

EDUCATION AS A FUNDAMENTAL RIGHT: BUILDING A NEW PARADIGM

by Ken Gormley*

INTRODUCTION

In 1973, the United States Supreme Court decided *San Antonio v. Rodriguez*, rejecting the argument that education was a fundamental right under the 14th Amendment of the United States Constitution, and slamming the door shut on Thurgood Marshall's great hope for achieving the promise of *Brown v. Board of Education*. In the years since *Rodriguez*, commentators have sought to categorize into three waves the decisions in which state courts have struck down their school financing schemes as unconstitutional. This article demonstrates that the "three wave" description is oversimplified and unhelpful. Those states that have invalidated their public education funding schemes have done so using a variety of state constitutional provisions, often intermingled, many of which are centuries old. This article maintains that further progress in the school funding area will only be accomplished if states amend their state constitutions to specifically provide that education is a fundamental right, rather than stretching constitutional text to justify school funding decisions based upon ambiguous (and often outdated) provisions.

Fifteen years ago, I had the privilege of interviewing Justice Thurgood Marshall at his Chambers in the Supreme Court, on a subject about which he cared deeply.¹ I was beginning to write an article about Charles Hamilton Houston -- the man who was Marshall's mentor and professor at Howard Law School -- the man who served as the first legal counsel to the NAACP and who was the principal architect of the strategy that led to the demise of the "separate but equal" doctrine in the United States. This work-in-progress, that ultimately appeared in a special issue of the *ABA Journal* dedicated to Justice Marshall's career,² focused on the collaboration of Houston and Marshall in the school desegregation cases that became known to history as *Brown v. Board of Education*. Justice Marshall was eighty years old at the time I met with him; he was in poor health, sitting in a chair with two canes and two hearing aids. But he perked up at the mention of Charles Houston. He started rummaging through his desk and extricated a picture of Houston he had been saving, so that I could see "what a damn handsome guy that Charlie was," as he put it.

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¹Author's interview with Justice Thurgood Marshall, January 29, 1990, United States Supreme Court, Washington, D.C.

²*A Mentor's Legacy: Charles Hamilton Houston, Thurgood Marshall and the Civil Rights Movement*, ABA J. 62 (June 1992).

As we sat there talking about the intricate legal strategy devised by Houston to strike at the separate but equal doctrine in the courts, it dawned on me what a radical plan it was at the time, back in the 1930s and 1940s when it was conceived. The genius of Charles Houston's strategy was that it was initially aimed at challenging separate but equal at the graduate and professional school levels – in cases like *Pearson v. Murray*,³ *Missouri ex rel Gaines v. Canada*,⁴ *Sweatt v. Painter*⁵ and *McLaurin v. Oklahoma*⁶ – where Houston knew that highly-educated judges would understand the stark differences between the quality of education at white institutions as compared to at under funded all-black institutions. Houston then planned to ratchet backwards to his real goal – striking at segregation in every public grade school and high school in America.⁷

Justice Marshall was outwardly proud of his role in *Brown*; he choked up when he talked about Charles Houston, who had died in 1952 from the crush of legal work, never witnessing that case make it to the Supreme Court. “The school case was really Charlie's victory,” Justice Marshall told me. “He just never got a chance to see it.”⁸

Yet there was an unmistakable look of sadness that crept into Justice Marshall's eyes when he talked about the legacy left behind by *Brown*. I came to understand that look more fully last year, when I had the privilege of organizing an historical retrospective to observe the 50th anniversary of *Brown*, later broadcast on C-SPAN's “American Perspectives” program.⁹ Julian Bond, civil rights legend and Chairman of the NAACP, co-moderated the program held at Duquesne University, which was jointly sponsored by the *Brown v. Board of Education National Historic Site*. We brought together Thurgood Marshall's son, John, and Charles Houston's only son, Charles Houston Jr., who appeared together on stage -- the first time the two had ever met. We heard inspiring words from civil rights legend Jack Greenberg, Minnijean Brown (one of the “Little Rock Nine”) and a dozen historic figures. But the finished product was as troublesome as it was uplifting.

This *Oxford Round Table* includes a number of first-rate presentations on *Brown*, so I will not attempt to match them. But I do want to share one personal experience, that was, and remains, unsettling to me. In organizing the

³182 A. 590 (Md. 1936).

⁴305 U.S. 337 (1938).

⁵339 U.S. 629 (1950).

⁶339 U.S. 637 (1950).

⁷“A Mentor's Legacy,” *supra* n, at 65-66.

⁸ *Id.* at 66.

⁹*Brown v. Board of Education: A 50-Year Commemoration*, Duquesne University, March 26, 2004, (C-Span television broadcast “American Perspectives” program, ID#181207, May 8, 2004).

Brown historical retrospective, in January of 2004, I flew to New York City in a blizzard to film an interview with Judge Robert Carter.¹⁰ Carter had served as Thurgood Marshall’s right hand man, the principal brief-writer in *Brown*, who argued the case alongside Marshall in the Supreme Court. He had just turned eighty-seven, this slightly-built African-American man with huge glasses, who continues to preside over cases in the federal district court in Manhattan with a sharp mind and a propensity to speak his mind. Towards the end of our interview, the camera was still rolling and Judge Carter looked at me with a mixture of unpleasantness and frustration. He blurted out: “The problem is that we had the wrong target.” “What was that?” I asked. The *real* problem, Judge Carter spelled it out for me, was not the separate but equal doctrine. It was “white supremacy.” “White people think that white skin is something that has some great value,” he said, “and gives them superiority to people of color.”¹¹ The sad truth, Judge Carter had concluded, was that even if white children and black children were permitted to attend school in the same building – as the *Brown* lawyers had fought so hard to establish – this did not mean those children would receive the same education. The system remained rigged to give black children something of sub-standard quality.

It was so unsettling to me, that the man who had argued *Brown* in 1954 would feel that way in 2004, that I remained depressed for a week. That feeling was only compounded when I waded into a project for *Pittsburgh Magazine*,¹² interviewing numerous old-time “Negro” lawyers who had blazed the path for implementing *Brown* back in the 1950’s. These were the lions of the profession who – like their counterparts in other cities – had dismantled the segregated public schools in Pittsburgh and who had brought lawsuits to end racially restrictive covenants and other devices that kept African-Americans (and often Jews) relegated to lower-class neighborhoods. At the end of our interview session, one prominent African-American lawyer told me bluntly: “Our inner city schools are just as segregated today – may even be worse – than the schools that Charles Houston visited back in the 1930’s.”¹³

The Honorable Justin Johnson, a distinguished senior judge on the Pennsylvania Superior Court who became the first African-American solicitor for the Pittsburgh Public Schools, reflected: “At one point in my life as a young man, I envisioned Taj Mahals coming up, great high schools in the City of Pittsburgh where everything was available to students of all races. Those schools were never built. Does it give me a sense of sadness? I would say I’m

¹⁰ Author’s filmed interview with Judge Robert Carter, January 28, 2004, New York City, New York.

