Adequacy and the Rights Revolution: Reinterpreting the Education Clauses in State Constitutions

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In the past decade, a number of state courts have found a new “fundamental right” to education in centuries-old state constitutional provisions. These courts have then used the fundamental rights determinations to establish levels of educational funding that, in the court’s view, are required to be constitutionally “adequate,” and even to mandate the content of the curriculum itself, ignoring considered legislative judgments to the contrary in the process. In this paper, I explore the historical understanding of the actual language of the state constitutional provisions on which these new state court decisions rest, concluding that in almost every instance the original provisions were designed to set only hortatory goals for the legislature, not to confer judicially-enforceable individual rights to certain levels of financial support for, or quality of, public education. I next consider some recent constitutional amendments that might be read as supporting the “fundamental rights” holdings, and conclude that in most cases these amendments, too, fall short of conferring a judicially enforceable right to a constitutionally mandated “adequate” public education. Finally, I take issue with the judicial holdings that have, through the use of “fundamental rights” determinations, injected themselves into what is inherently a policy judgment, reserved by the state constitutions to the political branches of government, and conclude with a cautionary note about the threat to participatory democracy these holdings might pose.
A Constitutional Puzzle

In 1998, I published a somewhat provocative article in the American Journal of Legal History entitled “When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education, 1776-1900.” Starting with the Supreme Court’s doctrinaire, positive-law holding in San Antonio Independent School District v. Rodriguez that education was not a fundamental right for purposes of federal constitutional analysis because there was no mandate for education to be found, either directly or indirectly, in the federal Constitution, I undertook a comprehensive review of education provisions in the constitutions of the several states. At first glance, one might have concluded that under the Rodriguez formulation, the states would be treating education—by which I mean state-financed education—as a fundamental right. The state constitutions from the outset, after all, contained pretty significant provisions addressing education.

My review of the first century and a quarter of our nation’s history led me to draw just the opposite conclusion, however. As described more fully below, most of the education provisions in state constitutions adopted during the eighteenth and nineteenth centuries were only hortatory, and even those that contained apparently obligatory language were in most cases not interpreted as imposing any specific mandate on the legislature, and certainly not as conferring a judicially-enforceable right to education.

The “hortatory” story from the eighteenth and nineteenth centuries holds true through the first three-quarters of the twentieth century. Even states that adopted somewhat obligatory language continued to treat that language as setting legislative goals, not judicially-enforceable mandates. Not until the 1970s, following the “rights revolution” of the Warren Court, do we find courts actually starting to hold that the education provisions in the state constitutions afforded
“fundamental right” status to public education, conferring a judicially-enforceable individual
right not just to an education but to a certain level of financing for, and even a certain quality of,
education. In most cases, these court decisions were rendered without much focus on the actual
language of the particular education provision at issue, and without much consideration of the
inherent policy judgments that underlie determinations of funding levels and quality. Far from
enforcing a constitutional mandate, therefore, these decisions have affected a fundamental shift
of policy-making power away from legislatures to the courts, posing a serious threat to
separation of powers and ultimately government by consent itself.

**18th and 19th Century Recap**

Most of the state constitutional provisions adopted during the founding period contained
language that was clearly only hortatory, describing goals that the legislatures “ought”4 to pursue
“as soon as conveniently may be,”5 but most assuredly not providing a judicially enforceable
right to any particular level or quality of education. A few early states flirted with obligatory
constitutional language, but these provisions obligated the legislature to establish schools,6 not to
provide an individual right to education, and even these nominally obligatory provisions were
quickly repealed or entirely unfulfilled. Georgia, for example, did not establish a common
school system until 1873, despite language in the Georgia Constitution of 1777 mandating that
“schools shall be erected in each county, and supported at the general expense of the State, as the
legislature shall hereafter point out.”7

New state constitutions adopted in the early part of the nineteenth century almost
uniformly followed the “hortatory” model if they made provision for education at all. Two states
did open the door for a claim of educational right, but the door was quickly closed by judicial
interpretation in one of them—and the mandate in the other seems not to have been enforced for
a century and a half. The constitutions of Indiana and Connecticut in 1816 and 1818, respectively, both required that the state’s schools be open to “all” the children of the state. Indiana’s provision was mitigated somewhat by the caveat, “as soon as circumstances will permit,” but even more by a decision of its Supreme Court holding that the constitutional mandate that the state’s schools be “equally open to all” meant “all the white children resident within the district.”

Oddly, the Indiana court relied on an Ohio court interpretation of the Ohio Constitution, which contained only hortatory language quite unlike the obligatory language of the Indiana Constitution.

Of the nearly two dozen new or amended constitutions that were adopted between 1835 and 1860, more than half followed the hortatory model. Several contained obligatory language, typically requiring the legislature to establish a “system” of schools, even a “thorough and efficient system,” rather than conferring an individual right to public education, enforceable in the courts of law.

