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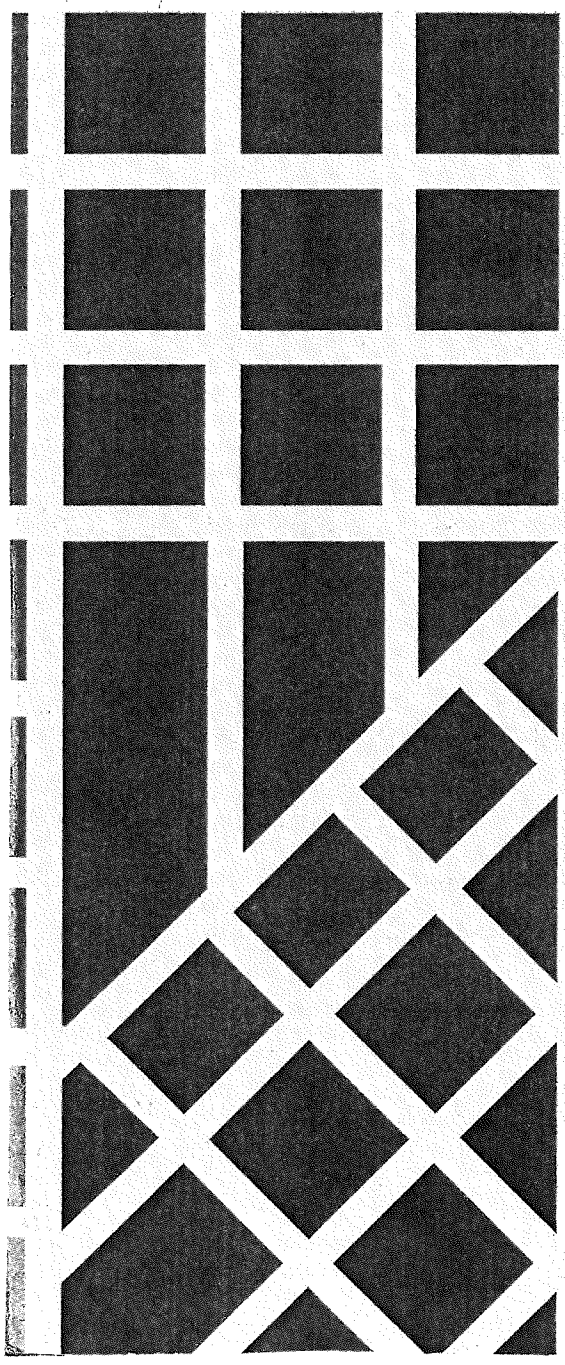

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(Handi-)Capping Equality and Excellence: The Unconstitutionality of Spending Caps on Public Education

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The year was 2081, and everybody was finally equal. They weren't only equal before God and the law. They were equal every which way. Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else. All this equality was due to the 211th, 212th, and 213th Amendments to the Constitution, and to the unceasing vigilance of agents of the United States Handicapper General.[1]

—KURT VONNEGUT, HARRISON BERGERON

My story mocks the idea of legally eliminating envy by outlawing excellence, which is precisely what the legislature means to do in the public schools, by putting a cap on local spending on them. Should it prevail it will be possible for me to say there are no longer any truly excellent public schools in all of Kansas. Talk about a level playing field![2]

—Kurt Vonnegut, Letter

[A]s we have made clear, Appellants'[schoolchildren] alleged injury, while flowing from the [spending] cap*, was not 'the inability of the [school] district to raise unlimited funds,' but rather the alleged unequal treatment (manifested in, among other things, lower per-pupil funding) that prevented them from even attempting to level the playing field.*[3]

—Petrella v. Brownback

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*Tristan L. Duncan is a partner in the law firm Shook, Hardy & Bacon L.L.P. and is one of the lead counsel in the *Petrella* litigation. This essay is an overview of a presentation made at the ABA Section of State and Local Government's Education Law Symposium, October 4-7, 2012, at the University of Missouri-Kansas City School of Law on "Hot Topics in Education." It discusses the significance of the pending *Petrella* case, which presents a federal constitutional challenge to the Kansas school finance laws, and, in particular, the State's spending cap on public education. Just after the symposium, on October 18, 2012, the U. S. Circuit Court of Appeals for the Tenth Circuit delivered a decision for the plaintiff schoolchildren and their parents, which this essay also discusses.

1. KURT VONNEGUT, HARRISON BERGERON (1961).

2. Unpublished Letter from Kurt Vonnegut to the Editor of the *Lawrence Journal-World* (May 12, 2005) (on file with author). The Vonnegut letter reads in relevant part:

> My story mocks the idea of legally eliminating envy by outlawing excellence, which is precisely what the legislature means to do in the public schools, by putting a cap on local spending on them. Should it prevail, it will be possible for me to say there are no longer any truly excellent public schools in all of Kansas. Talk about a level playing field!
>
> May I say to those who know my story, which ends in the execution of an enviably gifted student by a Handicapper General: We have always had Handicapper Generals among us, empowered by envy . . . .

3. *Petrella v. Brownback*, 697 F.3d 1285, 1295 (10th Cir. 2012) (emphasis added) (internal citations omitted).

IN A NATION FOUNDED ON LIBERTY, SELF-GOVERNMENT, EQUALITY, and local initiative—and at a time when America's educational system is widely recognized to be in financial crisis and requires substantial improvement—it's startling that any State would prohibit its communities from improving their public schools through collective civic action. But the State of Kansas has done just that. Ironically, while Kansans are free to spend unlimited amounts of money on junk food, video games, and other threats to the best interests of their children, Kansas bars its citizens from democratically taxing themselves to improve their child's education.

On December 10, 2010, facing significant budget cuts, teacher layoffs, escalating class sizes, and imminent closure of beloved neighborhood schools, concerned parents and local taxpayers filed suit in federal court challenging a state law that prohibits residents from raising extra money by voluntarily levying higher local taxes.[4] While some Kansans want to band together to avert the school funding crisis, the State prohibits them from doing so by forbidding them from collectively pooling their resources through voluntary local taxation. This prohibition is known as the "Cap on the Local Option Budget" (LOB Cap), and it functions as a ceiling on spending for public education (hereinafter the LOB Cap will be referred to as the Spending Cap).

