Originalism and School Finance Litigation
By
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Introduction

In school finance litigation,¹ the plaintiffs claim that the state legislature has violated the State Constitution² by failing to fund the public schools in an equitable³ or adequate⁴ manner.⁵ Although the constitutional theories seem straightforward,

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¹ Over the past forty years, the high court of virtually every State has grappled with a school finance case. Indeed, only Delaware, Hawaii, Mississippi, Nevada, and Utah have avoided litigation at the state high court level. Bonner ex rel. Bonner v. Daniels, 885 N.E.2d 673, 692 n.5 (Ind. App. 2008).

² This emphasis on state constitutional provisions illustrates the revival of constitutional law that began in the 1970s. See A.E. Dick Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 VA. L. REV. 873 (1976). Because of this revival, “it would be most unwise these days not also to raise the state constitutional questions.” William J. Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 502 (1977).

³ In “equity suits,” the plaintiffs assert that all children are entitled to have the same amount of money spent on their education and/or that children are entitled to equal educational opportunities. Specifically, the plaintiffs contend the legislature violates the State Constitution’s Equality Guarantee because education is a fundamental right. See Serrano v. Priest, 557 P.2d 929 (Cal. 1976); Horton v. Meskill, 376 A.2d 359 (Con. 1977); Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980).

⁴ In “adequacy suits,” which have dominated during the “Third Wave” (1989-present), the plaintiffs, relying on the State Constitutions’ Education Clauses argue that the finance system is unconstitutional because some schools lack the money to meet minimum standards of quality. See Julie K. Underwood & William E. Sparkman, School Finance Litigation: A New Wave of Reform, 14 HARV. J.L. & PUB. POL’Y 517, 536-37 (1991); Wayne Buchanan & Deborah Verstegen, School Finance Litigation in Montana, 66 Ed.Law Rep. 19, 32 (1991); David Thompson, School
the judicial opinions raise complex jurisdictional, merits, and remedial questions.\textsuperscript{6}

Moreover, despite scores of cases \textsuperscript{7} and a significant amount of academic

\textit{Finance and the Courts: A Reanalysis of Progress}, 59 Ed.Law Rep. 945, 960-66 (1990). In other words, all children are entitled to an education of at least a certain quality, and that more money is necessary to bring the worst school districts up to the minimum level mandated by the State Constitution. See William E. Thro, \textit{Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model}, 35 B.C. LAW REV. 597 (1994).


\textsuperscript{6} See generally R. Craig Wood, \textit{EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES} (2007).

\textsuperscript{7} There have been three waves of school finance litigation. See William E. Thro, \textit{The
commentary, “there are few certainties in the school funding litigation process.”

This uncertainty is the result of judges and attorneys asking the wrong questions. Like all constitutional litigation, a challenge to a State’s school finance system involves three fundamental questions. First, who allegedly violates 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). During the first wave, which lasted from the late 1960s until the Supreme Court's decision in San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), litigation relied on the federal Equal Protection Clause. Essentially, the plaintiffs asserted that all children were entitled to have the same amount of money spent on their education and/or that children were entitled to equal educational opportunities.

Because Rodriguez foreclosed the federal constitutional argument, the second wave, which lasted from the New Jersey Supreme Court's decision in Robinson v. Cahill, 303 A.2d 273 (N.J. 1973), until early 1989, focused on state constitutional provisions and continued to emphasize the equity theory.

In contrast, the third wave, which began with the Montana, Kentucky, and Texas plaintiffs' victories in 1989 and continues to the present, has emphasized the adequacy theory.


Constitution? As Rosenkranz demonstrated, answering this question tells us whether the constitutional challenge is a facial challenge to legislative authority or simply an as-applied challenge to executive enforcement of a statute.10 This is the question about standing and standards of proof. Second, what does the Constitution prohibit or require? Answering this question tells us how the Constitution limits the sovereign discretion of the government and what those limits mean. This is the question about constitutional meaning. Third, why is the Constitution violated or not violated? Answering this question tells us what constitutional actors must do to correct the violation or why the constitutional actors have conformed to the constitutional norms. This is the question about remedy.