Three—New Jersey in 1844, Wisconsin in 1848, and Iowa in 1857—contained requirements that their “system” be free and open to “all.” But Iowa’s mandate was gutted by another clause allowing the legislature to void the mandate any time after 1863, which it promptly did in 1864. Wisconsin’s mandate was gutted by judicial interpretation in the 1886 decision of *The State ex rel. Comstock v. Joint School District No. 1 of Arcadia*, holding that a child residing in a district without a school had no constitutional right to attend school in a neighboring district free of charge. And New Jersey’s mandate, held to provide a “legal right” for children to attend the school in their district, was nevertheless interpreted as not applicable if “the schools . . . were full.” In other words, the constitutional provision conveyed a right to access whatever educational system was available, but left it to the legislature to determine the scope of the educational opportunity that would be provided.
Following the Civil War, a number of states adopted new constitutional language specifying that the legislature create a “thorough and efficient system” of education open to “all children” in the state. Louisiana in 1864, Missouri in 1865 and 1875, Pennsylvania in 1873, Nebraska in 1875, and Colorado in 1876 all contained this apparent mandate, as did the “reconstruction” constitutions in Alabama in 1867 and Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas in 1868. The Illinois Constitution of 1870 added the additional mandate that a “good” common school education be provided to all children, the first state to include such an obviously qualitative component.

After reconstruction, most of these states continued to have constitutional provisions apparently mandating the creation of “systems” of education open to “all” children in the state. In none of the states, though, had these clauses been interpreted as conferring a judicially enforceable right to education at all, much less a judicially-enforceable right to a certain level of education spending or a certain quality of educational opportunity. Whatever the state legislature chose to provide had to be available equally to all the children of the state, but that requirement was imposed as much by the federal Constitution’s Equal Protection clause as by state provisions requiring that whatever education systems were established be open to “all” children.

20th Century Constitutional Amendments

Most of the new state constitutional provisions for education adopted in the twentieth century continue to track the language of provisions that were adopted in the late nineteenth century and that were not interpreted at the time to confer a judicially-enforceable right. These provisions principally fell into two groups—one requiring the state legislature to establish a system of schools, and the other requiring that education in the system be equally open (and free) to all children, which arguably provided stronger grounds for “individual right” arguments, at
least to the claimed right of equal access to whatever educational system was provided. In the former category, Arkansas in 1968 retreated from the 1874 language extending free education to “all” children between the ages of six and twenty-one, providing instead for a “suitable and efficient system of free public schools” “to secure to the people the advantages and opportunities of education,” which has not been found to provide a fundamental right to education. Florida added a provision to its Constitution in 1968 that “[a]dequate provision shall be made by law for a uniform system of free public schools,” and shortly thereafter the Florida Supreme Court found this “system” clause to confer an individual “right,” but that holding was effectively overturned by a 1998 Amendment to the Florida Constitution declaring education as a “fundamental value” rather than a fundamental right, expressly to avoid the consequences of the latter interpretation that had been given by the Florida courts. 

Georgia wanted its system of free common schools to provide “an adequate education for the citizens,” a clause which its courts first interpreted in 1979 as creating a right, but then in 1981 held the right not to be “fundamental.” Hawaii provided for a “system of public schools,” and Louisiana directed the legislature to establish a “public educational system,” but neither provision has been held to confer an individual or fundamental right.

Indeed, more than half the states have thus far adhered to the view, universally accepted through the end of the nineteenth century, that the provision of public education was inherently a policy judgment best left to the discretion of the political branches, primarily the legislature. Idaho, which provided for a “general, uniform and thorough system of public, free common schools,” adhered to the earlier, original understanding of its 1890 constitutional clause. In 1975 the Idaho Supreme Court held that, “On its face, [Section 1] mandates action by the Legislature. It does not establish education as a basic fundamental right. Nor, does it dictate a
central state system of equal expenditures per student.”

Even after other states interpreted similar state constitutional language as creating a fundamental right to publicly-financed education, the Idaho Supreme Court reiterated in 1993 that “education is not a fundamental right because it is not a right directly guaranteed by the state constitution. Rather, art. 9, §1 imposes [a duty upon the legislature]. . . .”