Through the Spending Cap, the Kansas legislature essentially tells its citizens that they may not dedicate their own property to the future of their own children by raising their own taxes to improve their own public school system even though that is what the voters want to do. The lawsuit argues that local voters, not the state, should decide how much education they can afford.

As a result of the state's statutory school finance scheme, and through a perverse formula, Kansas allocates some of the lowest funding in the State to the plaintiffs' school district, the Shawnee Mission School District (SMSD). This gross disparity in funding deprives the SMSD's schoolchildren of the educational benefits that other districts receive when the State funds them at much higher levels. The Spending Cap prohibits local residents from correcting this financial imbalance. The statutory scheme also disproportionately requires SMSD residents to send a higher percentage of their tax revenue to the

4. *Petrella v. Brownback*, 697 F.3d 1285 (10th Cir. 2012). The author is one of the lead counsel in the *Petrella* litigation. Her co-counsel are Professor Laurence H. Tribe of Harvard Law School and Jonathan S. Massey of Massey & Gail, LLP of Washington, D.C.

state for redistribution to other districts; the state subsequently returns to the SMSD a significantly lower amount for spending on SMSD students.[5] It is a system that not only robs Peter to pay Paul, but then adds insult to injury by preventing Peter from spending his own money to achieve equality with Paul. Thus, *Petrella* is a federal lawsuit by parents and citizens that seeks to help their school district raise the necessary funding to provide not only the best education their community can afford but more importantly, a funding level equal to the higher level the state pays to better-funded districts. These citizens seek to use their own money to level the playing field.

Past school funding lawsuits have tried only to raise (or level) the *floor; Petrella* seeks to remove the *ceiling*. And while adequacy funding suits offer ample justifications for a higher floor—a higher foundational level of funding—the *Petrella* litigants challenge the constitutionality of a ceiling.

The lawsuit also attempts to champion participatory democracy at its finest. It defends the collective rights of citizens to band together as a community and use their own pooled resources to improve the education of their own children. It does not merely defend the fundamental rights of liberty, property, and equality guaranteed under the Constitution to individuals. Instead, it also advances collective associational and petitioning rights, the kind of collective political liberties by which participatory democracy is achieved and upon which this country was founded.

Finally, the essay argues that at a time when it is widely predicted that our children will have to shoulder the staggering national debt during their adult years, it is alarming that any state legislature would strip children of the tools they will need to earn a decent future living. The Spending Cap does exactly that. It prevents school children from obtaining knowledge and learning necessary to be competitive in a global economy. Better education is the stepping stone to better jobs and prosperity. Therefore, holding back some children to give the appearance of state-wide uniformity among all children merely sets our children up for failure both individually and as a society.

5. The District recently reported in its legislative platform that "[f]or every $1 Johnson County taxpayers send to Topeka, 34.5 cents are returned for school operations." Dan Blom, *Financial Crisis Tops Shawnee Mission District's Legislative Platform*, PRAIRIE VILLAGE POST, Oct. 25, 2012, http://pvpost.com/2012/10/25/financial-crisis-shawnee-mission-districts-legislative-platform-13169.

I. Equality Principles

A. *An Elephant in a Mouse Hole: An Equal Protection Claim in* Rodriguez *Footnote 107?*

San Antonio Indep. Sch. Dist. v. Rodriguez,[6] established that education is not a fundamental right and wealth is not a suspect classification. As a consequence, most school finance litigation in the last forty years largely ignored the federal constitution, and instead, relied on state constitutions as the better vehicle for challenging the underfunding of public schools. Buried in a footnote in *Rodriguez*, however, is a three-pronged roadmap for a potentially viable Equal Protection claim that has been untapped. Footnote 107, originally penned by Justice Byron White, who, writing in dissent, posited the possibility that voters in an underfunded school district might indeed want to voluntarily tax themselves more to improve their children's public education and achieve parity with better funded school districts. In that situation, Justice White expressly argued the State's ceiling on local taxation amounted to a violation of equal protection.[7]

The majority of the Court did not disagree with Justice White's analysis. Rather, the Court noted that the issue was not ripe because the tax rate in the case before it was far below the state cap, and "[a]ppellees do not claim that the ceiling presently bars *desired* tax increases in Edgewood or in any other Texas district. Therefore, the constitutionality of that statutory provision is not before us and *must await litigation in a case in which it is properly presented*."[8]

In *Hargrave v. Kirk*,[9] cited by the *Rodriguez* majority, a three-judge court had held unconstitutional a state law limiting local education funding by providing that any county imposing upon itself more than 10 mills ad valorem property taxes for educational financing would be ineligible to receive state funds for the support of its public schools. *Hargrave* opined:

> What rational basis can be found for the distinctions that are inherent in the Act? . . . As postulated by the plaintiffs, 'The legislature says to a county, "You may not raise your own taxes to improve your own school system, even though that is what the voters of your county want to do." ' We have searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act.[10]

6. 411 U.S. 1 (1973).
7. *Id*. at 65-68 (White, J., dissenting).
8. *Id*. at 50 n.107 (emphasis added) (citing Hargrave v. Kirk, 313 F. Supp. 944 (M.D. Fla. 1970), *vacated*, 401 U.S. 476 (1971)).
9. 313 F. Supp. 944 (M.D. Fla. 1970).
10. *Id*. at 948.

The court explained that "the school districts (counties) are seeking through the plaintiffs to be able 'to determine their own tax burden according to the importance which they place upon public schools.' "[11] "The Florida Act prevents the local Boards from adequately financing their children's education. The complaint is not that the state *permits* the Boards to spend less, but that it *requires* them to spend less. Plaintiffs are asking to be able to raise more money locally."[12] Although the judgment in *Hargrave* was subsequently vacated on other grounds,[13] the Supreme Court's citation to it in the *Rodriguez* opinion is instructive.[14] Unlike in *Rodriguez*, in *Petrella* the Cap has been met. The SMSD has maxed out its Spending Cap, and, therefore, has reached the maximum local spending permitted under state law. Due to the Kansas formula, coupled with the Spending Cap, the SMSD remains in the bottom 5% of Kansas schools in per pupil funding for classroom instruction and cannot overcome this underfunding.

