Claremont Unified School District requires 80% athlete participation in the donation drive to sustain the sport from elimination. Ramus, *supra* note 104, at C7; see also Puntus, *supra* note 26, at 91 (criticizing California’s validation of transportation fees and suggesting transportation more important than extra-curricular activities).

149. See *supra* notes 144-148 and accompanying text (explaining continued existence of sports fees in California even after *Hartzell*).

150. See Crowe, *supra* note 61, at 24 (noting continued existence of fees in California under different name); see also *supra* notes 139-148 and *infra* note 151 and accompanying text (critiquing *Hartzell* majority opinion).

prohibiting pay-to-play programs is not the best solution for preserving extra-curricular activities.¹⁵¹

In states where pay-to-play programs are constitutional, high school sports are arguably spared from elimination when school districts are forced to make cuts.¹⁵² In these states, extra-curricular activities are considered a complement to a high school education, but not a necessity.¹⁵³ Indeed, school officials who face shrinking budgets often see sports as a reasonable place to make cuts.¹⁵⁴ Offering sports and other extra-curricular activities for a reasonable fee therefore serves dual purposes of preserving the opportunity to participate and providing local school boards with more control over curriculum offerings.¹⁵⁵ In contrast, a *Hartzell* jurisdiction would prevent a school board from enriching a school's offering of fee-based activities through judicial mandate.¹⁵⁶ Given the problems of removing school fees, schools with the option of implementing pay-to-play programs create a more tolerable environment for high school sports. During economic downturns the programs relieve schools of the burden of deciding whether to eliminate sports entirely or to subject them to "voluntary" donations.¹⁵⁷

Where fees associated with high school athletics are constitutional, many states require them to be reasonable.¹⁵⁸ In *Kelley*, the court justified the fee, in part, because the dollar amount was not challenged as excessive.¹⁵⁹ Such reasoning suggests that had the fee been excessive, the court may have reached

151. *Hartzell*, 679 P.2d at 61 (Richardson, J., dissenting) (forecasting opinion's negative impact on students).

152. See *Players as Payers*, *supra* note 6 (noting pay-to-play less painful than elimination of sports).

153. *Paulson v. Minidoka County Sch. Dist. No. 331*, 463 P.2d 935, 938 (Idaho 1970) (applying necessary element test to fees in Idaho); see also *Roth*, *supra* note 35, at 770 (conceding extra-curricular activities on margin of necessity).

154. See *Pay-to-Play Costs*, *supra* note 3 (noting school officials find sports cuts more reasonable than cuts to academics).

155. See *Harris*, *supra* note 35, at 1421 (concluding *Paulson* analysis affords more autonomy and flexibility to school boards).

156. See *Harris*, *supra* note 35, at 1410, 1418 (endorsing *Paulson* "necessary element" test). *Harris* agrees with the *Paulson* test's reasoning because it focuses on what constitutes an education, thereby ensuring minimal requirements for an education, while leaving nonessential programming to local school board control. *Harris*, *supra* note 35, at 1410, 1418. With control to decide which sports or extra-curricular activities will be offered for a fee, school curricula would be better tailored to particular communities' interests and needs. *Harris*, *supra* note 35, at 1418-19.

157. See *supra* notes 144-151 and accompanying text (noting abundance of post-*Hartzell* fees in California).

158. See *Kelley v. E. Jackson Pub. Sch.*, 372 N.W.2d 638, 640 (Mich. App. Ct. 1985) (finding no allegation of fee's excessiveness); *Granger v. Cascade County Sch. Dist. No. 1*, 499 P.2d 780, 786 (Mont. 1972) (upholding imposition of reasonable fee for non-credit bearing activities); see also *Bryant v. Whisenant*, 52 So. 525, 525-26 (Ala. 1910) (holding reasonable fee for heating and lighting within legislature's contemplation); *Hamer v. Bd. of Educ. of Sch. Dist. No. 109*, 265 N.E.2d 616, 622 (Ill. 1970) (noting no allegation of textbook rental fee being unreasonable); *Norton v. Bd. of Educ. of Sch. Dist. No. 16*, 553 P.2d 1277, 1279 (N.M. 1976) (upholding reasonable fees for non-required courses).