Illinois, too, resisted the trend, amending its Constitution in 1970 to designate education in its “system” of free public schools to be a “fundamental goal” rather than a “right,” a decision which the Illinois Supreme Court respected in the 1996 decision of Committee for Education Rights v. Edgar. Maine retained its 1820 provision making it the duty of its towns “to make suitable provision” for the support of public schools, and has not interpreted it as creating a fundamental right. Maryland mandated that a “thorough and efficient System of Free Public Schools” be established at the first legislative session after adoption of its 1867 constitution, yet its Supreme Court held in 1983 that neither this provision standing alone, nor in conjunction with a related budgetary provision, created a fundamental right:

The directive contained in Article VIII of the Maryland Constitution for the establishment and maintenance of a thorough and efficient statewide system of free public schools is not alone sufficient to elevate education to fundamental status. Nor do the budgetary provisions of § 52 of Article III of the Constitution require that we declare that the right to education is fundamental. The right to an adequate education in Maryland is no more fundamental than the right to personal security, to fire protection, to welfare subsidies, to health care or like vital governmental services; accordingly, strict scrutiny is not the proper standard of review of the Maryland system of financing its public schools.

The Michigan appellate courts, after first holding that Michigan’s “system” provision clearly bestowed on Michigan citizens a “fundamental right to a free public education,” ultimately rejected that position, holding in a series of cases that “education is not a fundamental right under Michigan’s Constitution of 1963,” concluding that “although a free public
education is a vitally important service provided by this state, there is no fundamental right to such an education under our constitution." 33 New Mexico held in 1987 that its mandate for a “uniform system of free public schools sufficient for the education of, and open to, all the children” did not give rise to a contractual relationship that would permit suits for breach of contract. 34 The Supreme Courts of Ohio and Oregon both declined to find a constitutional right in their respective, century-old provisions providing for “thorough and efficient” or “uniform, and general” systems of common schools. 35

In contrast, Connecticut in 1977 found that a 1965 amendment to its Constitution, which required the legislature to “implement . . . by appropriate legislation” the principle that “there shall always be free public . . . schools in the state,” conferred a judicially-enforceable “fundamental right” to education that subjected legislative financing judgments to “strict judicial scrutiny.” 36 And the initial reticence of the Pennsylvania courts in the 1970s to find a “fundamental right” from that state’s “thorough and efficient” constitutional provision was reversed in 1995 with that state’s Supreme Court squarely holding that “public education in Pennsylvania is a fundamental right.” 37

The second category of provisions shifted the focus from “system” of schools to the provision of education to “all children.” Alaska’s new Constitution of 1959 required the legislature to establish a “system of public schools open to all children of the state.” 38 Nebraska required its legislature to provide free instruction in the common schools to “all” children. 39 New Jersey mandated a “thorough and efficient system” of education for “all” children. 40 And New York mandated a “system of free common schools, wherein all the children of the state may be educated.” 41 Of these, the courts in both New Jersey and New York, in 1975 and 1976, respectively, found their respective clauses to create fundamental rights, 42 and the Alaska
Supreme Court held in 1972 that the provision in its state constitution conferred “a right to public education.”\textsuperscript{43}

Some states adopting provisions for “all” children included caveats that, in parallel provisions adopted in the nineteenth century, had undercut any claim of right. Arizona, for example, required the legislature to provide for the establishment of a “general and uniform public school system,” which “shall be as nearly free as possible” and which shall consist of a free school in every district for at least six months a year” and “open to all pupils between the ages of six and twenty-one.”\textsuperscript{44} Colorado continued to require the establishment “as soon as practicable” of a “thorough and uniform system of free public schools” for “all” the children of the state.\textsuperscript{45} The Arizona Supreme Court nevertheless found its clause to confer a “fundamental right,”\textsuperscript{46} while the Colorado Supreme Court expressly “refuse[d] . . . to venture into the realm of social policy under the guise that there is a fundamental right to education.”\textsuperscript{47}