¹¹ Id.

¹² *The Brown-ing of Pittsburgh*, Pittsburgh Magazine, May, 2004, at 58.

¹³ Author’s interview with Attorney Wendell Freeland, March, 2004, Pittsburgh, Pennsylvania.

very disappointed.”¹⁴

BUILDING A NEW PARADIGM: EDUCATION AS A FUNDAMENTAL RIGHT: THE FEDERAL PATH FORECLOSED

Last year was a time to celebrate Thurgood Marshall’s landmark victory in *Brown*. But it is now incumbent upon us to confront Marshall’s major *loss* as a Supreme Court Justice in *San Antonio v. Rodriguez*,¹⁵ decided in 1973. In that case, Justice Marshall failed to convince a majority of his Brethren that gross disparities in resources between poor school districts and wealthy districts in Texas violated the 14th Amendment of the United States Constitution. Since the Court concluded that education was *not* a fundamental right under the equal protection or due process clauses – education was nowhere mentioned in the text of the Constitution and public education was not even part of our nation’s culture when the 14th Amendment was adopted during the Reconstruction era -- it did not trigger a higher form of Constitutional scrutiny. The Texas system of public education, by which each district supplemented state funding with revenue from local *ad valorem* property taxes, admittedly resulted in gross disparities from district to district. In the wealthiest Alamo Heights district, which was the most affluent (and nearly a hundred percent white) the school district was able to expend \$594 per pupil in the sample year. In the poorest Edgewood district, which was 90 percent Mexican-American and 6 percent African-American, the district received had \$356 per pupil to spend – barely half as much.¹⁶ Thus, districts with low property tax bases, overwhelmingly comprised of minority students, received dramatically fewer resources. To make matters worse, the salaries for teachers were higher in the wealthy districts, and there was a more favorable student-faculty ratio in those districts.¹⁷ Nonetheless, because the Court’s majority concluded that there was no fundamental right at stake, the Texas system was examined under the deferential “rational basis test.”¹⁸ Justice Powell acknowledged that: “Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental

¹⁴*The Brown-ing of Pittsburgh*, at 62.

¹⁵ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

¹⁶ 411 U.S. at 12-14.

¹⁷ *Id.* at 85 (Marshall, J, dissenting).

¹⁸ For a discussion of how the rational basis test operates in due process and equal protection cases under the 14th Amendment, giving great deference to the legislature (and thus causing the governmental action in most instances to be upheld), *see* Nowak & Rotunda, *Constitutional Law*, Sec. 14.3 (7th ed. 2000).

constitutional rights...”¹⁹ However, *Brown* had declared only that when a state chooses to provide the opportunity of public education, “it must be made available to all on *equal* terms.”²⁰ Since education was not a fundamental right, this was a matter primarily left to the state and local governments to hash out. The U.S. Supreme Court would not second-guess the Texas legislature in determining how to raise and disburse revenues to fund its educational system. As long as the funding scheme bore some “rational relationship” to some “legitimate state purpose,” the federal courts would stay out.²¹

Justice Powell’s majority opinion, upholding the Texas scheme, garnered a narrow majority of five votes. In a long and blistering dissent, Justice Marshall responded: “[T]he fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.”²² Moreover, Marshall reminded his fellow Justices: “Only last Term, the Court recognized that ‘providing public schools ranks at the very apex of the function of a State,’”²³ referring to *Wisconsin v. Yoder*. Exasperated, Justice Marshall railed: “I, for one, am unsatisfied with the hope of an ultimate ‘political’ solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that may affect their hears, and minds in a way unlikely ever to be undone.”²⁴

If Thurgood Marshall were alive today, I am convinced that he would not be spending his time bemoaning the fact that *Brown v. Board of Education* failed to accomplish what he and Charles Houston and Houston’s cadre of lawyers had envisioned when they set out to topple the separate but equal doctrine seven decades ago. Nor would he sit around cussing out his Brethren for taking the unsatisfactory course they took in *San Antonio v. Rodriguez* – even though Marshall certainly enjoyed cussing and probably would have a few choice words to describe that decision. Marshall understood that *Brown* had been undercut since the day it was handed down. That did not faze him – it was still a gutsy move for a bunch of Negro lawyers litigating cases and cranking out briefs on a shoestring budget. *It got folks’ attention, didn’t it?* Thurgood Marshall was above all a pragmatist. He would have shifted the discussion to the more pressing question: “*What in God’s name do we do next?*”

That is the question that we face as we gather at this historic academic campus in a country from which we, as Americans, inherited our

¹⁹ Id. at 16.

²⁰ Id. at 30, quoting *Brown*, 347 U.S. at 493 (emphasis added).

²¹ Id. at 39-44.

²² Id. at 111 (Marshall, J., dissenting).

²³ Id. quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

²⁴ Id. at 71, citing *Brown*, *supra*, 347 U.S. at 494.

notions of liberty and justice, dating back to the Magna Charta and the English Bill of Rights. How do we blow up the paradigm that our courts created in the '50s and '60s, when *Brown* was born amidst riots and National Guardsmen patrolling school halls to protect black students who wished to attend a public school, and move to a wholly new paradigm? In this century, by the time it plays out, we had better be able to ensure that students of all races are able to attain not just a barely-adequate, but a *high quality* public education, regardless of what school district they are born into. It is no secret that *de facto* segregation still predominates the American system of public education,²⁵ even after the death of the infamous *Plessy v. Ferguson* decision.²⁶ Given that fact of life, it is time to shift away from the *Brown* model. The new goal should be to create a fundamental right of public education for *all* children, rather than focusing on whether we are successfully bussing white and black children to the same school buildings. That is what I believe visionaries like Charles Houston and Thurgood Marshall would be setting their sites on, if they were with us here today, to confront the legal quandary left behind in the wake of *Brown*.

The secret to pushing the American legal system in such a direction lies not in the United States Constitution, at least not given the precedent of *Rodriguez* and the likely composition of the U.S. Supreme Court for decades to come. The secret lies, instead, within the text and jurisprudence of the fifty state constitutions.