159. *Kelley*, 372 N.W.2d at 640 (citing no claim of excessive fee as one justification for upholding fee); see also *supra* note 95 and accompanying text (discussing *Kelley* court's justifications for upholding fee).

a different result.¹⁶⁰ The reasonableness requirement applied in *Kelley*, however, lacks teeth because subsequent school athletic fees in Michigan were far from reasonable.¹⁶¹ One Michigan school district, in fact, had a \$250 dollar fee per sport.¹⁶² The ambiguity inherent in the term “reasonable” coupled with the rising costs of fees in jurisdictions with reasonableness requirements suggests that renewed challenges to pay-to-play programs based on the unreasonableness of a fee would likely fail.¹⁶³

One reason for the failure of reasonableness requirements to take hold is that there is no limit to the amount schools may charge.¹⁶⁴ Moreover, in tough fiscal times, the power of school administrators to levy a fee may be subject to abuse given that neither local voters nor the state must approve the amounts of pay-to-play fees.¹⁶⁵ Thus, reasonableness is a subjective measure that school officials can manipulate depending on the amount of money needed to bridge the current funding gap.¹⁶⁶

While fee waivers serve a laudable goal in preserving access to activities and sports for low-income students, their existence as a financial solution does not justify the constitutionality of a fee program.¹⁶⁷ Moreover, the *Hartzell* court noted and many scholars aptly conclude that the waiver procedure itself is a degrading experience that both stigmatizes students and results in reluctance of eligible students to participate.¹⁶⁸ Rejecting fees and associated waiver procedures for credit worthy courses only ensures access to what some consider

160. *Kelley*, 372 N.W.2d at 640 (justifying fee based on its reasonableness).

161. See *Pay-to-Play Benching*, *supra* note 95, at 11 (recounting Michigan student’s struggle to pay \$500 for two semesters of cheerleading).

162. See *Pay-to-Play Benching*, *supra* note 95, at 11 (reporting \$250 per sport fee in Michigan town).

163. MERRIAM WEBSTER’S DELUXE DICTIONARY 1528 (10th ed. 1998) (defining “reasonable”). The relevant definition vis-à-vis the reasonable costs of a fee is choice c: “moderate, fair.” *Id.* The limits of a moderate or fair cost seem no clearer to this author than the limits of a reasonable fee.

164. MISS. CODE ANN. § 37-7-335 (2004) (authorizing school boards in Mississippi to charge reasonable fees); see also *supra* notes 158-163 and accompanying text (describing ineffective reasonableness requirements in states allowing fees).

165. See *Rado*, *supra* note 2, at 1 (noting fees unregulated); *Brown*, *supra* note 13 (describing lack of statistics on pay-to-play programs). But see MASS. GEN. LAWS CH. 71, § 47 (2004) (providing for annual audit of student activity funds); N.C. GEN. STAT. § 115C-47(6) (2004) (requiring reporting of fee and charges to Superintendent of Public Instruction); see also *infra* text accompanying notes 202-208 (suggesting mandatory reporting of fees as solution to lack of current regulation).

166. *Rado*, *supra* note 2, at 1 (noting pay-to-play programs lack state regulation and voter authority).

167. *Granger v. Cascade County Sch. Dist. No. 1*, 499 P.2d 780, 786 (Mont. 1972) (observing waiver defense distinct from constitutional issue); see also *supra* notes 116-117 and accompanying text (describing waivers as financial solutions, but not legal justifications). But see *Kelley v. E. Jackson Pub. Sch.*, 372 N.W.2d 638, 639 (Mich. Ct. App. 1985) (justifying fee, in part, based on availability of waiver).