The initial forays by Alaska, Arizona, New Jersey, New York, and Connecticut into “discovering” a fundamental right to education, based on relatively recent, 20th century amendments to the constitutions of those states, were followed in several other states despite the fact that these other states were still operating under constitutions or constitutional provisions adopted in the nineteenth century (or earlier) without any notion that those provisions created a judicially-enforceable “right” or “fundamental right” to education at the time they were drafted and ratified. The Delaware Supreme Court, for example, in 1980 found a constitutional right to education in its 1897 constitutional provision providing for a “system of free public schools.”\textsuperscript{48} The Kentucky high court in 1989 found a “fundamental right” in its 1891 constitutional directive to the state legislature to provide “by appropriate legislation” for an “efficient system of common schools.”\textsuperscript{49} The Supreme Judicial Court of Massachusetts and the Supreme Court of New
Hampshire held in 1993 and 1997, respectively, that the parallel provisions of their respective constitutions—the 1780 Massachusetts Constitution and the 1784 New Hampshire Constitution, which made it the “duty” of the legislature “to cherish the interests of literature and the sciences, and all seminaries of them”—conferred a right to an “adequate” education despite explicit acknowledgement that the word “adequate” was not to be found in the constitutions at all.\(^50\) The Minnesota Supreme Court in 1993 found a “fundamental right” to education in that State’s 1857 constitutional provision describing the duty of the Legislature “to establish a general and uniform system of public schools.”\(^51\) North Dakota’s Supreme Court found in 1992 and 1994 first a “right” and then a “fundamental right” in its 1889 provision for a “uniform system” “open to all children of the state.”\(^52\) South Carolina’s Supreme Court likewise waited more than a century to find in 1999 that its 1895 provision providing for a “system of free public schools open to all children” conferred a right “for each child to receive a minimally adequate education,” which it then proceeded to define \textit{ex nihilo}.\(^53\) Tennessee’s high court found in 1993 a “right to a free public education” guaranteed to the children of the state from an 1870 provision “encourage[ing the] support” of a “system” of education. It did so after discussing the opinions of other state courts that have found a “fundamental right” to education in their own, typically much stronger, constitutional provisions.\(^54\) A Texas appellate court found in 1987 a “fundamental right” in its 1876 provision to create an “efficient system of public free schools.”\(^55\) Washington’s 1889 “ample provision for the education of all children” via a “general and uniform system” was held in 1975 to be a “fundamental constitutional right.”\(^56\) West Virginia’s 1872 requirement that “the legislature shall provide, by general law, for a thorough and efficient system of free schools” was interpreted in 1979 as conferring a “fundamental constitutional right,” obligating the legislature to develop “certain high quality statewide educational standards.”\(^57\) Wisconsin’s 1848 provision
for “as nearly uniform as possible” district schools, free to “all children”, was held in 1976 to create a “fundamental right.”  

Perhaps most stark of all was the 1997 decision of the Vermont Supreme Court in Stanford v. Vermont, interpreting a more than 200-year-old constitutional provision in that state’s constitution. The Vermont Constitution of 1793 provided:

> Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and 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.

Despite the clearly hortatory nature of this provision, the Vermont Supreme Court in 1997 effectively treated the provision as creating a judicially-enforceable fundamental right, going so far as to state that “[t]he contention that the framers intended these fundamental freedoms to be mere aspirational ideals rather than binding and enforceable obligations upon the state cannot be seriously maintained.”

An even odder story comes out of Alabama. The Alabama Constitution of 1901 contained an education provision virtually identical in relevant respects to the provision in its 1875 Constitution: “The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years.” Only the word “liberal” was added. As was clear with countless other provisions adopted during the Nineteenth Century, the mandate to establish a “system” of schools did not confer a judicially-enforceable right for individuals. Nevertheless, to confirm that understanding in the wake of Brown v. Board of Education and to delete a requirement for segregated education (though retaining permissive segregation), the people of Alabama in 1956 amended their Constitution to provide:
It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.

* * *

To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide.64

Shortly after the 1956 amendment was adopted, the Alabama Supreme Court held in Mitchell v. McCall that “the State of Alabama is under no constitutional obligation to provide public schools” under Sec. 256 of the Alabama Constitution of 1901, as amended.65 But the amendment was held to be unconstitutional by a state trial court in the 1990 case of Alabama Coalition for Equity v. Hunt66 because of its obvious racially-discriminatory purpose, and the State Supreme Court, in a magnificent logical feat, subsequently re-interpreted the 1901 version of Section 256 as leaving no doubt “that Alabama schoolchildren have an enforceable constitutional right to an education.”67 Because the 1956 Amendment “modified the original provision to eliminate any implication that there is a constitutional right to public education in Alabama,”68 noted the Court, the unamended version of Section 256 must have conferred a constitutional right to education lest the 1956 Amendment be deemed a “futile act.”69

The route to fundamental right in these states, via judicial interpretation (one might say judicial fiat), stands in stark contrast to the route pursued in North Carolina, which in 1970 amended its Constitution to provide that “the people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”70 Yet even in North Carolina, the
courts have gone beyond the constitutional mandate, holding in 1997 that the longstanding constitutional requirement for a “general and uniform system of free public schools” gave to “every child a fundamental right to a sound basic education.”

Consequences of the 1970s “Rights” Trend

The full import of the trend toward treating education as a judicially-enforceable fundamental right is only now beginning to come into view. Recent cases in Nevada and Kansas, for example, demonstrate just how great a threat to citizen self-government the “fundamental rights” formulation is. Before turning to those cases, though, it is important to define just what is meant by the new treatment of education as a fundamental right.

At one level, the right to pursue an education has always been viewed as fundamental in this country. The Wyoming Constitution of 1890 accurately conveys the prevailing sentiment: “The right of the citizens to opportunities for education should have practical recognition.” And the Supreme Court’s recognition in Pierce v. Society of Sisters and Meyer v. Nebraska of a right of parents to direct the education of their children marks the beginning point of the era of substantive due process in the non-economic arena. State court decisions treating education as a fundamental right would therefore seem to be entirely unobjectionable.