STATE CONSTITUTIONAL OPTIONS: EARLY CASES

Charles Houston was fond of saying: “A lawyer is either a social engineer or he’s a parasite on society.”²⁷ There is plenty of room for proactive, creative lawyering here. Many state courts have already established a template by which dysfunctional systems of public education can be struck down, on a statewide basis. Building upon that template, there exist rich opportunities that would have been very attractive to visionaries like Charles Houston and Thurgood Marshall. Ironically, the secret lies in the state constitutions – the very playing fields that Houston and Marshall scrupulously avoided, for the most part, in their quest to overturn the separate but equal doctrine. It is important to underscore that the majority of the U.S. Supreme Court in *San Antonio v. Rodriguez*, even as it rejected plaintiffs’ argument that a fundamental right to education was buried in the 14th Amendment of the federal

²⁵ See, e.g., Quentin A. Palfrey, *The State Judiciary’s Role in Fulfilling Brown’s Promise*, 8 Mich. J. Race & L. 1, 2-12 (2002); Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 Amer. U. L. ev. 1461 (2003).

²⁶ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁷ Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the struggle for Civil Rights*, 84 (1983).

Constitution, issued a broad invitation for states to examine the issue under their own constitutions. Justice Powell wrote that, rather than federal courts sticking their noses into the delicate business of structuring and funding the Texas system of public education, that was a matter that should be left to the state courts, utilizing “judicial principles sensitive to the nature of the State’s efforts and to the rights reserved to the States under the Constitution.”²⁸

Despite the dispiriting defeat in the *Rodriguez* case, Justice Marshall was able to enjoy a brief period of vindication in 1989, before he died, when the Texas Supreme Court decided *Edgewood Independent School District v. Kirby*.²⁹ The *Edgewood* case was essentially the same piece of litigation considered by the U.S. Supreme Court in *Rodriguez*, which had now percolated up through the state court system. The Texas Supreme Court struck down the state’s entire system of public education under the state constitution. Relying on Article VII, Section I of the Texas Constitution dating back to 1876, that required the legislature to “make suitable provision for the support and maintenance of an efficient system of public schools,” the Texas high court employed an equal protection-type analysis to conclude that all children, rich and poor alike, had a right to equal opportunity access to educational funds.³⁰ The court wrote that “those who drafted and ratified article VII, section I never contemplated the possibility that such gross inequalities could exist within an ‘efficient’ system.”³¹ The state’s financing scheme for public education was not efficient and, therefore, was unconstitutional.

How does a state take a position contrary to that of the United States Supreme Court, when it comes to such an important individual right for citizens, as the Texas Supreme Court did in the *Edgewood Independent School District* case? It happens regularly. This is an important feature of our federal system, in which state and federal constitutionalism co-exist compatibly. The key is as follows: The state provision must not undercut the federal provision. There are no federal Supremacy Clause problems, however, where a state chooses to give its citizens *more* rights under the state constitution, than those enjoyed under the federal charter. The federal Constitution sets the floor, beneath which states may not fall. But a state may always go beyond that floor, and grant more expansive rights under the state constitution.³² That is precisely what Texas did in the school funding case.

Since 1971, the year of the first major school-funding suit in California, litigants in forty-five states have challenged the constitutionality of their states’

²⁸ 411 U.S. at 39.

²⁹ 777 S.W. 2d 391 (Tex. 1989).

³⁰ 777 S.W. 2d at 394-395.

³¹ *Id.* at 395.

³² Ken Gormley, Jeffrey Bauman, Joel Fishman and Leslie Kozler, *Then Pennsylvania Constitution: A Treatise on Rights and Liberties* 24-25 (2004).

educational funding schemes utilizing the federal and state constitutions.³³ Such suits have been successful in the highest courts of at least twenty states, all of them using their own state constitutions.³⁴ All fifty state constitutions contain some sort of an education clause,³⁵ some of which have no precise counterpart in the federal constitution. These have been used in extremely creative ways by judges and lawyers. The Kentucky Supreme Court, in a leading case decided in 1989, invalidated its entire system of public education pursuant to Section 183 of the Kentucky Constitution that requires the General Assembly to “provide for an efficient system of common schools throughout the state.”³⁶ The New Jersey Supreme Court utilized a provision requiring a

³³ See Paul L. Tractenberg, *Education*, in *State Constitutions for the Twenty-First Century, Volume 3: The Agenda of State Constitutional Reform* (G. Alan Tarr and Robert F. Williams, eds.) at 429 (forthcoming 2005).

³⁴ Sheila E. Murray, William N. Evans, Robert M. Schwab, *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. Econ. Rev. 789, 792-794 (1998) (including a table of successful challenges as of 1996); Peter D. Enrich, *Race and Money, Courts and Schools: Tentative Lessons From Connecticut*, 36 Ind. L. Rev. 523 at n. 9 (2003); Michael F. Addonizio, *From Fiscal Equity to Educational Adequacy: Lessons From Michigan*, 28 J. Educ. Fin. 457 at 457-58 (2003). [Note: Enrich says 20, Addinizio says 19. Must also add Kansas. *Nonby v. State (Montoy II)*, 102 P.3d 1160 (Kan. 2005)].

³⁵ See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 Harv. J. on Legis. 307, 311 n.5 (1991). There is some debate over whether the Mississippi Constitution requires its legislature to create public schools, because Art. VII, Sec. 201 contains some wiggle room by stating that it must do so “upon such conditions and limitations as the Legislature may prescribe.” *Id.* However, this seems to qualify as a provision requiring the creation of a public school system, with some possible limitations. For a list of the relevant provisions, see Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L. J. 1013 at n. 532 (2003). That list is as follows: Ala. Const. Art. XIV, §256; Alaska Const. art. VII, §1; Ariz. Const. art. XI, §1; Ark. Const. art. XIV, §1; Cal. Const. art. IX, §1; Colo. Const. art. IX, §2; Conn. Const. art. VIII, §1; Del. Const. art. X, §1; Fla. Const. art. IX, §1; Ga. Const. art. VIII, §1; Haw. Const. art. X, §1; Idaho Const. art. IX, §1; Ill. Const. art. X, §1; Ind. Const. art. VII, §1; Iowa Const. art. IX, 2nd, §3; Kan. Const. art. VI, §1; Ky. Const. §183; La. Const. art. VIII, §1; Me. Const. art. VIII, pt. 1, §1; Md. Const. art. VIII, §1; Mass. Const. pt. 2, ch. 5, §2; Mich. Const. art. VIII, §2; Minn. Const. art. XIII, §1; Miss. Const. art. VIII, §201; Mo. Const. art. IX, §1(a); Mont. Const. art. X, §1; Neb. Const. art. VII, §1; Nev. Const. art. XI, §2; N.H. Const. pt. 2, art. LXXXIII; N.J. Const. art. VIII, §4, pt. 1; N.M. Const. art. XII, §1; N.Y. Const. art. XI, §1; N.C. Const. art. IX, §2; N.D. Const. art. VIII, §1; Ohio Const. art. VI, §3; Okla. Const. art. XIII, §1; Or. Const. art. VIII, §3; Pa. Const. art. III, §14; R.I. Const. art. XII, §1; S.C. Const. art. XI, §3; S.D. Const. art. VIII, §1; Tenn. Const. art. XI, §12; Tex. Const. art. VII, §1; Utah Const. art. X, §1; Vt. Const. ch. 2, §68; Va. Const. art. VIII, §1; Wash. Const. art. IX, §1; W.Va. Const. art. XII, §1; Wis. Const. art. X, §3; Wyo. Const. art. VII, §1.