168. *Hartzell v. Connell*, 679 P.2d 35, 44 (Cal. 1984) (precluding participation based on special waiver); *Granger*, 499 P.2d at 529 (explaining waiver procedure in public school as degrading experience for those unable to pay); see also *Harris*, *supra* note 35, at 1420 (recognizing stigma associated with method of administering waiver procedures); *supra* note 118 and accompanying text (discussing authority opposed to waivers).

a basic education.¹⁶⁹ Such a distinction, fails to explain how the waiver procedure for students who choose to participate in optional activities is any less degrading.¹⁷⁰ The notion that a student will not be stigmatized because an activity is optional provides no solace for low-income student-athletes.¹⁷¹ In fact, it suggests such students must either accept the stigma inherent in the waiver procedure or not participate.¹⁷²

The Mississippi fee statute's waiver provision is a good example because it takes these sensitive issues into consideration.¹⁷³ It requires the waiver "be kept in the strictest of confidence," forbidding discrimination and overt identification of any recipient of the waiver, and noting the potential stigma and ridicule associated with a hardship waiver.¹⁷⁴

B. Pay-to-play programs are unwise solutions

Despite their constitutionality, pay-to-play programs are not viable athletic funding solutions because the problems associated them with outweigh the benefits they provide.¹⁷⁵ As addressed above, the utility of pay-to-play programs as a general funding solution is minimal because they supplement merely one to three percent of a school's overall budget.¹⁷⁶ Additionally, problems such as inequity between schools that are able to implement pay-to-play programs and schools that are not, decreased participation, increased parental involvement, and philosophical concerns call into question the practicality of pay-to-play programs as a funding solution.¹⁷⁷

Moreover, notwithstanding the *Paulson* court's interpretation of the term "extra," there is strong support for the notion that extra-curricular activities, including sports, are not supplemental to education.¹⁷⁸ While *Hartzell* is the

169. Harris, *supra* note 35, at 1420 (rejecting waivers if no consideration of whether fee effects elements of "basic education").

170. Harris, *supra* note 35, at 1420 (reasoning concerns of stigma have less force regarding optional courses than credit-worthy courses). Harris' argument centers on a basic education and because optional activities are outside that basic education, a fee waiver program is okay. Harris, *supra* note 35, at 1420. The flaw in her reasoning is that it critiques the stigma of a waiver procedure for services the author considers basic to education, but dismisses the same stigmatizing effect that could deter participation in optional activities. Harris, *supra* note 35, at 1420.

171. *Contra* Harris, *supra* note 35, at 1420 (noting deterrent effect of waiver less concerning for optional courses).

172. See Harris, *supra* note 35, at 1420 (focusing waiver criticism solely on credit-worthy courses).

173. MISS. CODE ANN. § 37-7-335(2)(a) (2004) (tackling issues associated with waivers by statute).

174. MISS. CODE ANN. § 37-7-335(2)(a) (2004); see also *supra* note 118 and accompanying text (addressing authority critical of waiver provisions and quoting text of Mississippi statute).

175. See Brown, *supra* note 13 (quoting Connecticut principal's sentiment about pay-to-play programs); *No Free Ride*, *supra* note 5 (describing pay-to-play as national phenomenon).

176. See *supra* notes 122-124 (identifying school budgets for sports as only one to three percent of overall budget).

177. *Supra* Part II.C.5 (describing existing problems associated with pay-to-play programs).