Rodriguez footnote 107 sets forth essentially three elements for a viable Equal Protection challenge: (1) a state's underfunding of a school district, (2) a cap on local spending, and (3) voter willingness to voluntarily increase local taxes to overcome the underfunding.[15] In *Petrella*, plaintiffs argue all three elements are satisfied: (1) Kansas underfunds the SMSD by distributing an amount of money to it far below the per pupil funding it gives to other districts,[16] (2) the Spending Cap prevents increased local spending, and (3) the SMSD citizens want to raise local taxes to equalize the underfunding. *Petrella* thus

11. *Id.* at 949.
12. *Id.* (emphasis added).
13. Askew v. Hargrave, 401 U.S. 476 (1971).
14. *See* Robinson v. Cahill, 303 A.2d 273, 280 (N.J. 1973).
15. *See Rodriguez*, 411 U.S. at 50 n.107.
16. The SMSD is underfunded to a gross degree. Shawnee Mission is in the bottom 5% of all districts in the state in terms of money it receives from the state for its operating budget, which relates to classroom instruction, and it is in the bottom 25% of all districts in the state in terms of total funding between state, federal and local sources for classroom instruction. KAN. DEP'T OF EDUC., 5 YEAR PER PUPIL EXPENDITURES REPORT 2004-09, Petrella v. Brownback Trial Court Document No. 29-2 (on file with author). During the proceedings before the trial court, the state Defendants admitted that "SMSD receives less General State Aid per student than many other school districts" and that "General State Aid to SMSD may have declined and SMSD receives *less aid per student than most other school districts*." Opposition to Motion for Preliminary Injunction of Defendants Brownback, Schmidt and Estes, at 5, Petrella v. Brownback Trial Court Document No. 43 (Jan. 27, 2011) (on file with author) (emphasis added); Memorandum in Support of Motion to Stay or Dismiss filed by Defendants Sam Brownback, Ron Estes, and Derek Schmidt, at 15, Petrella v. Brownback Trial Court Document No. 37 (Jan. 21, 2011) (on file with author).

presents the very *Rodriguez* footnote 107 Equal Protection claim that the Supreme Court telegraphed almost forty years ago.

In addition to *Rodriguez* footnote 107, the *Petrella* plaintiffs' Equal Protection analysis is bolstered by yet another Supreme Court case—also authored by Justice White. While Justice White wrote his 1973 *Rodriquez* Equal Protection analysis in dissent, thirteen years later, Justice White wrote for the majority in *Papasan v. Allain*,[17] and this time, the equal protection claim was *not* dismissed.

What was the pivotal difference between the two cases? Justice White distinguished unequal funding arising from *naturally* occurring wealth disparities (as existed in *Rodriguez*), which were constitutional, from *intentionally* unequal allocations of state money (as plaintiffs alleged in *Papasan*), which could be unconstitutional.[18] The *Papasan* Court held that plaintiffs could state a claim that a state's intentional unequal distribution of school land funds violated equal protection to the extent such differential treatment was not rationally related to a legitimate state interest.[19] The Court explained that "funding disparities based on differing [naturally-occurring] local wealth"—*i.e.*, precisely the sort of wealth-based disparities the *Petrella* defendants argue justify the Spending Cap—far from being constitutionally problematic, are "a necessary adjunct of allowing meaningful local control over school funding."[20] In contrast, the *Papasan* Court held that a state's intentional unequal distribution of school land funds violated equal protection to the extent that such differential treatment was not rationally related to any legitimate state interest.[21] *Petrella* presents precisely that kind of state-created discrimination that *Papasan* found could be impermissible.[22]

17. 478 U.S. 265 (1986).

18. *Id.* at 289.

19. *Id.* at 288-89.

20. In *Rodriguez*, the Court upheld the Texas system of school finance,which preserved a large measure of local control to communities, based upon the rationale that"[t]he persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, *local control means . . . the freedom to devote more money to the education of one's children*." *Rodriguez*, 411 U.S. at 49. (emphasis added). In *Papasan*, the Court explained that "the variations that resulted from allowing local control over local property tax funding of the public schools were constitutionally permissible," because "the differential financing available to school districts was traceable to school district funds available from local real estate taxation, *not to a state decision to divide state resources unequally among school districts*." *Papasan*, 478 U.S. at 287-88 (emphasis added).

21. *Id.* at 289.

22. The *Petrella* defendants are various Kansas state officials including the Governor, the Attorney General, the Treasurer, the Commissioner of Education, and the Chair and members of the State Board of Education.

B. *The Cart Before the Horse: Non-severability, Redressability, and Standing*

Thirty-nine years after *Rodriguez* and twenty-six years after *Papasan*, the Tenth Circuit, in a unanimous panel opinion by Justice White's former law clerk, Judge David M. Ebel, revived the *Petrella* plaintiffs' Equal Protection challenge to the Kansas Spending Cap, which a lower court had dismissed on standing grounds. The lower court had determined the Spending Cap was not severable from the rest of the funding formula, concluding "because the LOB cap was not severable from the rest of the Act, a finding that the LOB cap was unconstitutional would result in the invalidation of the entire act," which, in turn, would eliminate any taxing authority for the [SMSD] to voluntarily raise more taxes.[23] "Further, because the district court concluded that Kansas law provided no independent taxing authority for school boards, a favorable decision for the plaintiffs would result in the SMSD school board being unable to levy any taxes at all."[24] So construed, the Kansas statutory non-severability clause would insulate the constitutionality of the Spending Cap from judicial review.

