



**STATE OF VERMONT**  
OFFICE OF LEGISLATIVE COUNCIL

**MEMORANDUM**

To: The House and Senate Committees on Education  
From: Donna Russo-Savage, Peter Griffin, and Rebecca Wasserman  
Date: February 5, 2015  
Subject: *Brigham v. State*, 166 Vt. 246 (1997)

This memorandum has been prepared in response to a variety of questions posed by Legislators regarding the scope of the Vermont Supreme Court's decision in *Brigham v. State*, 166 Vt. 246 (1997). It provides an overview of the decision and includes quotations and page references from the decision that may help to circumscribe the boundaries of a constitutionally-valid education funding system.

**I. BACKGROUND**

At the time of the *Brigham* decision, Vermont funded public education through a combination of local property tax assessments and State aid, known as the Foundation Plan. Under the Plan, the State annually set a foundation tax rate, which was a rate the State considered to be a reasonable rate of local property taxation necessary to enable each district to raise enough funds to provide "at least a minimum-quality education program." The amount needed for a minimum-quality program was known as the "foundation cost" (253). State aid was then to be calculated to make up the difference between the foundation cost for all students in a district and the amount that the district could actually raise at the foundation tax rate. Under the Plan, the foundation tax rate was not a minimum or maximum rate imposed on school districts. Rather, it was a rate used to calculate the amount of State aid that would be necessary to equalize disparities among districts' taxable property wealth.

The *Brigham* plaintiffs alleged that Vermont's education financing system violated the Vermont Constitution<sup>1</sup> by:

1. depriving students residing in "property-poor" school districts of their right to the same educational opportunities as students in wealthier school districts;

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<sup>1</sup> In the proceedings before the Superior Court, plaintiffs also alleged violations of the U.S. Constitution. The Superior Court rejected the federal claims on the basis of the *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), holding that there is no fundamental right to an education under the U.S. Constitution and any funding disparities under the Foundation Plan were rationally related to the State's legitimate purpose of fostering local control. The parties' joint appeal to the Vermont Supreme Court was based solely on plaintiffs' claims under the Vermont Constitution.

2. compelling property owners in “property-poor” school districts to contribute an unjust proportion of tax dollars to fund education; and
3. depriving “property-poor” school districts of the ability to raise sufficient money to provide educational opportunities equal to those in wealthier school districts and compelling the districts to impose disproportionately high tax rates (250).

## II. THE COURT’S DISCUSSION AND ANALYSIS

### A. Factual Discussion

The *Brigham* Court stated:

Even if we are to assume that [the Foundation Plan] is working adequately to accomplish its purpose, we must confront the constitutionality of the system in light of the limited nature of the Foundation Plan’s purpose. The object of the Plan is not equality of educational opportunity generally, or even equality of local capacity to facilitate opportunity. It is only to equalize capacity to produce a minimally adequate education, assuming the voters can sustain the state-selected tax rate (253-54).

The Court observed that adjustments were made to the State aid calculation that “generally reduce[d] its equalizing effect” (252). It also noted that wealthier school districts were relatively more able to raise the funds necessary to support an educational program that was more than “minimally adequate” than were poorer districts (253). “Thus, a foundation-formula, state-aid program can boost the capacity of the poorest districts, but still leave substantial deficiencies in overall equity” (253).

The Court determined that “the undisputed evidence ... amply support[ed] plaintiffs’ claim that wide disparities in student expenditures exist[ed] ... and that these disparities correlate[d] generally with taxable property wealth within the districts”<sup>2</sup> (255). The Court observed, however, that the record was

relatively less developed [regarding whether] funding disparities result in unequal educational opportunities, and specifically that ‘[c]omparatively low expenditures for education cause diminished educational opportunities for the students attending the affected schools.’ The essential point, however, [was] undisputed. [At the trial level, the State] had ‘concede[d] that the ... funding scheme denie[d] children residing in comparatively property-poor school districts the same “educational opportunities” that [were] available to students residing in wealthier districts’ (255).

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<sup>2</sup> As an example in support of its statement, the Court compared taxing ability and per-pupil spending in Richford (property tax base of \$140,000/student and average spending of \$3,743/student) and in Peru (property tax base of \$2.2 million/student and average spending of \$6,476/student) for FY1995.