178. E.g., *Hartzell v. Connell*, 679 P.2d 35, 42-43, n.12 (Cal. 1984) (citing cases and secondary sources which consider extra-curricular activities integral component of public education); *The Case for Activities*,

only decision to address sports fees, courts have generally recognized extra-curricular activities as “fundamental ingredients of the educational process.”¹⁷⁹ Educators across the country agree that sports and extra-curricular activities do not supplement, but rather, complete an education.¹⁸⁰ For example, there exists a strong correlation between academic achievement and participation in sports and extra-curricular activities.¹⁸¹ Sports foster teamwork, leadership, self-esteem, school spirit and pride in community.¹⁸² These benefits not only explain why athletes tend to perform better academically, but they also link education to good citizenship and preservation of democracy.¹⁸³ Additionally, while only a small percentage of high school athletes earn college athletic scholarships, for some students, high school athletics provide an incentive for them to come to school.¹⁸⁴

While sports do not outweigh the value of academics, the line between the two is becoming blurred and the end of the school day no longer delineates where education stops and recreation begins.¹⁸⁵ Although the holding in *Hartzell* did not successfully maintain the vitality of free extra-curricular activities in California, the court’s position that extra-curricular activities should not be “contingent upon the fluctuating financial health of local school

supra note 21 (preferring term co-curricular activities because inherently educational); Swift, *supra* note 13, at 60 (noting many United States educators believe academics and school sports combine for complete education). *But see* Paulson v. Minidoka County Sch. Dist. No. 331, 463 P.2d 935, 938 (Idaho 1970) (finding all extra-curricular activities, including sports, by definition outside school’s curriculum).

179. *Hartzell*, 679 P.2d at 42 (concluding based on precedent from sister states); *see also* Kelley v. Metro. County Bd. of Educ., 293 F. Supp. 485, 493 (M.D. Tenn. 1968) (holding sports fundamental ingredient in educational process).

180. *See* Swift, *supra* note 13, at 60 (linking athletics and academics in public schools); *The Case for Activities*, *supra* note 21 (arguing sports inherently educational). Swift illustrates the link between academics and sports with the following imagery:

[A]cademics and school sports in America have a lefthand-righthand relationship. Because a person can live with one hand, does that make the other a luxury? Senior year in high school is a once-in-a-lifetime experience, and if priorities are the issue, the priority of each school board should be to insist that a senior’s experience be educationally complete, not just academically complete.

Swift, *supra* note 13, at 60.

181. *See* Swift, *supra* note 13, at 60 (providing examples of athletes and participants in extra-curricular activities having higher grades on average than non-participants).

182. *See generally* *The Case for Activities*, *supra* note 21 (listing values inherent in school sports); Swift, *supra* note 13, at 60 (citing school spirit, morale, self-esteem and skill development at risk if sports eliminated).

183. *Hartzell*, 679 P.2d at 43 (reasoning results of group activities linked to constitutional role of preserving democracy in California); *see also* *The Case for Activities*, *supra* note 21 (indicating interscholastic sports promote citizenship, sportsmanship, community pride, teamwork, and self-discipline).

184. *See Pay-to-Play Costs*, *supra* note 3 (noting sports encourage some students to attend school); Swift, *supra* note 13, at 60 (explaining membership on team motivates students to succeed in school despite not being star athlete).

185. *See* Roth, *supra* note 35, at 770 (conceding extra-curricular activities on margin of necessity); *supra* notes 179-184 (analyzing authority on extra-curricular activities as part of educational process).

districts” remains sound.¹⁸⁶ Financial realities, however, demonstrate that there is not enough funding for every valuable program.¹⁸⁷ Between cutting teachers or athletics, a minimal basic education requires the former, but can exist without the latter.¹⁸⁸ Even so, the problems associated with pay-to-play programs far outweigh their utility and make them an impractical solution to financial woes.¹⁸⁹

C. Viable solutions and alternatives to pay-to-play programs

Alternatives to pay-to-play programs exist, but achieve varying success nationwide.¹⁹⁰ Fundraising efforts to preserve school sports, including parental involvement in booster clubs represent local solutions to funding shortages.¹⁹¹ The most efficient way to increase funding for athletic programs is a property tax override, which increases the existing local contribution.¹⁹² While such a solution eases the financial burden on individual athletes, the members of a particular community may not be receptive to paying for schools’ athletic programs.¹⁹³ Pay-to-play programs allow schools to avoid local voter temperament and in some communities, the inevitable rejection of tax overrides.¹⁹⁴

Parents and booster clubs are typically the most committed to preserving high school athletics and are the ones who organize countless fundraising events.¹⁹⁵ These types of fundraising efforts, however, are not long term

186. *Hartzell v. Connell*, 679 P.2d 35, 44 (Cal. 1984); see also *supra* Part III.A (critiquing *Hartzell* opinion).