“thorough and efficient system of free public schools” – language common to many state constitutions – to invalidate its state Public School Education Act on three separate occasions over three decades.³⁷ The Vermont Supreme Court in 1997 invalidated its school financing system by invoking Chapter II, Section 68 of the Vermont Constitution, which provides: “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.”³⁸

Utilizing equally colorful constitutional language, the Washington Supreme Court struck down its public educational system by relying upon Article IX, Section 1, of the state constitution, which provides: “It is the paramount duty of the state to make ample provision for the education of the children residing within its borders without distinction or preference on account of race, color, caste or sex.”³⁹

The jurisprudential logic employed by state courts in invalidating school funding provisions has been as varied as the provisions they have relied upon. Some scholars, it should be noted, have over-simplified the state constitutional dynamic that has produced these decisions. Without a host of unique state constitutional texts and bodies of jurisprudence, most of the school finance reform in this country most likely would not have taken place. Yet this has not been a simplistic process. Nor has it, necessarily, reached an end-point.

THE “THREE WAVES”

It has been standard in the literature to describe school finance litigation as occurring in “three waves” in the United States.⁴⁰ The first wave, according to this theory, began in the 1960s or early 1970s. It is typified by the initial *Serrano v. Priest*⁴¹ decision in California, in 1971, which sought to resolve a challenge to school funding under the equal protection clause of the 14th Amendment contained in the United States Constitution. The second “wave”

³⁶ *Rose v. Council for Better Education, Inc.*, 790 S.W. 2d 186 (Ky. 1989).

³⁷ See *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976)(*Robinson II*); *Abbott v. Burke*, 575 A.2d 359 (N.J.1990)(*Abbott II*); *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994)(*Abbott III*).

³⁸ *Brigham v. State of Vermont*, 692 A.2d 394 (Vt. 1997).

³⁹ *Seattle School District No. 1 of King County v. Washington*, 585 P.2d 71 (Wash. 1978).

⁴⁰ See, e.g., Murray, Evans & Schwab, *supra*, n. ___ at 791; Addonizio, *supra* n. __ at 458-60; Palfrey, *supra* n. __ at 16-20; William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J. L. & Educ. 219 (1990).

⁴¹ *Serrano v. Priest* (“*Serrano I*”), 487 P.2d 1241 (Cal. 1971).

presumably began in 1973 with the Supreme Court's decision in *San Antonio v. Rodriguez*, shutting the door on the 14th Amendment as a viable means of reform; this new wave instead focused on state constitutional provisions guarantying equality, seeking to channel school finance challenges into state equality guarantees.⁴² The third "wave," under this standard description, began roughly in 1989 with the Kentucky Supreme Court's decision in *Rose v. Council for Better Education*⁴³ and the Texas Supreme Court's decision in⁴⁴ and the Montana Supreme Court's decision in the *Helena Elementary* case,⁴⁵ all of which were decided the same year. In this trilogy of cases, and others that followed, the courts presumably jettisoned equality analyses under state constitutions in favor of an "adequacy" analysis in scrapping dysfunctional funding schemes for public education.⁴⁶

This oft-repeated formula for classifying school funding cases into three waves, however, is both over-simplified and out-dated. It is far more productive to describe the cases, now that *Brown* can be viewed with the benefit of a half-century's hindsight, in a more linear and historically true fashion. In reality, there have been only two dominant phases in school finance litigation. The first, quite short-lived and unsuccessful, immediately followed the initial *Brown* decision and the implementing directive of *Brown II*.⁴⁷ The Supreme Court in *Brown I* had declared that "(t)oday, education is perhaps the most important function of state and local governments" and "(s)uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."⁴⁸ Not surprisingly, in the earliest cases challenging obvious disparities in school funding schemes, litigants assumed that the federal equal protection clause was the ticket to reform. They invoked the 14th Amendment and typically selected federal courts as their

⁴²Murray, Evans & Schwab, *supra* n. __ at 791. *Serrano II*, in which the California Supreme Court declared that its earlier decision rested on both the United States and the California Constitutions, was one of the earliest cases in this category. See *Serrano v. Priest* ("Serrano II") 557 p.2d 929 (Cal. 1976). See, also, *Robinson v. Cahill* 303 A.2d 273 (N.J. 173). For a list of the so-called "second wave" cases that prevailed, See William Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 Santa Clara L. Rev. 1185, at n.10 (2003).

⁴³790 S.W. 2d 186 (Ky. 1989).

⁴⁴*Edgewood*, *supra* note __.

⁴⁵*Helena Elem. Sch. Dist. No. 1 v. State*, 769 p. 2d 684 (1989).

⁴⁶Murray, Evans & Schwab, *supra* at 791. For a list of the so-called "third wave" cases, see Koski *supra* n. __ at note 14.

⁴⁷*Brown v. Board of Education of Topeka (Brown II)*, 349 U.S. 294 (1955).

⁴⁸*Brown v. Board of Education of Topeka (Brown I)*, 347 U.S. 483, at 493 (1954).

preferred forums.⁴⁹ In short order, however, that avenue was blockaded in 1973, with the decision in *San Antonio v. Rodriguez*. Not only did a majority of the Court, in that case, conclude that education was *not* a fundamental right under the federal Constitution, it also held that wealth was not a suspect classification that triggered strict scrutiny under the equal protection clause; the 14th Amendment was thus a dead-end. What followed was a second, much more aggressive and successful phase of school funding challenges: Those in state courts, invoking previously ignored state constitutional provisions. Virtually all-meaningful reform has come from this latter continuum of cases.