Yet the recent state court holdings have understood the fundamental right to education at an entirely different level—not just the right to pursue the education of one’s choice, but the “right” to have someone else—the government, which is to say taxpayers—pay for that education. How much education, at what cost, and for what purpose? Even in states that have constitutional provisions which, on their face, appear to impose qualitative mandates—“adequate,” “suitable,” “good,” “quality” or “high quality”—hardly provide judicially
manageable criteria for answering such questions. These things are inherently policy judgments, not matters that can be determined by the courts as if there were some scientifically correct determination.\(^{80}\)

It should come as no surprise, therefore, that courts which begin with finding a constitutionally-protected fundamental right to education quickly progress to making policy judgments about funding levels and even curricular design. In *Rose v. Council for Better Education, Inc.*,\(^{81}\) for example, the Kentucky Supreme Court set out the contours of a curriculum necessary for a constitutionally adequate education. Such a curriculum should, according to the Kentucky court, foster oral and written communication skills, provide knowledge of different economic, political, and social systems, foster mental and physical health, develop an appreciation for the arts, and prepare one for higher education or vocational training, and ultimately employment. The West Virginia Supreme Court adopted a similar approach, determining in *Pauley v. Kelly*\(^{82}\) that a curriculum fostering literacy, mathematical ability, governmental awareness, knowledge of one’s self, preparation for a career or further education, recreational activities, the arts, and social ethics, was constitutionally mandated.

The Maryland Supreme Court seems to have understood that such judicial policy-making is a necessary consequence of the courts converting aspirational goals into fundamental rights. “The right to an adequate education in Maryland,” it held in *Hornbeck v. Somerset County Bd. of Educ.*, “is no more fundamental than the right to personal security, to fire protection, to welfare subsidies, to health care or like vital governmental services.”\(^{83}\) Yet when only one of those fundamentally important government services is deemed a “fundamental right,” courts claim the ability to vindicate that right even at the expense of other government services (or, conversely,
by ordering the imposition of taxes not approved by the people’s representatives). This was the scenario that came to pass in Nevada in 2003 and Kansas in 2005.

In 1994 and again in 1996, Nevada voters overwhelmingly approved an amendment to their state Constitution, which prohibited the state Legislature from imposing new or increased taxes without the concurrence of 2/3 of the Members of each house of the Legislature. In 2003, the Nevada Supreme Court found in *Guinn v. Legislature of State of Nevada* that this core structural restriction on the taxing power of the state legislature was interfering with the legislature’s ability fully to fund the state’s $1.6 billion education budget, which the Court found to be mandated by the state constitution (even though the only requirement in the state constitution was that the state establish a school in each district for at least six months a year—a “mandate” that would be accomplished at significantly less than the $1.6 billion budgeted for education). The Court then issued a truly extraordinary Opinion and Writ of Mandamus directing the Nevada Legislature to consider tax-increase legislation by “simple majority rule” rather than the 2/3 vote required by Article 4, § 18(2) of the Nevada Constitution. The court found the structural limitation imposed by Nevada voters on its Legislature to be a mere “procedural and general constitutional requirement” that had to “give way to the substantive and specific constitutional mandate to fund public education.”

Similarly, the Kansas Supreme Court in *Montoy v. Kansas* found that the largest education budget in that state’s history was not constitutionally adequate, and issued an order directing the legislature to appropriate additional funds to meet the court’s view of what would constitute “suitable” funding mandated by Article VI, section 6 of the Kansas Constitution. This, despite the fact that in Kansas, as elsewhere, the power to tax and spend the fiscal resources of the state is assigned to the legislature, not to the courts, and the constitutional mandate that the
“legislature shall provide for intellectual, educational, vocational and scientific improvement by
establishing and maintaining public schools” was expressly subject to the discretionary caveat,
“which may be organized and changed in such manner as may be provided by law.”

Both courts expressly rested their rulings on Marbury v. Madison and the Supreme
Court’s view in that case that it is the role of the courts to interpret the constitution and enforce
its provisions against contrary legislation. Yet, truth be told, both reflect a significant
expansion of the holding in Marbury itself, and an even greater expansion once one considers the
indefinite nature of the constitutional text at issue in these cases.

It is important to remember the precise claim that Chief Justice Marshall actually staked
out in Marbury v. Madison. As I have noted elsewhere, it was not (as many have apparently
come to believe) that the courts are the only arbiter of constitutional questions—the Kansas
Supreme Court went so far as to claim in Montoy “that the final decision as to the
constitutionality of legislation rests exclusively with the courts.” Nor was it even that the
Supreme Court is the final arbiter of all constitutional questions, not just for the judicial branch
but for all three branches of government, though that was certainly urged by Marbury’s counsel,
who made the following argument to the Court:

This is the supreme court, and by reason of its supremacy must have the
superintendance of the inferior tribunals and officers, whether judicial or
ministerial. In this respect there is no difference between a judicial and a
ministerial officer.