187. See *Pay-to-Play Costs*, *supra* note 3 (linking decrease in state education funding to implementation of pay-to-play program).

188. See *Pay-to-play costs*, *supra* note 3 (explaining school officials consider athletic cuts reasonable when academic funding threatened). See generally, *supra* note 39 (discussing minimal public education includes teacher instruction).

189. See *Brown*, *supra* note 13 (noting pay-to-play problems outweigh benefits); *supra* notes 175-184 (arguing costs of pay-to-play programs too high).

190. See, e.g., *Hiestand*, *supra* note 65, at 10C (suggesting success of corporate sponsorship in Indiana exception to rule); *Swift*, *supra* note 13, at 60 (offering tax on professional sports tickets as alternative to pay-to-play programs); *Woody*, *supra* note 65, at D4 (noting hope for large corporate sponsorship to save sports in New Kent County unrealistic).

191. See *Pay-to-Play Costs*, *supra* note 3 (identifying parents and booster groups efforts lower athletic costs).

192. See *Most*, *supra* note 15, at 117 (noting tax overrides viable alternative to pay-to-play); see also *supra* notes 59-61 and accompanying text (discussing local contribution in school finance scheme).

193. See *Most*, *supra* note 15, at 117 (describing community with many elderly people without school aged children would vote down tax override); *No Other Choice*, *supra* note 6 (illustrating voter sentiment about threatened cuts being disingenuous to pass tax).

194. See *Rado*, *supra* note 2, at 1 (noting pay-to-play insulated from local voter control); see also *Dodd*, *supra* note 2 at 853 (demonstrating public school left to mercy of local voters in absence of state funding).

195. See *Brewington*, *supra* note 15, at 12C (illustrating varied fundraising methods including bake sales, car washes and bingo night); *Swift*, *supra* note 13, at 60 (lauding commitment and excellence of high school booster clubs).

solutions because they only cover funding for one year or season at a time.¹⁹⁶ Moreover, there are limits to the amount of fundraising communities can tolerate.¹⁹⁷

Both mom-and-pop fundraising operations and athletic departments must look beyond traditional fundraising to new sources of revenue such as corporate sponsorship.¹⁹⁸ While Indiana enjoys atypical success from corporate sponsorship through television revenues and major corporate sponsors, sponsorship can also succeed on a smaller, local level.¹⁹⁹ The possibilities available to enterprising fundraisers include, company logos on uniforms, banners at sports venues, and advertisements in programs.²⁰⁰ While some criticize corporate sponsorship as exploiting and commercializing high school athletics, as long as the school directs how the money is used, the National Federation of State High School Associations has endorsed the practice.²⁰¹

At present, the struggle against pay-to-play programs occurs at the local level and, for the most part, is left completely unregulated by the states.²⁰² A better solution would begin at the state level with the state demonstrating its clear support for the value of high school athletics.²⁰³ States should first implement a mandatory reporting system in order to determine the magnitude of the problem.²⁰⁴ In states that allow reasonable fees, the reporting system would reveal whether the reasonableness requirement is failing.²⁰⁵ Likewise, in states that have no stated policy on student fees, reporting may alert state officials to the alarming sacrifices students and parents make to participate in public school athletics.²⁰⁶ If a state determines that pay-to-play solutions are

196. See Brewington, *supra* note 15, at 12C (noting bake sales and car washes temporary solutions).

197. See Brewington, *supra* note 15, at 12C (conceding fundraising gets old for communities).

198. See Swift, *supra* note 13, at 60 (suggesting considerable corporate support for high school athletics).

199. See Brewington, *supra* note 15, at 12C (noting Indiana and its celebrated Hoosiers' success with television rights fees); Swift, *supra* note 13, at 60 (reasoning corporate sponsorship possible at local level).