Within this second dominant phase, which began in the early 1970's with intermittent successes and failures that continues into the present, there have certainly been sub-trends that can be identified. Thus, it is fair to say that many of the early leading cases of the 70's and 80s (including decisions in California,⁵⁰ Connecticut,⁵¹ West Virginia,⁵² and Wyoming⁵³) relied heavily upon offshoots of equal protection theory. This should come as no surprise. State courts were influenced heavily by *Brown* and its progeny. These *Brown*-related cases – propelled forward by Charles Houston – were about equality. *Brown* had revolutionized thinking with respect to the notion that public school education was attached, in some fashion, to constitutional rights that adhered to both black and white children. It was therefore natural for these early state constitutional decisions to focus on the *inequities* produced by the existing state systems of public education, working backwards to show that such inequities had led to a breach of the relevant state constitutional command.⁵⁴ A second sub-group of the state constitutional phase was premised at least in part on “adequacy” challenges. In many cases of the 1980s and ‘90s, state courts began shying away from comparing educational expenditures from one district to another – i.e. the equality approach -- focusing instead on the adequacy of educational opportunities across the board.⁵⁵ Texas,⁵⁶ Kentucky⁵⁷ and

⁴⁹ See, e.g., *Hargrave v. McKinney*, 413 F.2d 320, 324 (5th Cir. 1969) (suggesting that education was a fundamental right under the federal 14th Amendment).

⁵⁰ *Serrano v. Priest (Serrano II)*, 557 P.2d 929 (Calif. 1977).

⁵¹ *Horton v. Meskill*, 376 A.2d 359, at 374-75 (Conn. 1977).

⁵² *Pauley v. Kelly*, 255 S.E. 2d 859 (W. Va. 1979).

⁵³ *Washakie County School District v. Herschler*, 606 P.2d 310 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980).

⁵⁴ For an excellent discussion of three different “waves” of school funding cases, see Palfrey, *supra* n. _____. The first wave involved challenges under federal constitutional decisions. The second wave involved equality claims utilizing state constitutions. See *id.* at 16-20.

⁵⁵ Palfrey, *supra*, at 21-22. See, also, William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance*

Montana⁵⁸ are among the states that favored this approach. Yet this did not amount to a sea change in litigation strategies. Rather, it was a minor adjustment to the same state constitutional theme. As one commentator aptly put it, “more money for poor schools frequently meant less money for rich schools or higher taxes in rich communities.” Flying the flag of demanding penny-for-penny equality was often causing wealthier districts and legislators to dig in against a perceived threat to their existing domain.⁵⁹ Focusing on the adequacy of education, for all students, was determined to be a more palatable way of framing the same issue.

It is unhelpful and inaccurate to suggest that these cases can be segregated and packaged into neat “equality” and “adequacy” boxes. In fact, most state constitutional decisions in this area contain elements of both equality and adequacy themes.⁶⁰ Such a result was most likely inevitable. In federal and state constitutional jurisprudence, generally, equal protection and substance due process (from which the “adequacy” notion is derived), are inextricably intertwined.⁶¹ Most lawsuits involving a claim that governmental action treats two classes of individuals differently and unfairly, create a concurrent claim that a fundamental right has been taken away without due process. The reverse – i.e. fundamental rights claims often bring with them equality claims – is equally true.⁶² It is impossible to divorce “equality” from “adequacy” theories,

Reform Litigation, 19 JL & Educ. 219 (1990)(hereinafter Thro, *The Third Wave*); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C.L. REV. 597, 603 (1994)(hereinafter Thro, *Judicial Analysis*).

⁵⁶ Edgewood, *supra*, 777 S.W. 2d 391 (Tex. 1989).

⁵⁷ *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 at 206 (Ky. 1989).

⁵⁸ *Helena Elementary School District No. 1 v. State*, 769 P.2d 684 (Mont. 1989).

⁵⁹ Quentin A. Palfrey, *supra* note __ at 18-20.

⁶⁰ A number of authors have made this general point. *See, e.g.*, William S. Koski, *supra* note __ at 1188-95; Paul L. Tractenberg, *supra* n. __ at 430-35. *See, also*, Julie K. Underwood, *School Finance Litigation: Legal Theories, Judicial Activism, and Social Neglect*, 20 J. Educ. Fin. 143, 150 (1994).

⁶¹ *See, e.g.*, *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (combining elements of due process and equal protection analysis). *San Antonio v. Rodriguez*, discussed earlier, is itself a case that is analyzed under both the due process and equal protection provisions. *See* 411 U.S. at 16-17. For an example of how state courts merge discussions of due process and equal protection under miscellaneous provisions, *see Gormley et al.*, *supra* n. __, at Sec. 4.1. For an excellent example of a state constitutional case combining analysis under both due process and equal protection notions, *see Commonwealth v. Wasson*, 842 S.W. 2d 487 (Ky. 1993).

⁶² *See, generally*, Nowak & Rotunda, *supra* n. __ at Sec. 14.1, for a discussion of the inter-relationship between equal protection and due process analysis. For a time, the United States Supreme Court actually merged “fundamental rights” analysis with equal

because they are joined at the hip. Moreover, a host of practical factors have nudged state courts in the direction of a variety of theories, unrelated to defined “waves.”

One such practical consideration has been the text of the Constitution in question. The fifty state constitutions contain such radically different collections of language – when it comes to equality, due process, and education itself -- that courts tend to latch onto whatever provision or provisions will allow them to construct the most compelling judicial opinion, once they conclude that a financing scheme is constitutionally deficient. Thus, the second phase of school finance litigation linked to state constitutional decision-making is best viewed as a series of ripples along a single continuum. The fluctuation has been driven by a hodge-podge of state constitutional provisions and theories, that are in turn driven by the particular state’s constitutional text, the state constitutional jurisprudence that has accreted over the years around it, and the political realities that confront the courts when they hand down such school finance decisions – these decisions are inevitably controversial, because they involve large expenditures of funds.

THE “FUNDAMENTAL RIGHTS” SUBSET

Buried within this continuum of state constitutional case law, there is an additional subset that must now be examined with care. It is a subset of cases that views education as a fundamental right, bringing *San Antonio v. Rodriguez* back to life under a panoply of distinct state constitutional provisions.

The highest courts of at least fourteen states, at one time or another, have declared that education is a fundamental right under their state constitutions.⁶³ Eight of these states, in doing so, have struck down their public

protection analysis. See Kathleen M. Sullivan & Gunther, *Constitutional Law* 640-643 (15th ed. 2004).