Rather, Marshall made the much more limited, common-sense claim that, in a regime operating
under a constitution by which only certain limited, enumerated powers were granted to the
government, laws made in excess of that delegated authority could not be applied by judges
bound by oath to uphold the Constitution. The courts, then, were not only authorized to refuse
to give unlawful statutes any effect in the cases before them, but were in fact obligated to take that course.

Marshall was not the first to make such a claim, of course. Alexander Hamilton made it explicitly in Federalist 78:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no \textit{ex post facto} laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.\textsuperscript{96}

Oliver Ellsworth likewise contended during the Connecticut ratifying convention that judicial review would also be available to enforce the limits of the powers granted to the national government:

This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void.\textsuperscript{97}

Indeed, the idea that judicial review would be used to insure conformity with \textit{all} the Constitution’s provisions—the limits of enumerated powers as well as the express prohibitions—seems to have been assumed by the delegates to the constitutional convention, even during a debate in which the convention rejected efforts to have the Supreme Court justices serve as a council of revision that would have a share in the President’s veto power. George Mason noted, for example, that judges “could declare an unconstitutional law void.”\textsuperscript{98} Luther Martin, who opposed including Supreme Court justices in a council of revision, and James Wilson, who supported such a council, both agreed that judges, in their judicial capacity, would already have
“a negative on the laws.” The debate over the council of revision was thus about whether the justices should also have the power to negate laws on policy grounds before they took effect, not whether they would be obliged, when asked to enforce an unconstitutional law in a case or controversy before them, to give effect to the unconstitutional law, the Constitution itself notwithstanding.

The line between a court properly invalidating unconstitutional legislation, on the one hand, and interjecting itself into the policy judgments of the elected branches of government, on the other, has been well established ever since the constitutional convention rejected a policy-making role for the courts that would have been provided had the council of revision task been added to the judiciary’s constitutional duties. The former is designed to uphold constitutionalism and the “government by consent of the people” foundation upon which it rests, while the latter undermines government by consent by permitting an unelected (or at least less accountable) judiciary to make fundamental policy choices that ought to be made by the people or their direct representatives.

Admittedly, precisely defining that constitutional line may be a difficult task, but we can look to some examples of state educational provisions for a model of judicially-enforceable clauses. Florida’s Constitution was amended in 2002 to specify maximum class sizes, for example; Pennsylvania’s 1874 Constitution contained a requirement that the legislature appropriate “at least one million dollars each year” “for the maintenance and support of a thorough and efficient system of public schools”; and Nevada’s 1864 Constitution contained a mandate (still in effect) that the “legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year.” All of these provisions are specific enough to lend themselves quite
readily to judicial enforcement, and also to the argument that, by enforcing such provisions, the courts are merely giving voice to the higher mandate that the people have imposed via their constitution. The several state constitutional mandates that public schools be open to “all” the children of the state are of a similar nature, easily and properly enforceable by the courts.

Indeterminate provisions which mandate a “thorough and efficient system” of public schools, or even those that call for “suitable” or “adequate” education systems, are not as susceptible to judicial enforcement, and the clearly hortatory clauses are not susceptible to judicial enforcement at all, at least not on any theory of constitutional interpretation remotely resembling the authority-of-the-people-based holding of Marbury v. Madison. Yet the recent spate of state court “adequacy” holdings purport to do just that.

Whether decisions such as those recently issued by the Kansas and Nevada Supreme Courts, made possible by “fundamental rights” determinations, result in the re-allocation of state resources or the imposition of additional taxes, the fact remains that the considered policy judgments of the state legislatures are being altered by the courts, based upon expansive interpretations of what is, in most cases, clearly hortatory constitutional language. Quite apart from the threat to separation of powers, decisions such as these also threaten the very essence of government by consent and, collaterally, the benefits to be gained from participatory democracy.

Thomas Jefferson’s own plans for public education, in contrast, in Virginia were developed to foster participatory democracy. Jefferson proposed the establishment of a school in each community, managed by the citizens of that community. The plan appears to have been designed not just to educate the children of the community in the basic common school subjects, but also to educate the local citizenry in the habits of self-government. This plan, or something quite like it, was common in New England towns, and was adopted in the western territories of
the United States as well, with early federal educational land grants to townships made directly to the people of the township. This aspect of “civic education” is quite salutary though largely overlooked in current debates over educational policy. Its import was somewhat impaired with the centralization plans of the early nineteenth century, by which the setting of educational policy was largely transferred from the local township to the state. But even at the state level, determinations of educational policy were still part of the political process, with ultimate responsibility resting with the people themselves.