200. See Swift, *supra* note 13, at 60 (illustrating small-scale corporate sponsorship possibilities).

201. See Morrison, *supra* note 65 (articulating child exploitation and commercialism as common critiques of corporate sponsorship). Morrison suggests commercialism already exists in education, illustrated by student clothing and school equipment. *Id.* Morrison further explains that the educational mission is not compromised, but rather enhanced through this new form of funding. *Id.*; Swift, *supra* note 13, at 60 (revealing National Federation of High Schools' support for corporate sponsorship).

202. See *supra* note 65 and accompanying text (discussing pay-to-play programs as tool to compensate where state and local contributions do not).

203. See *Hartzell v. Connell*, 679 P.2d 35, 44 (Cal. 1984) (directing economic questions about school finance to state legislature). *But see* Dodd, *supra* note 2 (advocating increased federal subsidy for extra-curricular activities). Given the requirements associated with federal dollars, schools would be better served if the state maintained control of improving the problems of extra-curricular activity funding.

204. See N.C. GEN. STAT. § 115C-47 (2004) (regulating fees through mandatory reporting to Superintendent of Public Instruction). Some states already require in depth reporting schemes for other aspects of school finance, so charting student fees would merely add one layer to the process. 603 MASS. REGS. CODE § 10.01 (2005) (listing fifteen categories of student information Massachusetts schools must already report).

205. See *supra* notes 158-163 and accompanying text (analyzing failure of reasonableness requirement).

206. See *supra* notes 175-189 and accompanying text (addressing positive and negative aspects of pay-to-play programs).

acceptable, a reporting system would at least rein in what is now an unchecked tool, used without state or local voter oversight.²⁰⁷ Such a system would also enable the state to enforce reasonableness standards where necessary.²⁰⁸

In addition to mandatory reporting, legislatures should re-evaluate their duty to public education.²⁰⁹ States that do not regard extra-curricular activities as vital to a mandated free education should re-examine the educational values those activities provide.²¹⁰ Similarly, states that must provide an “adequate” education should consider whether an education in which sports, clubs, plays or music cost extra constitutes an adequate education.²¹¹ If not, the legislature should increase the percentage of funding allocated for extra-curricular activities accordingly.²¹² Moreover, if fees were upheld prior to the state establishing education as a fundamental right, an evaluation of the state’s duty to educate may result in a possible reconsideration of the state’s policy on athletic fees.²¹³

The reality that available funding cannot cover every valuable school related activity should not justify a reliance on pay-to-play programs.²¹⁴ State and local communities should work together so that the vitality of extra-curricular

207. Rado, *supra* note 2, at 1 (noting fees outside state regulation and not subject to voter scrutiny).

208. See N.C. GEN. STAT. § 115C-47 (2004) (requiring school board approval of all fees in addition to reporting to Superintendent); *supra* notes 158-163 and accompanying text (analyzing failure of reasonableness requirements).

209. See *supra* notes 30-35 and accompanying text (outlining state’s responsibility to educate).

210. See *supra* notes 85-95 and accompanying text (discussing *Paulson* line of cases); Chmelynski, *supra* note 4 (arguing onus on legislatures to expand free public education).

211. See Most, *supra* note 15, at 116 (describing life long impact of participation in sports, clubs, plays and musical instruments).