⁶³ Those states are: Alabama, Arizona, California, Connecticut, Kentucky, Minnesota, New Hampshire, North Dakota, Tennessee, Virginia, West Virginia, Wisconsin, Wyoming. The relevant cases are as follows: *Opinion of the Justices*, 624 So. 2d 107, 157 (Ala. 1993); *Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973); *Serrano v. Priest* (Serrano I), 487 P.2d 1241, 1258 (Cal. 1971); *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977); *Rose v. Council for Better Education, Inc.*, 790 S.W. 2d 186, 206 (Ky. 1989); *Skeen v. Minnesota*, 505 N.W. 2d 299, 315 (Minn. 1993); *Claremont School District v. Governor* (Claremont II), 703 A.2d 1353, 1359 (N.H. 1997); *Bismark Public School District v. North Dakota*, 511 N.W. 2d 247, 257 (N.D. 1994); *Tennessee Small School Systems v. McWherter*, 851 S.W. 2d 139, 151 (Tenn. 1993); *Scott v. Virginia*, 443 S.E. 2d 138, 142 (Va. 1994); *Pauley v. Kelly*, 255 S.E. 2d 859, 878 (W.Va. 1979); *Kukor v. Grover*, 436 N.W. 2d 568, 579 (Wis. 1989); *Washakie County School District v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980), *cert denied* 449 U.S. 824 (1980).

school funding systems as constitutionally defective, often combining the fundamental right pronouncement with an equal protection analysis, an “inadequacy” determination and/or some other theory unique to that state’s constitution.⁶⁴ Not all states that have traveled down this path, incidentally, have embraced significant change. At least six states, after determining that education is a fundamental right under their state constitutions, have gone on to *uphold* their existing public school systems.⁶⁵ For the most part, however, courts that have ventured down this path have gone on to implement significant changes.

THE CURRENT STAGNATION

It would be misleading to suggest that the second phase of state constitutional reform is still in full bloom. By the 1990s, state court decisions invalidating school financing systems began petering out. Numerous states have rejected state constitutional challenges in various forms.⁶⁶ Ironically, Kansas – the state that spawned litigation for which the *Brown* case was named – is until recently was among those in which supreme courts specifically found that education was *not* a fundamental right, leaving untouched funding schemes that perpetuated de facto segregation in their school systems.⁶⁷ (In January of 2005,

Florida amended its Constitution in 1998 to specifically provide that “the education of children is a fundamental value of the people of the State of Florida.” Fla Const. Art. IX, Sec. 1. Thus, this change was made through amending the text of the state charter itself, rather than through judicial interpretation.

It should be noted that on at least one occasion, the Pennsylvania Supreme Court has stated that education is a fundamental right under the state constitution. *See School District of Wilkesburg v. Wilkesburg Education Association*, 667 A.2d 5, 9 (Pa. 1995) (Flaherty, J.). However, the court later seemed to retreat from that position. *Marrero v. Commonwealth*, 739 A.2d 110, 113 (Pa. 1999).

⁶⁴ See cases from Alabama, California, Connecticut, Kentucky, New Hampshire, Tennessee, West Virginia, and Wyoming, *supra*.

⁶⁵ The states in question are Arizona, Florida, Minnesota, North Dakota, Virginia, and Wisconsin. The relevant cases are as follows: *Roosevelt Elementary School District No. 66 v. Bishop*, 877 P.2d 806 (1994). *Skeen v. Minnesota*, 505 N.W. 2d 299, 316 (Minn. 1993); *Bismark Public School District v. North Dakota*, 511 N.W. 2d 247, 262 (N.D. 1994); *Scott v. Virginia*, 443 S.E. 2d 138, 142-43 (Va. 1994); and *Kukor v. Grover*, 436 N.W. 2d 566, 574 (Wis. 1989).

Thus far, despite the amendment of the Florida Constitution to declare education a “fundamental value,” there has been no successful challenge to the Florida school funding scheme. *See Carolyn D. Herrington & Virginia Weider, Equity, Adequacy and Vouchers: Past and Present School Finance Litigation in Florida*; 27 J. Educ. Fin. 517, 520 (2001).

⁶⁶ *See* Peter D. Enrich, *supra* n.at note 9. (listing states where challenges have failed).

⁶⁷ *Unified School District No. 229 v. Kansas*, 885 P.2d 1170 (Kan. 1994), *cert. denied*,

however, the Kansas Supreme Court scrapped the state's school funding scheme, just after the fiftieth anniversary of the *Brown* decision, concluding that it violated Article 6, Section 6 of the Kansas Constitution.)⁶⁸ Among those states that have backed off from sweeping proclamations that their school systems are constitutionally infirm, largely this is because they are increasingly cognizant that state legislatures must figure out ways to pay for these massive overhauls. This reality inevitably creates an uncomfortable friction between the judicial and the legislative branches, often causing courts to invoke the "political questions" or some other mechanism to avoid the issue.

In Pennsylvania, for instance, the state Supreme Court in *Marrero v. Commonwealth*,⁶⁹ reached a result in 1999 that is typical of this new trend. Despite compelling evidence that the public school district in Philadelphia (comprised overwhelmingly of minority students) was woefully underfunded,⁷⁰ the Pennsylvania Supreme Court punted and concluded that the issue of funding was "solely committed to the discretion of the General Assembly."⁷¹ The Court went on to state that the legislature had satisfied its constitutional mandate to provide a "thorough and efficient system of public education." The Court wrote: "These are matters which are exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government."⁷²

A NEW PARADIGM: MODERN FUNDAMENTAL RIGHTS PROVISIONS

Although school finance litigation has experienced ups and downs over the past four decades, two things can be said with certainty. First, the state constitutional approach, by far, has dominated this area. Indeed, without state constitutional rulings there would have been no positive movement. Second, state constitutional reform in the courts has generally led to tangible, positive results. In those states that have scrapped their education funding schemes, striking them down under various provisions of their state constitutions, strong evidence exists to demonstrate that progress has followed, to some quantifiable extent. Experts in the field of education law and school funding have produced a body of data to demonstrate that states that have taken the plunge have made discernable strides towards equality and improved quality, particularly when

515 U.S. 1144 (1995).

⁶⁸ See *Montoy v. State* (Montoy II), 102 p.3d 1160 (Kan. 2005). See, also, *Montoy v. State* (Montoy III), 112 p. 3d 923 (Kan. 2005).

⁶⁹ 739 A.2d 110 (Pa. 1999).

⁷⁰ See *Marrero v. Commonwealth*, 709 A.2d 956 (Pa. Cmwlth. Ct. 1997) and Petitioners' briefs filed in that matter.