The parties agreed that “unequal funding yields, at a minimum, unequal curricular, technological, and human resources.” The Court concluded, that although

equal dollar resources do not necessarily translate equally in effect, there is no reasonable doubt that substantial funding differences significantly affect opportunities to learn. . . . Money is clearly not the only variable affecting educational opportunity, but it is one that government can effectively equalize (255-56).

## **B. Analysis Under the Vermont Constitution**

Although the *Brigham* decision was limited to whether the then-current education financing mechanism was constitutional, it was based on a broader discussion of the constitutional right to an education and to equal educational opportunities.<sup>3</sup>

### **1. The Right to Education in Vermont — the “Education Clause” of the Vermont Constitution, Chapter II, § 68**

Chapter II, § 68 of the Vermont Constitution provides that “a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth.”<sup>4</sup> This provision, or a similar one, has existed since adoption of the first Vermont Constitution in 1777 (258). In fact, education is the only governmental service ever to have been included in the Vermont Constitution (258–59). The *Brigham* Court noted that the importance of education and the “fundamental obligation” of the State to provide it are “enduring themes in the political history of Vermont” and the subject of “forthright” declarations of the State’s courts (262–63). The Court stated that, “in Vermont, the right to education is so integral to our constitutional form of government . . . that any statutory framework that infringes upon the equal enjoyment of that right bears a commensurate heavy burden of justification” (256).

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<sup>3</sup> The *Brigham* Court’s analysis was based solely on the Vermont Constitution. The *Brigham* Court acknowledged that other states have considered constitutional challenges to locally funded educational systems and the Court provided examples of cases in which the funding systems in other states were determined to be constitutional and others in which they were determined to be unconstitutional (256). Ultimately, however, the Court declared:

Although informative, all of these cases are of limited precedential value to this Court because each state’s constitutional evolution is unique and therefore incapable of providing a stock answer to the issue before us. Similarly inapposite is the United States Supreme Court’s ruling in *Rodriguez*, which was based on the virtual absence in the United States Constitution of an education clause, as well as considerations of federalism, which understandably deterred the Court from defining educational rights applicable in all fifty states. . . . Neither constraint is applicable to this Court. An understanding of the constitutional issue presented requires, rather, a review of the specific historical and legal origins of the right to education in Vermont (257).

<sup>4</sup> The *Brigham* Court rejected the State’s argument that the change from “shall” in the 1777 provision (“A school or schools shall be established . . .”) to “ought” in both the 1786 and current versions demonstrated the intent to “relegate education to a mere discretionary ideal.” Rather, the Court stated, the framers considered both words to create a binding obligation (261-62).

The Brigham Court noted that although the State has a constitutional obligation to provide public education, the Constitution is silent regarding the way in which it must be *funded*. It pointed out that there is no constitutional mandate that public education be funded by locally-imposed property taxes or in any other specific manner (259).

“Although the Legislature should act under the Vermont Constitution to make educational opportunity available on substantially equal terms, the specific means of discharging this broadly defined duty is properly left to its discretion” (268).

In rejecting the State’s contention that towns, not the State, have the primary constitutional responsibility for education,<sup>5</sup> the *Brigham* Court declared that the State’s

argument fundamentally misunderstands the state’s constitutional responsibility ... for public education. The state may delegate to local towns and cities the authority to finance and administer the schools within their borders; it cannot, however, abdicate the basic responsibility for education by passing it on to local governments, which are themselves creations of the state.

The State’s position confuses constitutional ends ... with legislative means, that is, the methods it has employed to fulfill its obligation.

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Whether this dysfunction between means and ends ultimately denies the citizens of Vermont the “common benefit” ... of the education constitutionally guaranteed is the question to which we now turn” (264-65).

## **2. The Right to Equal Educational Opportunities — the “Common Benefits Clause” of the Vermont Constitution, Chapter I, Article 7**

Chapter I, Article 7 of the Vermont Constitution provides:

That *government is*, or ought to be, *instituted for the common benefit*, protection, and security *of the people*, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

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5 The State’s specific arguments, as stated and rejected by the Court, were:

1. “[T]he primary constitutional responsibility for education rests with the *towns* of Vermont, that its funding must be derived from whatever sources are available locally, that the only substantial tax available to towns is the property tax, and therefore that funding inequities are an inevitable — but nevertheless constitutional — consequence of local disparities in property wealth” (264; emphasis in the original).