212. See Ch. 70 Foundation Budget FY05 Final, (exemplifying state using foundation budget approach and allocating funding according to categories), available at <http://finance1.doe.mass.edu> (follow “Chapter 70 Programs” hyperlink; then follow “Final Chapter 70 Aid and Spending Requirements for Y05” hyperlink; then download “formula spreadsheet”). In Clinton, Massachusetts for example, the 2005 foundation budget allocated \$30,373 to high school athletics out of a total high school budget of \$2,677,674. *Id.* The athletic fees at Clinton High School for the same year were \$100 for one sport, \$175 for two sports, and \$225 for three sports. See *Clinton High School Fees*, *supra* note 110. One way to reduce these fees could be to increase the amount allocated to athletics in the budget, taking into consideration that districts are not bound by these guidelines. MASS. GEN. LAWS ch. 70, § 8 (2004) (authorizing districts freedom to allocate funds without regard to foundation budget categories). Such an increase in spending might convey a state commitment to providing athletics to all interested students. *Romney Proposal*, *supra* note 110 (noting elimination of fees requires increased state revenue to municipalities). Governor Romney is opposed to placing additional funding burdens on cities and towns and thus suggests increased state aid to eliminate fees. *Romney Proposal*, *supra* note 110. The Governor echoed a similar sentiment in his State of the Commonwealth address wherein he proposed education reform that would include an extended school day to provide for “special help, study hall and sports. Learning should last well into the afternoon, not end at two o’clock.” *State of the Commonwealth*, *supra* note 110.

213. PRACTICAL EDUCATION, *supra* note 11, at 260 (suggesting possible reconsideration for athletic fees). Dodd notes a link between a state’s recognition of education as a fundamental right and the legality of school fees. *Id.* She proposes “the stronger the state right to an education, the less likely a court would sustain any school-imposed fee.” *Id.*

214. *Hartzell v. Connell*, 679 P.2d 35, 44 (Cal. 1984) (noting financial hardship no defense to free school violation and economic solution appropriate for legislature).

activities may withstand the “inevitably fluctuating financial health of local school districts.”²¹⁵ Localities should pursue innovative fundraising, including corporate sponsorship and invest funds in an activities trust in order to bridge future funding gaps and sustain a renewable funding source for the future.²¹⁶ Alternatively, schools should seek to cut costs without cutting programs entirely. For example, reducing the competition schedule or eliminating holiday games or practices.²¹⁷ Such collaboration would foster both local control and state oversight.²¹⁸

IV. CONCLUSION

Parents, school officials, and state legislators undoubtedly aspire to the *Hartzell* court’s view that public education ought to be “as wide as life itself.”²¹⁹ Financial realities, however, limit the number of programs that can be fully funded, creating the need for alternative revenue sources. While pay-to-play programs present an easy tool for school administrators to preserve sports programs, the problems associated with them outweigh their utility as a practical funding solution. Whether extra-curricular activities are construed as necessary depends on which student is used as the archetype, but their value in public education is undisputed and they must be preserved.

The post-*Hartzell* California experience demonstrates that however unpopular, pay-to-play programs ought to remain legal and available to school administrators. Nevertheless, these programs should be used sparingly and only as a last resort to preserve activities in danger of elimination. Given the associated problems with using pay-to-play solutions—including the lack of state or voter oversight—their continued existence should hinge on their reasonableness. Reporting systems and procedures could serve to establish transparency of school fee programs and ensure that they are in fact reasonable. Finally, state oversight and local involvement in keeping fees reasonable would demonstrate clear support for public high school athletics, which would encourage more students to participate and reap the benefits associated therein.

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215. *Id.* (rejecting notion of paying to attend public school).

216. Hiestand, *supra* note 65, at 10C (reporting on Indiana’s rainy day plan: “an endowment for even tighter budgets”).

217. *Pay-to-Play Costs*, *supra* note 3 (suggesting alternatives to student fees).

218. Harris, *supra* note 35, at 1421 (describing local school board control over curriculum integral); *see also supra* notes 164-166 and accompanying text (discussing lack of state regulation).

219. *Hartzell*, 679 P.2d at 42 n.12.