⁷¹ *Marrero v. Commonwealth*, 739 A.2d 110, 113 (Pa. 1999).

⁷² *Id.* at 113-114, quoting *Marrero* by *Tabales v. Commonwealth*, 709 A.2d 956 at 966 (Pa. Cmwlth.. 1998).

measured by “before and after” in-state standards.⁷³ As some commentators have correctly noted, progress has been most pronounced when court action has been coupled with legislative/political action.⁷⁴ Thus, as one scholar in the field has explained: “If the state’s legislature and governor have the will to change public school financing systems, but not the political courage, the court can provide the necessary political cover. Members of the political branches can deflect political fallout towards the court’s decision. A judicial-political coalition supporting reform may significantly aid reform efforts.”⁷⁵

The most productive avenue for meaningful change, therefore, rests in corralling the state constitutional phase of reform and coaxing it to a new level. Adopting freestanding state constitutional provisions that make *explicit* that education is a fundamental right for all children in a given state is the first step necessary to achieve such a break-through, in order to end the current period of stagnation. Although a scattering of state courts have gone out on a limb to find an implicit fundamental right of education buried within their constitutions, such decisions rest on quicksand. The fact is that most of the state constitutional provisions dealing with education were crafted in a different era when public school education did not hold the significance it does today. Rather than having to stretch language and shape an historical record out of ambiguous raw materials, it is far wiser to tackle the issue head-on.

Regardless of what the Framers of the 14th Amendment may have meant in 1868, American citizens today recognize that education is perhaps the single most important key to enjoying the entire panoply of rights afforded under the Constitution. It is hard to imagine that the Framers, if they were transported to this time period, would not place it at the top of their list, as an integral part of enjoying life, liberty, property and a host of other basic rights. Indeed, the recently-drafted Charter of Fundamental Rights contained in the draft European Unit Constitution, a modern example of Constitution-making, includes an explicit “Right to Education” in Article II-74, that states, *inter-alia*: “Everyone has the right to education and to have access to vocational and

⁷³See, e.g., Murray, Evans & Schwab, *supra* n. __, at 789, 806-808; Liz Kramer, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & Educ. 1, 50-51 (2002) (relating to California, Kentucky and Texas); Matthew H. Bosworth, *Courts as Catalysis: State Supreme Courts and Public School Finance Equity* at 234-36 (2001); Addonizio, *supra* note __, at 463-64, and 482-83 (reporting mixed results, but some progress, in Michigan); Enrich, *supra* note __ at 554-559 (again reporting data in Connecticut that is “neither entirely cheerful nor entirely disheartening, with at least some success in reducing fiscal disparities).

⁷⁴Enrich, *supra* note __ at 525-26; Bosworth, *supra* n. __, at 234-36; John Dayton, *Serrano and its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 W. Educ. L. Rep. 447 at 463 (2001).

⁷⁵Dayton, *supra* at 464.

continuing training...”⁷⁶

Another federal Constitutional Convention is not likely to occur in the United States, in the foreseeable future. Yet amending a state constitution, as a rule, is not a difficult process. Unlike the Herculean task of revising the federal charter, most state constitutions – because they are far more detailed and must be updated regularly -- can be changed with relative ease and alacrity. In Pennsylvania, as in many other states, an amendment simply requires a majority vote of two successive legislatures, plus approval by the voters in the following election.⁷⁷ Assuming the ballot question is phrased fairly, proposed amendments can be ushered through the process with relative ease.⁷⁸

Presently, only a tiny number of states contain language in their state constitutional text that comes close to “fundamental rights” language. The Washington Constitution make it a “paramount” duty of the state “to make ample provision for the education of all children residing within its borders....”⁷⁹ The Georgia Constitution states that providing an adequate public education for citizens is a “primary obligation” of the state.⁸⁰ The Illinois Constitution, one of the few to use the word “fundamental,” tracing itself back to an earlier era before that term carried its current meaning, provides: “A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services.”⁸¹

The only state constitution to include a truly modern “fundamental rights” provision is that of Florida, which was amended in 1998 to incorporate such express language. Article IX, Section 1 of the Florida Constitution now provides: “The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders.”⁸²

⁷⁶See Charter of Fundamental Rights of the European Union 2000 O.J. (C364) 1, Art. II-74.

⁷⁷See Harry L. Witte, *Amending the Pennsylvania Constitution*, in Gormley et al., *supra* n. __, Ch. 35; Michael Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 Calif. L.Rev. 1473 (1987).

⁷⁸Id.

⁷⁹Wash. Const., art. IX, Sec. 1.

⁸⁰GA. Const., art. VIII, Sec. 1.

⁸¹ILL. Const. Art. X, Sec. 1.

⁸²FLA. Const., Art. IX, Sec. 1. For a discussion of this and related amendments to the education provisions of the Florida Constitution in 1998, see Carolyn D. Herrington and Virginia Weider, *Equity, Adquacy and Vouchers: Past and Present School Finance Litigation in Florida*, 27 J. Educ. Fin. 517 (2001).

It is true, as Paul Tractenberg has observed in a chapter on education rights contained in the splendid new treatise on state constitutional law edited by Alan Tarr and Robert Williams, that “strong” education provisions do not necessarily produce strong judicial interpretations of those provisions.⁸³ Language alone does not necessarily a winning constitutional argument make. For instance, the text in Illinois and Georgia set forth above has not led to successful school finance overhauls, despite vigorous challenges.⁸⁴ Even in Florida, where the 1998 amendments were aggressively constructed to produce education finance reform, there has not yet been a successful challenge utilizing those provisions.⁸⁵

Yet none of this means that the cup is half empty rather than half full. There is no question that clear, strong, modern constitutional text that defines education as a fundamental right is invaluable and productive on many levels. First, it gives the courts a sturdier hook on which to hang decisions mandating educational finance reform, if they wish to do so, rather than forcing them to rely upon ambiguous provisions that are often centuries old. Second, it gives legislatures and governors political cover, enabling them to point their fingers at the courts and the state constitution if costly school finance reforms – which they may favor personally but fear politically – are necessary. Third, fresh constitutional history in the form of legislative debates and/or written explanations drafted at the time constitutional initiatives are ratified by voters provides a strong footing on which to base school finance reform – much stronger than antiquated and murky provisions that pre-date public school education as we know it today. Fourth, and perhaps most importantly, the “fundamental right” designation has a specific meaning in modern American constitutional jurisprudence; thus, it will bring with it certain tests and standards that ensure that dysfunctional and inequitable school funding schemes do not remain in place.