The “equity” litigation of the past generation insured that the people did not use that responsibility and power to allocate educational resources in an inequitable fashion—a salutary judicial check on majority tyranny. The new “adequacy” litigation, however, removes educational policy-making from the political process altogether, permitting the courts to countermand the educational decisions that the people (or their direct representatives) had made for themselves. Quite apart from the fact that the courts have no particular expertise that would suggest they are more capable of making these policy judgments than the legislature, the demise of citizen participation that will most certainly follow cannot be a good thing, even for the success of the education programs themselves.

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See, for example, Vt. Const. of 1786, ch. II, § 38; Vt. Const. of 1793, ch. II, § 41.


6 See, e.g., N.C. Const. of 1776, art. XLI; Pa. Const. of 1776, § 44; Vt. Const. of 1777, § 40.

7 Ga. Const. of 1777, art. LIV (emphasis added).

8 Lewis v. Henlry, 2 Ind. (2 Cart.) 332, 334 (1850).

9 See, e.g., Mich. Const. of 1835, art. X, § 2; Iowa Const. of 1846, art. IX, § 3; Cal. Const. of 1849, art. IX, § 3; Ohio Const. of 1851, art. VI, § 2; Minn. Const. of 1857, art. VIII, § 3.

10 N.J. Const. of 1844, art. IV, § 7, pt. 6; Wisc. Const. of 1848, art. X, § 3; Iowa Const. of 1857, art. IX (1st), § 12.

11 65 Wis. 631 (1886).

12 Pierce v. Union District School Trustees, 46 N.J. Law (17 Vroom) 76, 78 (1884).

13 La. Const. of 1864, Title XI, art. 141; Mo. Const. of 1865, art. VIII, § 1; Pa. Const. of 1873, art. X, § 1; Nebr. Const. of 1875, art. VIII, § 6; Colo. Const. of 1876, art. IX, § 2.

14 Ala. Const. of 1867, art. XI, § 6; Ark. Const. of 1868, art. IX, § 1; Fla. Const. of 1868, art. IX, §§ 1-2; Ga. Const. of 1868, art. VI, § 1; La. Const. of 1868, Title VII, art. 135; Miss. Const. of 1868, art. VIII, § 1; N.C. Const. of 1868, art. IX, § 2; S.C. Const. of 1868, art. X, §§ 3 & 10; Tex. Const. of 1868, art. IX, § 1.

15 Ill. Const. of 1870, art. VIII, § 1. Despite this apparent qualitative mandate, we have located no case interpreting the clause as conferring a judicially-enforceable right to a certain qualitative level of education, although there are cases holding that the “thorough and efficient” clause, immediately preceding, required that school districts be compact and contiguous. See, e.g., People ex rel. Community Unit Sch. Dist. No. 1 v. Decatur Sch. Dist. No. 61, 194 N.E.2d 659, 661-62 (Ill. App. 1963) (citing People ex rel. Tudor v. Vance, 29 N.E.2d 673 (Ill. 1940); People
In any event, the qualitative language was dropped from the education provision in the Illinois Constitution of 1970.

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16 See *Ward v. Flood*, 48 Cal. 36 (1874).

17 Ark. Const. of 1874, art. XIV, § 1 (as amended by Amendment 53, adopted 1968). The requirement that the state maintain “a general, suitable and efficient system of free public schools” might be read to import a qualitative component, but thus far the Arkansas courts have not interpreted the clause in such a manner, and the final clause of the provision—that the amendment was intended to authorize the provision of educational services to children under 6 and to adults over 21, and that “no other interpretation shall be given to it”—strongly counsels against any such interpretation.

18 Fla. Const. of 1868, Art. IX, § 1; *Scavella v. School Bd. of Dade Cty.*, 363 So.2d 1095 (Fla. 1978). The Florida Constitution was amended again in 2002 to provide specific mandates regarding class size. See Fla. Const. of 1968, Art. IX, §1, as amended.


21 La. Const. of 1974, Art. VIII, § 1. (no right??)

22 Idaho Const. of 1890, Art. IX, § 1.

23 For an example of the earlier understanding, which prevailed even through the first three-quarters of the twentieth century, see *Logan City Sch. Dist. v. Kowallis*, 77 P.2d 348, 351 (Utah 1938) (“The provision for being open does not apply to matters financial; it does not mean they must be free. It simply means that all children must have equal rights and opportunity to attend

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the grade or class of school for which such child is suited by previous training or development”); Utah Const. of 1895, Art. X, § 1 (providing for “system” “which shall be open children of the state”).


26 672 N.E.2d 1178, 1194-95 (Ill. 1996).