The Tenth Circuit rejected this Catch-22 logic. While the Tenth Circuit acknowledged that severing the Cap could bring down the whole funding scheme, the judges said the Cap's constitutionality was a matter for the Article III court to decide. The lower court could not duck its Article III duty to declare what the law is, *i.e.*, whether the Spending Cap is unconstitutional. In so holding, the court stated:

> In this litigation, Appellants, plaintiffs below, brought an action under 42 USC § 1983, challenging the statutory scheme by which the state of Kansas funds its public schools. The district court dismissed their suit for lack of standing. . . .We conclude that the Appellants have standing because their alleged injury—unequal treatment by the State—would be redressed by a favorable decision.[25]
>
> Only if, on remand, the district court concludes that the LOB Cap is unconstitutional should it then determine whether the cap is severable under Kansas law. . . . For the foregoing reasons, we hold that Appellants have standing to challenge the constitutionality of the LOB Cap, regardless of whether the cap is severable from the rest of the Act.[26]

The Tenth Circuit effectively said the lower court had put the cart before the horse.[27] The court first must determine the constitu-

23. *Petrella*, 697 F.3d at 1291.
24. *Id.*
25. *Id.* at 1289.
26. *Id.* at 1296.
27. *Id.* The Tenth Circuit stated the District Court's conclusions regarding severability of the Cap and taxing authority were "premature." *Id.* at 1292.

tionality of the Spending Cap, and only after that constitutional determination is it appropriate to determine the scope of relief for the constitutional violation. "Appellants could get meaningful relief under a variety of scenarios," Judge Ebel wrote.[28] "Most preferable to appellants would be [1] an invalidation of the LOB cap coupled with a finding that the cap is severable . . . [but] Appellants could also get relief through [2] an injunction against the act as a whole, because it would redress Appellants' alleged injury of discriminatory treatment. Or the district court could [3] strike down the LOB cap and the Act, but stay its order to give the Kansas Legislature time to respond.[29]

In reaching this conclusion, Judge Ebel explained:

> The injury Appellants claim to suffer is not "the inability of the district to raise unlimited funds through a local tax," but the deprivation of equal protection, suffered personally by Appellants, by virtue of the alleged "intentional underfunding" of their school district, coupled with the LOB cap's statutory prohibition on even attempting to raise more money to compensate for this alleged underfunding.[30]

Thus, the court's reasoning, with respect to its characterization of the injuries suffered by the students and their traceability to the Spending Cap, appears remarkably similar to the *Rodriguez* footnote 107 logic: ". . . Appellants' alleged injury, . . . flowing from the [Spending] Cap, was . . . the alleged unequal treatment (manifested in, among other things, lower per-pupil funding) that prevented them from even attempting to level the playing field."[31]

28. *Id*. at 1294.

29. *Id*. at 1294-95 (citing Davis v. Mich. Dep't of Treas., 489 U.S. 803, 817-18 (1989); Heckler v. Mathews, 465 U.S. 728, 740 (1984); Iowa-Des Moines Nat. Bank v. Bennett, 284 U.S. 239, 247 (1931); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978); Local 514 Transp. Workers Union of Am. v. Keating, 358 F. 3d 743, 750 (10th Cir. 2004); Jacobs v. Barr, 959 F.2d 313, 317 (D.C. Cir. 1992)).

30. *Id*. at 1294 (citations omitted); *see* Montoy v. State, 120 P. 3d 306 (Kan. 2005) (*Montoy I*). The *Montoy* litigation arose out of an earlier challenge to Kansas's school finance system, which resulted in a series of decisions from the Kansas Supreme Court starting in 2003. In 2005, the Kansas Supreme Court determined that the then-current school finance system (the School District Finance and Quality Performance Act) violated the state constitution because it "failed to make suitable provisions" for funding the public schools. *Id*. at 310. Judge Ebel noted, ". . . pertinent to this [federal] appeal, the *Montoy II* court concluded that the new legislation was still inadequate under the Kansas Constitution, both because it still failed to provide enough funding overall, and because its revisions to how local property taxes would be *levied and distributed* 'exacerbate[d] *disparities based on district wealth*." *Petrella*, 697 F.3d at 1290 (emphasis added) (citing Montoy v. State, 112 P.3d 923, 937 (Kan. 2005) (*Montoy II*)).

31. *Petrella*, 697 F.3d at 1295.

C. *State-Imposed (Handi-)caps as Illegitimate State Action*

The Fourteenth Amendment requires equal treatment of people similarly situated. Yet the Spending Cap is premised on the opposite notion—that *unequal treatment* is justified as a means to achieve *identical results*. What the Constitution requires is equal protection, however, not identical outcomes. "If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect."[32] Yet that is precisely the situation here. The notion of "inequality" in the form of too much education is an illegitimate state interest because it rests on disadvantaging and handicapping an arbitrarily disfavored group. The current school finance system holds back some, like SMSD students, solely in order that others not fall behind by comparison. Such a targeted burden designed to bring about an artificial identity of outcomes is the opposite of equal *protection* of the laws, and its purpose is not a legitimate governmental interest even under the rational basis test.[33]

Thus, the *Petrella* plaintiffs argue the Spending Cap fails federal constitutional scrutiny under the Equal Protection Clause because the articulated state interest—

> holding back the SMSD children as part of a policy of enforced mediocrity—is simply not a legitimate state interest. It is premised upon the blatantly prejudicial notion that if some children learn "too much," that is if they excel, then they will no longer be "equal," which outcome must, according to the State, be prevented by severely rationing the funds voters may raise from local taxpayers. It does nothing to increase spending for disadvantaged children in any district and, predictably, compromises the education of children—disadvantaged or not—who happen to attend public school in so-called 'rich' districts. Ironically, it creates an incentive for wealthy and middle-income parents to send their children to private schools, which reduces school diversity and further decreases public support for Kansas public schools.[34]

32. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Steven, J., concurring).