2. The State’s “only responsibility, if any, is to ameliorate inequities of they become too extreme” (264).

The *Brigham* Court stated that Vermont’s Common Benefits Clause is “generally coextensive with the equivalent guarantee” of the Equal Protection Clause of the U.S. Constitution (265). It declined, however, to decide whether to use the rational basis test or whether stricter scrutiny was required for the issue before it. Rather, the Court declared:

Labels aside, we are simply unable to fathom a legitimate governmental purpose to justify the gross inequities in educational opportunities evident from the record. The distribution of a resource as precious as educational opportunity may not have as its determining force the mere *fortuity* of a child’s residence. It requires no particular constitutional expertise to recognize the capriciousness of such a system (265; emphasis in the original).

The State argued that even if there is a constitutional right to a public education, there is no evidence the right was intended to be distributed equally. The Court responded that “while the political means, or the political will, to effectuate the goal of educational equality may have been absent for many years, the *principle* of educational equality” has been present since at least the early 19th Century (265-67; emphasis in original). In addition:

[E]qual protection of the laws cannot be limited by eighteenth-century standards. While history must inform our constitutional analysis, it cannot bind it. Yesterday’s bare essentials are no longer sufficient to prepare a student to live in today’s global marketplace. To keep a democracy competitive and thriving, students must be afforded equal access to all that our educational system has to offer. In the funding of what our Constitution places at the core of a successful democracy, the children of Vermont are entitled to a reasonably equal share (267).

The Court also rejected the State’s assertion that the primary rationale for the financing system was the fostering of local control, stating that “there is no necessary or logical connection between local control over the raising of educational funds, and local decisionmaking with respect to educational policy” (265-67).

### III. THE COURT’S DECISION

#### A. Equal Educational Opportunity

The *Brigham* Court held that the then-current education financing system, “with its substantial dependence on local property taxes and resultant wide disparities in revenues available to local school districts, deprive[d] children of an equal educational opportunity in violation” of Chapter II, § 68 and Chapter I, Article 7 of the Vermont Constitution (249).<sup>6</sup>

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<sup>6</sup> The Court repeated this conclusion throughout the decision, *e.g.*:

When applying the Education and Common Benefits Clauses to the evidence, “the conclusion becomes inescapable” that the system had “fallen short of providing every school-age child in Vermont an equal educational opportunity” (249).

“[T]he current system, which concededly denies equal educational opportunities, is constitutionally deficient” (256).

Vermont’s education financing system fell “well short of achieving reasonable educational equality of opportunity” and violated “the right to equal educational opportunities under Chapter II, § 68 and Chapter I, Article 7 of the Vermont Constitution” (268).

We find no authority for the proposition that discrimination in the distribution of a constitutionally mandated right such as education may be excused merely because a “minimal” level of opportunity is provided to all. ... [Equal protection] is not addressed to ... minimal sufficiency but rather to the unjustifiable inequalities of state action’ (267–68).<sup>7</sup>

The Court noted, however, that

*absolute* equality of funding is neither a necessary nor a practical requirement to satisfy the constitutional command of equal educational opportunity. ... [D]ifferences among school districts in terms of size, special education needs, transportation costs, and other factors will invariably create unavoidable differences in per-pupil expenditures. Equal opportunity does not necessarily require precisely equal per-capita expenditures, nor does it prohibit cities and towns from spending more on education if they choose, but it does not allow a system in which educational opportunity is necessarily a function of district wealth.

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[To] fulfill its constitutional obligation the state must ensure *substantial* equality of educational opportunity throughout Vermont (268; emphasis in the original).

### **B. Tax Rate Equity**

The *Brigham* Court declined to rule on the property-owner and school-district plaintiffs’ claim of a right to tax rate equity.

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<sup>7</sup> Quoting Justice Marshall’s dissent in *Rodriguez*, 411 U.S. at 89.