27 Me. Const. of 1820, Art. VIII, § 1.


35 Board of Ed. of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979); Ohio Const. of 1851, Art. VI, § 2; Olsen v. State, 554 P.2d 139, 144 (Ore. 1976); Ore. Const. of 1857, Art. VIII, § 3.


38 Alaska Const. of 1959, Art. VII, § 1 (emphasis added).


41 N.Y. Const. of 1938, Art. XI, § 1.


44 Az. Const. of 1912, Art. XI, § 1 (emphasis added).

45 Colo. Const. of 1876, art. IX, § 2.


51 *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993); Minn. Const. of 1857, Art. XIII, § 1.


Tennessee-Small Sch. Dist. v. McWherter, 851 S.W.2d 139, 151 (Tenn. 1993); Tenn. Const. of 1870, Art. XI, § 12.


Buse v. Smith, 247 N.W.2d 141, 149 (Wis. 1976); Wisc. Const. of 1848, Art. X, § 3.

692 A.2d 384 (Vt. 1997).

Vt. Const. of 1793, ch. 2, § 68.

Brigham, 692 A.2d, at 394.

Ala. Const. of 1901, Art. XIV, § 256 (emphasis added).


Ala. Const. of 1901, Art. XIV, § 256, as amendment by Amend. 111 (ratified Sept. 7, 1956).

Mitchell v. McCall, 273 Ala. 604, 606, 143 So.2d 629, 631 (Ala. 1962). The federal District Court for the Southern District of Alabama apparently did not share this view, or the traditional understanding that the state Supreme Court was the final arbiter of state constitutional law, holding in Smith v. Dallas County Board of Education, 480 F.Supp. 1324, 1337 (S.D. Ala. 1979), that “the state constitution provides all children with an entitlement to public education.”


Opinion of the Justices No. 333, 624 So.2d 107, 147 (Ala. 1993).
68 Id. (quoting Mobile, Ala.-Pensacola, Fla. Bldg. & C.T.C. v. Williams, 331 So.2d 647, 649 (Ala. 1976)).

69 Id.


71 Id., Art. IX, § 2 (reiterating provision of 1868 Constitution).


74 268 U.S. 510 (1925).

75 262 U.S. 390 (1923).


78 Ill. Const. of 1870, Art. VIII, § 1.


80 A couple of state constitutions have provided judicially manageable standards. As noted above, Florida’s Constitution was amended in 2002 to require specific class-size reductions, for example. Fla. Const. of 1868, Art. IX, § 1, as amended. And Pennsylvania’s 1874 Constitution contained a requirement that the legislature appropriate “at least one million dollars each year” “for the maintenance and support of a thorough and efficient system of public schools.” Pa. Const. of 1874, Art. X, sec. 1, repealed 1967.
Nev. Const. Art. 19, § 2(4) provides that a constitutional amendment requires the approval of a majority of the voters at two general elections. The 2/3 vote tax initiative at issue here, also known as the “Gibbons Tax Restraint Initiative” after its chief sponsor, Jim Gibbons (now a member of the U.S. House of Representatives from Nevada’s 2nd District), was supported by more than 70% of the voters in each of the two elections.

Nev. Const. Art. 4 § 18(2).


Id., at 1272.

120 P.3d 306 (Kan. 2005).

Kansas Const. Art. VI, § 6(b), dealing with school finance, provides: “The legislature shall make suitable provision for finance of the educational interests of the state. . . .”

Kansas Const. Art. VI, § 1.

Guinn, 71 P.3d at 1272; Montoy v. State, 112 P.3d 923, 930 (Kan. 2005 (‘‘Montoy II’’).


Montoy II, 112 P.3d at 930 (emphasis added).

1 LANDMARK BRIEFS, supra, note Error! Bookmark not defined., at 145.

Marshall as holding that “only the people, acting in specially called constitutional conventions, could create a written constitution that limited and defined government and was ‘permanent’ and supreme over ordinary law”); cf. Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (holding that contrary state laws must yield to the federal Constitution, laws and treaties).


99 Id. at 76 (Martin); id. (Wilson) (noting that “the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights”).

100 Fla. Const. of 1868, Art. IX, § 1, as amended.


See, e.g., Ala. Const. of 1901 (as amended in 1956), Art. XIV, § 256 ("It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources"); Kan. Const. of 1859, Art. VI, § 1 ("The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law"); Mass. Const. of 1780, Part the Second, Ch. V, § 2 ("it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them"); Mich. Const. of 1963, Art. VIII, § 1 ("schools and the means of education shall forever be encouraged"); Nev. Const. of 1864, Art. XI, § 1 ("The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements"); N.H. Const. of 1784, Art. 83 ("it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions"); Vt. Const. of 1793, Ch. 2, § 68 ("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").