33. The Supreme Court has repeatedly struck down unsupported or arbitrary measures under the rational basis test. *See, e.g.*, Allegheny Pitts. Coal Co. v. County Comm'n of Webster County, 488 U.S. 336 (1989); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985). "The state must do more than justify its classification with a concise expression of an intention to discriminate." Plyler v. Doe, 457 U.S. 202, 227 (1982). In fact, the Spending Cap is properly subject to strict scrutiny. When legislation burdens the exercise of a right deemed to be fundamental, the government must show that the intrusion withstands strict scrutiny. Zablocki v. Redhail, 434 U.S. 374, 388 (1978). Under strict scrutiny, the state bears the burden of showing that the law is narrowly tailored to a compelling government interest. Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977).

34. Appellant's Brief at 22 Petrella v. Brownback, 697 F.3d 1285 (2012) (No. 11-3098).

Thus, the Petrella plaintiffs claim that the goal of holding back the spending on SMSD students in order to achieve a Procrustean "equality" is a wholly illegitimate governmental interest. Even in cases that do not involve fundamental rights, a court must be able to "ascertain some relation between the classification and the purpose it served. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[35]

The *Petrella* defendants' primary justification for the Spending Cap is that students in the SMSD must be prevented from attaining the educational achievements that local funding would make possible. Those achievements, in Defendants' view, would create "inequality." But that identical-outcome goal is simply an illegitimate one, because it rests on disadvantaging and handicapping an arbitrarily disfavored group. The search for a rational relationship, while deferential, "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[36]

It is hard to parse a rational basis or legitimate governmental purpose for the Spending Cap. It manifestly reduces educational quality. It harms special needs students, average students, and in fact *all* students. The Spending Cap prevents SMSD from devoting additional resources to at-risk, special needs, and underprivileged students. Nor does the Spending Cap serve any purpose in promoting educational "equity." On the contrary, it *reduces* educational equity by preventing the SMSD from compensating for the low per-pupil funding provided by the State. The Spending Cap prevents the district residents from correcting this imbalance. Rather than addressing educational inequalities, it compounds them.[37]

The Spending Cap is not an example of a neutral law having a discriminatory impact because it is specifically *intended* to disadvantage

35. Romer v. Evans, 517 U.S. 620, 633 (1996).

36. *Id.*

37. Ironically, under *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002), public money may be directed to private or parochial schools according to a parental freedom of choice principle, but in the same community, the Spending Cap prevents local spending to achieve educational excellence in public schools. A state that permits public subsidization of private and parochial schools through, for example vouchers and tax credits, but bars supplementation of public schools through voluntary local tax increases, would seem to defeat, rather than further, the parental freedom of choice rationale justifying vouchers and tax credits. Thus, the Spending Cap obstructs parental freedom of choice.

a class of students: It deliberately holds back those the State perceives as too far ahead in order to accomplish "equity" (*i.e.*, identical student outcomes). No matter what labels are used, handicapping excellence is an illegitimate state purpose.

II. Excellence Principles

A. *Spending Caps and the First Amendment: The Unconstitutional Deprivation of "Future Melvilles and Hawthornes"*

Because public education involves communication of ideas and information, it is expressive activity entitled to First Amendment protection. Restricting voluntary spending on education inhibits this expressive activity. Indeed, the people, through the ballot box, must control the maximum level of knowledge and information they can afford, not the state. In *Petrella* the plaintiffs seek to protect their fundamental right to spend their own money on something they value: the public education of their children. The arbitrary Spending Cap abridges this basic right.

The U.S. Supreme Court has repeatedly held that government-imposed spending caps may not be used as part of misdirected "egalitarian" efforts to "equalize" differences among different communities.[38] The Spending Cap denies parents within local school districts the right to spend their own money to improve the education of their own children. The inability of parents to voluntarily use the Local Option Budget, and its related tax levy mechanism, to equalize disparities in state-provided education funding is particularly harmful under a compulsory system of education. Parents are required by law to send their children to school, yet are denied the right to ensure that the schools to which they must send those children have sufficient funding to serve their educational purpose. Thus, the *Petrella* plaintiffs maintain that the Spending Cap violates the First Amendment.

The Spending Cap not only impinges on the *Petrella* school children's *individual* free speech rights to use their own family and community's money to acquire knowledge and learning uninhibited by the

38. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .." Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) (per curiam). *See generally* Davis v. Fed. Election Comm'n, 554 U.S. 724, 741-42 (2008); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 n.30 (1978); Emily's List v. Fed. Election Comm'n, 581 F.3d 1, 6 n.2 (D.C. Cir. 2009).

State, but it also impermissibly burdens the *Petrella* parents and citizens' *collective* First Amendment rights to assemble, associate and work together to promote the educational interests of their community's children. The Supreme Court has recognized that the Constitution protects "the practice of persons sharing common views banding together to achieve a common end."[39] That is particularly is that true when the end at stake involves the communication of information and ideas, the very heart of the educational enterprise. Yet, the Spending Cap eviscerates the right to work together to seek local tax increases in local school districts. It eliminates any education-enhancing purpose citizens might have in working together to seek an increase in local school funding, or any incentive for them to do so, because it provides that any resulting funds may not be spent on local education. In theory the citizens can organize, but they are prevented by law from achieving their speech-related objective of promoting education. The Spending Cap perversely limits money collectively raised to spend on student education, but not on school building construction, roads, sewage disposal, or other activities.[40] This anomalous result turns constitutional values on their head because education is "perhaps the most important function of state and local governments" and is "importan[t] . . . to our democratic society."[41] It thus burdens the right of political association for speech-related ends by eliminating the

39. Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290, 294 (1981); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, *educational*, religious, and cultural ends.") (emphasis added).

40. Most galling is the fact that the School Finance law permits the district to raise money through local taxes for building construction, and there are ample resources—a surplus in fact—within that "capital outlay" account. Deposition Excerpts from deposition of Shawnee Mission School District Assistant Superintendent Robert DiPeirro, at 143:6-16, Petrella v. Brownback Trial Court Document No. 53-1 (on file with author). Yet, the Spending Cap prevents the district from using local money for desperately needed classroom instruction and reduction of pupil teacher ratios, which by itself is an irrational distinction. *Id.* ("The Shawnee Mission School District has a cash balance in the capital outlay account. That money cannot be used to lower classroom ratios because it can only be used to maintain and build construction projects."). The Spending Cap is like a "neutron bomb": it devastates the human element of education—student learning—while leaving bricks and mortar intact.

41. Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *see also* Plyler v. Doe, 457 U.S. 202, 221 (1982) (reaffirming the "importance of education in maintaining our basic institutions" and education's "fundamental role in maintaining the fabric of our society"); Ambach v. Norwick, 441 U.S. 68, 76 (1979) (noting "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests").

speech-linked benefit that citizens might hope to achieve by trying to organize a local tax increase in their school district.

The Spending Cap operates just like laws that the Supreme Court has invalidated as restrictions on speech because they eliminate the gains a speaker expects to receive from expression. In *United States v. National Treasure Employees Union*,[42] for example, the Supreme Court struck down a limit on honoraria because it decreased the incentive of government employees to speak.[43] The Court observed: "Although [the statute] neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on expressive activity."[44] "We have no way to measure the true cost of that burden, but *we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne*."[45] The same is true here: the Spending Cap's devastating effects on the *Petrella* schoolchildren threatens to choke off educational achievement and excellence. By eliminating the speech-related gain from engaging in constitutionally protected activities, the Spending Cap abridges fundamental rights.

B. *Fundamental Rights: Liberty and Property Interests in the Care and Upbringing of Children*

The *Petrella* plaintiffs also argue that the Spending Cap is unconstitutional because it unduly interferes with the well-settled fundamental right of parents to direct and control the upbringing of their children.[46] The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law."[47] The Due Process Clause includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."[48] Among the fundamental liberties traditionally protected by the Due Process Clause is the right

42. 513 U.S. 454 (1995)
43. *Id.* at 469
44. *Id.* at 468.
45. *Id.* at 470 (emphasis added).
46. *Petrella*, 697 F.3d at 1291 (The *Petrella* plaintiffs assert "a fundamental liberty interest in directing and participating in the upbringing of their children; a fundamental property interest in spending their own money to improve public education in their district, thereby protecting property values[.]").
47. U.S. Const. amend. XIV, § 1; *see also* Washington v. Glucksberg, 521 U.S. 702, 719 (1997).
48. *Glucksberg*, 521 U.S. at 720; *see also* Reno v. Flores, 507 U.S. 292, 301-02 (1993).

of parents to control and participate in the education of their children. In fact, the Supreme Court has opined that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."[49] As long ago as 1923, the Supreme Court held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own."[50] Two years later, in *Pierce v. Society of Sisters*,[51] the Court again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control."[52] The Court explained that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[53]

The Court has frequently reiterated the "constitutional dimension to the right of parents to direct the upbringing of their children."[54] In *Prince v. Massachusetts*,[55] the Court confirmed that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[56] In *Stanley v. Illinois*,[57] the Court opined that "[i]t is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' "[58] And in *Wisconsin v. Yoder*,[59] the Court observed that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[60] "[I]t cannot now be doubted that the Due Process

49. Troxel v. Granville, 530 U.S. 57, 65 (2000).
50. Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923).
51. 268 U.S. 510 (1925).
52. *Id.* at 534-35.
53. *Id.* at 535.
54. *Troxel*, 530 U.S. at 65.
55. 321 U.S. 158 (1944).
56. *Id.* at 166.
57. 405 U.S. 645 (1972).
58. *Id.* at 651 (citation omitted).
59. 406 U.S. 205 (1972)
60. *Id.* at 232; *see also* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (noting that "the relationship between parent and child is constitutionally protected"); Parham v.

Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[61]

In addition to these liberty interests, the Supreme Court also has recognized that an individual has a fundamental right to make decisions about the use of his or her own property, especially when the individual wants to use his or her own property to aid, nurture, and care for his or her own children. Thus, in *Moore v City of East Cleveland*,[62] the U.S. Supreme Court invalidated a local ordinance on substantive due process grounds because the law prohibited a grandmother from using her own property to house her grandchildren. In so holding, the Court opined that the law unduly interfered with both property and liberty interests protected under the Fourteenth Amendment.[63]

The interrelationship among the liberty and property interests and collective political freedoms protected by the Fourteenth Amendment is illustrated by *Nixon v. Shrink Missouri Government PAC*,[64] in which the Supreme Court struck down state-imposed spending caps on political campaigns as unconstitutional violations of free speech. In a concurring opinion, Justice Stevens observed that the expenditure caps were also unconstitutional under a due process analysis, relying on *Moore v. City of East Cleveland:* "[o]ur Constitution and our heritage properly protect the individual's interest in making decisions about the use of his or her own property. Governmental regulation of such

J. R., 442 U.S. 584, 602 (1979); Santosky v. Kramer, 455 U.S. 745, 753 (1982); *Glucksberg*, 521 U.S. at 720.

61. *Troxel*, 530 U.S. at 66. As discussed more fully in the this section discussing the Substantive Due Process rights implicated by the Spending Cap, as well as the prior section discussing the First Amendment, the *Petrella* plaintiffs seek to vindicate conceptually distinct but interrelated fundamental rights, *e.g.*, the parental right to care for and nurture each individual's own children, *Troxel*, and the First Amendment associational and petitioning rights to bring about collective action to effectuate more fully that parental right. It is interesting to note that Justices Kennedy and Scalia have expressed a preference for a First Amendment analysis to a Due Process analysis to vindicate such parental rights. *Troxel*, 530 U.S. at 95-96 (Kennedy, J., dissenting) ("*Pierce* and *Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion.") Justice Kennedy describes the right protected in those cases as "an independent right of the parent in the 'custody, care and nurture of the child,' free from state intervention" as well as "a parent's right to raise his or her child free from unwarranted [state] interference." *Id.* at 94, 95.

62. 431 U.S. 494 (1977)

63. *Id.* at 505-06; *see also id.* at 513 (Stevens, J., concurring) (noting that the principle question is whether the housing ordinance impermissibly restricted a right to use one's own property).