If the words “education constitutes a fundamental right of all citizens” are inserted into the text of a state constitution, there is a specific, practical significance to such an amendment. It means, pursuant to the prevailing jurisprudence of most states, which is consistent with federal jurisprudence, that strict scrutiny would be triggered whenever the government enacted a law or took action, which impacted that right. This, in turn, would mean that the courts would be required to examine such a legislative scheme with a healthy measure of skepticism, and to strike it down unless there were “compelling government interests” that justified it.⁸⁶ Such an explicit constitutional

⁸³Tractenberg, *supra*, n. ____, at 431.

⁸⁴Committee for Educational Rights v. Edgar, 641 N.E. 2d 602 (Ill. App.Ct. 1994), *aff’d*, 672 N.E. 2d 1178 (1996); McDaniel v. Thomas, 285 S.E. 2d 156 (Ga. 1981).

⁸⁵See Herrington and Weider, *supra* n. ____ at 520.

⁸⁶For a discussion of federal “strict scrutiny analysis,” see Allan Ides & Christopher N. May, *Constitutional Law: Individual Rights* 56-57 (2004). For a good example of a

command would give the courts potent ammunition. It would allow them (indeed it would require them) to mandate that the state legislature fix glaring problems relating to education funding, rather than side step them. Maintaining dysfunctional systems of public education would simply not be an option under this constitutional standard.

CONCLUSION

Senator Rick Santorum (R.Pa.), in a recently published a book entitled “It Takes a Family: Conservatism and the Common Good,”⁸⁷ articulates a vision of public education that is at odds with updating state constitutions in this fashion. Among other points contained in this text, Senator Santorum advocates that more mothers should stay at home; and more parents should home-school their children (as he and his wife do). Senator Santorum writes: “[W]e cannot help noticing that schools are not once mentioned in the federal Constitution.”⁸⁸ He goes on to say that: “It’s amazing that so many kids turn out to be fairly normal, considering the weird socialization they get in public schools.”⁸⁹ He thus advocates more home schooling, as a means of returning to the basics. In Santorum’s view, which reflects a rather extreme perspective of the role of modern public education, we should do as our forefathers intended by sitting on stiff-backed chairs beside our fireplaces and doing our book-learning at home.

Senator Santorum is correct that the Framers nowhere bestowed a right to public schooling in the federal Constitution. That much should come as no surprise – public education was not a part of our nation’s culture in the 1780s.⁹⁰ Most American families, including those in Pennsylvania where he now serves, were living in cabins on the frontiers or eking out rough livelihoods on meager farms.⁹¹

Yet we cannot limit ourselves, over two centuries later, to the resources that were available when the federal and many state constitutions were drafted and ratified in the 1700s. Certainly, we would not imagine limiting our children to reading books that were published in 1787, to gain their knowledge, today, about science and politics and literature and math.⁹²

state constitutional case employing such analysis, *see* *In re T.W.* 551 So. 2d 1186, 1190-1193 (Fla. 1989). *See, also*, *Fischer v. Department of Public Welfare*, 502 A.2d 114, 120-21 (Pa. 1985).

⁸⁷Rick Santorum, *It Takes a Family: Conservatism and the Common Good* (2005).

⁸⁸*Id.* At 352.

⁸⁹*Id.* At 386.

⁹⁰*See* Ken Gormley & Vanessa Browne-Barbour, *It Takes An Education*, Pittsburgh Post-Gazette, July 31, 2005 at J-1.

⁹¹*Id.*

Home schooling has advanced in impressive ways. It is a wonderful luxury for those who can afford it, and for those who favor it as a method of learning. But what about those families in which the parents themselves are uneducated and do not possess the tools to teach? What about those families who cannot put a meal on the table for their children at lunchtime? Are we to say, as a society, that these children do not have a right to an education as well?⁹³

Senator Santorum's own children, according to news accounts, have attended cyber-schools, linked to the public schools and paid for by state residents' tax dollars.⁹⁴ The Internet and cyber-schooling were not available in the 1780s. Yet this is an example of a creative development that has benefited his and many other children, as our society's definition of a suitable public education expands infinitely with new technology and previously unimagined repositories of knowledge.⁹⁵

Moreover, our fore bearers at a federal and state level would have applauded the evolution that has placed education at the core of our valued rights. For Thomas Jefferson, public education was essential to provide citizens with the skills necessary to perform their civic duties and to make the new Constitutional system work effectively.⁹⁶ John Adams likewise considered public education to be a matter of "national concern and expense" necessary to accomplish the goals of the new republic.⁹⁷ Indeed, the very first constitutions of many states – some of them dating back to 1776 – set forth explicit provisions encouraging or mandating public education.⁹⁸ So important was public education that when Congress admitted new states to the union in the early 1800s, it required them to include education provisions in their constitutions as a prerequisite to becoming part of the United States.⁹⁹

⁹²Id.

⁹³Id.

⁹⁴Id. at J-3. *See, also*, Amy McConnell Schaarsmith, *Penn Hills Loses Santorum Cyber School Tuition Fight*, Pittsburgh Post-Gazette July 11, 2005; David Conti & Reid R. Frazier, *Santorum Tuition Refund Denied*, Tribune-Review, July 12, 2005.

⁹⁵Id.

⁹⁶Id. at J-3;. *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

⁹⁷Id. *See* Michael A. Rebell, *The Campaign for Fiscal Equity, Adequacy Litigation: A New Path to Equity?*, 141 Pli/NY 225 (May 12, 2004).

⁹⁸Tractenberg, *supra* n. ___, at 398-400. For instance, Pennsylvania's Constitution of 1776 provided: "A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices." PA. Const. of 1776, Sec. 44.

⁹⁹David Tyack and Thomas James, *State Government and American Public Education: Exploring the "Primeval Forest,"* 26 Hist. Educ. Q 39, 40 (1986); Bosworth, *supra*, at.

If education is to become a fundamental right in any meaningful sense in modern America, there is no better way to accomplish this than to make it so, expressly. The creative use of state constitutions to establish a renaissance in public education in our country is a most promising new frontier. It is exactly the path Thurgood Marshall and Charles Houston would have taken, if they were here to take the next ambitious step with the benefit of historical hindsight, and foresight.

If education is really as important as we profess, in America, we should not be shy about trading in the paradigm of *Brown v. Board of Education* for a new one, now that the bridge that Houston and Marshall constructed has supported its weight for a half-century, serving its purpose. Including education as a fundamental right in our state charters is a positive way to fight a battle that we should not permit ourselves to grow tired of, let alone to lose.

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