64. 528 U.S. 377 (2000)

decisions can sometimes be viewed either as 'deprivations of liberty' or as 'deprivations of property.' "[65]

The *Petrella* plaintiffs maintain that like the unconstitutional spending cap in *Nixon*, the Kansas education Spending Cap similarly abridges fundamental liberty and property interests and the political freedoms guaranteed to them by the First and Fourteenth Amendments to the United States Constitution.

C. *Constitutional Cross-Roads: The Neighborhood School as a Locus of Civic Republicanism, Federalism, and Social Progress*

In *Missouri v. Jenkins*,[66] the Court held that a district court had abused its discretion in fashioning a remedy to end segregation in the Kansas City, Missouri School District, because the district court had ordered the direct imposition of a tax increase on Kansas City, Missouri citizens, *rather than enjoining the state's cap on local taxation for public education*. The federal district court had tried to unilaterally raise local taxes to fund its integration plan to stem "white flight." The Court of Appeals reasoned that permitting the local school district to tax itself beyond the level of the state cap on taxation was more consistent with democratic values, that "permitting the school board to set the levy itself would minimize disruption of state laws and processes and would ensure maximum consideration of the views of state and local officials."[67] The Supreme Court endorsed that view: "In assuming for itself the fundamental and delicate power of taxation, the District Court not only intruded on local authority but circumvented it altogether."[68] The Court stressed the importance of "a proper respect for the integrity and function of local government institutions. *Especially is this true where, as here, those institutions are ready, willing, and—but for the operation of state law curtailing their powers—able to remedy the deprivation of constitutional rights themselves*."[69]

So here, too, the *Petrella* plaintiffs are ready, willing, and able to exercise their rights to act collectively with other citizens within the district, to propose, vote for, pass and pay a tax increase above and beyond the Spending Cap to achieve parity with other school districts

65. *Id.* at 398-99 (Stevens, J., concurring) (citing *Moore*, 431 U.S. at 513 (Stevens, J., concurring in judgment)).
66. 495 U.S. 33 (1990).
67. *Id.* at 43.
68. *Id.* at 51.
69. *Id.* (emphasis added).

that enjoy higher per-pupil funding. As the Supreme Court indicated, enjoining the cap on local taxation serves democratic self-governance.

In contrast, permitting the Spending Cap to endure is constitutionally untenable. It amounts to telling the *Petrella* parents and citizens that they are helplessly stuck with imminent harm to their children brought about by the school funding crisis, and that there is nothing meaningful that they can do as a community to avert the budgetary crisis (other than host bake sales and car washes to raise paltry private donations). As Justice Kennedy stated in concurrence, ". . . the power of taxation must be under the control of those who are taxed. This truth animated all our colonial and revolutionary history."[70] State ceilings on local taxation, therefore too, ". . . can lead to deep feelings of frustration, powerlessness, and anger on the part of taxpaying citizens,"[71] because they interfere with voter control of the level of taxation voters are willing to impose upon themselves for the benefit of their children.[72] If the bedrock democratic principle "consent of the governed" means anything, then it first and foremost must mean that the state cannot deprive voters of the right to choose to support public education to avert imminent harm to their children's opportunities for improved learning—the stepping stone to better jobs, prosperity and participation in our democracy as informed citizens.[73]

Thus, *Petrella* is significant from an historical perspective in the development of education law and civil rights litigation.[74] *Jenkins* involved the Kansas City, Missouri school district, which is located a few miles to the east of the Shawnee Mission School District in Johnson County, Kansas. In neighboring Shawnee Mission, minority and English Language Learner student populations have sky-rocket[ed],

70. *Id*. at 68 (Kennedy, J., concurring in part and concurring in the judgment)

71. *Id*. at 69.

72. *Cf*. Bond v. United States, 131 S. Ct. 2355, 2364 (2011) (" '[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power. . . . It allows States to respond, *through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times* without having to rely solely upon the political processes that control a remote central power. . . . [T]he individual liberty secured by federalism is not simply derivative of the rights of the States. Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.") (emphasis added) (internal citations omitted).

73. *See generally* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Heather K. Gerken, *Foreword: Federalism All The Way Down*, 124 HARV. L. REV. 4 (2010).

74. *Brown v. Board of Education*, 347 U.S. 483 (1954) involved the Topeka, Kansas Board of Education and Kansas school children. Geographically, Topeka is but a relatively short distance from Shawnee Mission, Kansas, approximately an hour's drive.

with a recent 116% increase.[75] The SMSD community has welcomed this diversity.[76] As plaintiff Diane Petrella testified, when moving from Michigan, she looked for a community with strong local support for public education and a rich diverse population as well. She comparatively shopped for such a neighborhood throughout the Kansas City metropolitan area and selected the SMSD.[77]

The Shawnee Mission School District sits at a geographic, historic and social crossroads. It is poised to move forward as a culturally diverse and welcoming community that supports as rigorous a public education as it collectively and voluntarily can afford—all the while acknowledging its responsibility to contribute substantial tax revenue to the rest of the state to fund the education of other children in other districts. The Spending Cap short-circuits this consensual social progress.

The Shawnee Mission School District, therefore, represents the very kind of "laboratory of democracy" that federalism principles are supposed to protect.[78] Far from being at odds with federalism principles,

75. Over the last five years, there has been a 73% increase of minority students and English-Language Learners in the SMSD as well. SHAWNEE MISSION SCHOOL DISTRICT 2009-2010 LEGISLATIVE PLATFORM, at 2, Petrella v. Brownback Trial Court Document No. 29-13 (on file with author); SHAWNEE MISSION SCHOOL DISTRICT 2011-2012 LEGISLATIVE PLATFORM, at 2, Petrella v. Brownback Trial Court Document No. 29-14 (on file with author).

76. In fact, the KANSAS CITY STAR recently reported that the Shawnee Mission and Johnson County areas have experienced a "new diverse identity." As the article reports, "Hector Cruz and Brian Hughes came here from different worlds and different cultures thousands of miles apart. But they had similar ideas about how white their Johnson County neighborhoods would be. They couldn't have been more wrong or more surprised. 'I didn't know there would be people from India, Pakistan, China and other places of the world," said Cruz, who moved to Johnson County from Mexico City in 2006 when his company was bought out and he was transferred. . . . 'There's a lot of diversity here. There's no question about it. It's a good thing,' said Hughes, whose first next-door neighbors were Ethiopian. 'I was expecting a white monolithic, segregated neighborhood where we would be with other Caucasians. Coming to Kansas, you just don't think of a multicultural, diverse society,' Hughes said. Clearly, the joke about Johnson County's population being as beige and bland as its architecture is more suited to the 1970s than 2011. Over the last 30 years, Johnson County has evolved from a largely white community to one with an array of races and ethnicities that can be seen in our schools, churches, restaurants, hospitals and grocery stores." Brad Cooper, *The changing face of Johnson County*, KANSAS CITY STAR, Dec. 21, 2011, http://joco913.com/news/the-changing-face-of-johnson-county/#storylink=misearch.

77. Affidavit of Diane Petrella, at 1-2, Petrella v. Brownback Trial Court Document No. 29-31 (Jan. 10, 2011) (on file with author).

78. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *cf. Bond*, 131 S. Ct. at 2364 ("The federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes[.]' . . . By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.").

lifting the Spending Cap serves them. In *Petrella*, the SMSD's School Closure Plan, as a rational response to the State's budget cuts, runs directly contrary to a wealth of social science research establishing the importance of neighborhood schools for educational achievement, as well as the social and health benefits for children from the ability to walk and ride their bikes to school. Neighborhood schools foster a sense of community, help prevent obesity, promote energy conservation, and enhance property values—all of which attract new families to the neighborhood and keep the community vibrant.[79] The loss of neighborhood schools leads to declining enrollments, which in turn triggers further loss of revenue because school funding in Kansas is allocated on a per pupil basis. Hence, closing neighborhood schools in a misguided effort to save money is ultimately a self-defeating proposition.

III. Kurt Vonnegut on Liberty and Equality in Public Education

In 2005, the *Montoy* case was pending before the Kansas Supreme Court. Shawnee Mission parents filed an *amicus* brief in that case questioning the constitutionality of the Cap.[80] That brief invoked the timeless literary masterpiece, HARRISON BERGERON, a satirical short story by Kurt Vonnegut to help demonstrate the fundamental unfairness and unconstitutionality of the Spending Cap.

In HARRISON BERGERON, Vonnegut creates a future society in which equality is achieved by literally handicapping people—physically—so that nobody is better than anyone else. Nobody is smarter, faster, or stronger. This government-created "equality" is enforced by the Handicapper General, an official whose job it is to install physical handicaps on the talented, skilled, and industrious to insure universal, unthreaten-

79. Nicole Stelle Garnett, Professor of Law, University of Notre Dame Law School, *School Closures and Urban Neighborhoods: Lessons from Chicago's Catholic Schools*, JOHN B. GAGE LECTURE, UMKC SCHOOL OF LAW, KANSAS CITY, MO (Oct. 4, 2012); Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Charter Schools, and Urban Neighborhoods*, 79 U. CHI. L. REV. 31, 32-33, 50 (2012) (citing WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT, TAXATION, SCHOOL FINANCE AND LAND-USE POLICIES 145-55 (Harvard 2001)) (discussing the shift in the American educational landscape with the rapid disappearance of urban Catholic schools and the rise of charter schools. They discuss their empirical research regarding the comparative role of Catholic versus charter schools as "community institutions"). "[P]arent networks at neighborhood public schools enable 'community-specific social capital.'" *Id.* at 50 (citing William A. Fischel, *Why Voters Veto Vouchers: Public Schools and Community-Specific Social Capital*, 7 ECON. GOVERNANCE 109, 112-17 (2006)).

80. The author of this article was also the author of that 2005 *amicus* brief.

ing mediocrity. The General achieves this Procrustean objective by outlawing excellence.

The *Montoy amicus* brief drew parallels between the Vonnegut satire and the real life application of the Spending Cap to Kansas schoolchildren. Just as the cranial handicaps, crudely installed in the brain of the gifted young man, Harrison Bergeron, were intended to diminish his intelligence so that others, who were less smart by comparison, appeared identical and therefore "equal," so, the brief argued, the education Spending (Handi-)Cap similarly crippled academic excellence so that public education state-wide also perversely appeared identical and therefore "equal" by comparison. The HARRISON BERGERON satire demonstrated a critical point of the brief: the Spending Cap functioned like an oppressive handicap, eliminating excellence and destroying any truly meaningful understanding of equality. Therefore, the Spending Cap, like the handicaps in HARRISON BERGERON, should not seriously be considered legitimate state action.

In 2013, eight years after the *Montoy amicus* brief was filed, in the wake of the press surrounding the *Petrella* litigation, there is now a growing awareness and concern about education Spending Caps and similar prohibitions, rationing and/or bootlegging of education among our public schools. It is now even more disturbing than ever that, in Kansas, real legislators are passing real laws, applauded by some real journalists, that have the deliberate purpose of legally eliminating envy by outlawing excellence in some real schools. As Vonnegut perceptively expressed it in 2005, in his heretofore unpublished Letter to the Editor, the reality of public school finance in Kansas is "*as preposterous to me as any lampoon I ever wrote*."[81]

81. *See* Vonnegut Letter, *supra* note 2. The letter reads in pertinent part:

In regard to my phone interview with your reporter Scott Rothschild, which had to do with my story "Harrison Bergeron" . . . Mr. Rothschild gave me no clear idea of what the [*Montoy*] case was about, which I now know to be actions by the legislature as preposterous to me as any lampoon I ever wrote. My story mocks the idea of legally eliminating envy by outlawing excellence, which is precisely what the legislature means to do in the public schools, by putting a cap on local spending on them. Should it prevail, it will be possible for me to say there are no longer any truly excellent public schools in all of Kansas. Talk about a level playing field!