In the context of school finance litigation, all three questions merit extensive scholarly study. I addressed the first question in a previous work11 and I intend to address the third question in the future, but this Article addresses the second question—what does the State Constitution require or prohibit with respect to the financing of schools?12 In particular, I focus on how to determine what the State


12 To be sure, I am not the first to address this question. In a path breaking work, my colleague Scott Bauries argued that the State Constitutions impose a duty to act affirmatively in pursuit of a particular policy goal. See Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST LAW REVIEW 705 (2012). Conversely, my frequent co-author, R. Craig Wood, has argued that, at least with respect to education, the
Constitutions mean for school finance. My thesis is that Originalism is the best way of enforcing the constitutional limits and constraining judicial power.

This article has three parts. Part I explores the nature of American Constitutions and judicial review. Drawing on the words of both Madison and Hamilton, it explains how written Constitutions limit the sovereign discretion of the government, why the judiciary must enforce those limits, and why the courts must interpret those limits. Part II offers a brief overview of Originalism as a method of constitutional analysis. In particular, it explains the importance of original public meaning—not original intent—as an interpretative approach and why constitutional constructions must be consistent with original public meaning. Part III applies Originalism to school finance litigation. Initially, this Part illustrates how courts have rejected the idea of limits on legislative discretion, judicial enforcement of those constitutional limits, and analysis of those limits using


Outside of the school finance context, some scholars have explored the issue of whether education was a fundamental right under the State Constitutions at the time of the adoption of the Fourteenth Amendment. Eastman contends the state constitutions did not create a fundamental right to an education. John C. Eastman, *When Did Education Become A Civil Right? An Assessment of State Constitutional Provisions for Education 1776-1900,* 42 Am. J. LEGAL Hist. 1, 2 (1998). However, Calabresi and Perl reached the opposite conclusion. See Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education,* 2014 Mich. St. L. REV. 429, 435 (2014) (arguing the right to a public school education was already by 1868 a fundamental state constitutional right of state citizenship and that segregation in public schools was therefore unconstitutional from 1868 on).
original public meaning. The Part then explains why the State Education Clauses are limits on legislative discretions, why the courts must enforce those limits, and how courts should interpret and construe those limits. In particular, it explores the significance of the semantic differences between the Education Clauses in terms of setting standards, allocating burden of proof, and establishing a hierarchy of constitutional values.

I. AMERICAN CONSTITUTIONS AND JUDICIAL REVIEW

A. Constitutions Limit the Sovereign Discretion of Governments

Advocating the ratification of the Constitution, Madison observed:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.13

Madison’s words implicitly acknowledge the fallibility of human nature,14 but also recognize the Constitution establishes the parameters of the government and


14 The Constitution’s implicit distrust of humanity is not surprising. As Mark David Hall demonstrated, Calvinist theology (sometimes called reformed theology) was one of the foundations of the Constitution. Mark David Hall, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 12-40 (2013). This is not to discount the influence of Locke or Montesquieu, but simply to acknowledge the Framing Generation had great awareness of the Calvinist thread of the Protestant tradition. As Hall explained, “American leaders were familiar with Locke, but few thought his political philosophy was at odds with traditional Christian or Calvinist political ideas.” Id. at 24. Rather, “Locke’s political philosophy is best understood as a logical
establish limits on the government.\textsuperscript{15} In effect, all constitutional provisions are limitations on the government’s sovereignty—its discretion to pursue a particular end by a particular means.\textsuperscript{16} Thus, without a constitution, the government possesses nearly unbridled freedom to pursue its desired means and ends.\textsuperscript{17} A constitution limits this unbridled government discretion.\textsuperscript{18}

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\item extension of Protestant resistance literature rather than as a radical departure from it. \textit{Id.} at 21.
\item As Marci Hamilton observed, committed Calvinists or those—such as Madison—who had attended Princeton where they took required courses from John Witherspoon, the greatest Calvinist theologian of the era, dominated the Constitutional Convention. Marci A. Hamilton, \textit{The Calvinist Paradox of Distrust and Hope at the Constitutional Convention} in \textit{Christian Perspectives on Legal Thought} 4049, 4051 (Michael W. McConnell, Robert Cochran, \& Angela C. Carmella, eds., 2001) (Kindle Edition). “Madison's Notes of the Debates are permeated with statements making clear that the Framers believed all humans with power must be distrusted and that distrust must be built into the system, but that a system could be crafted that would deter the vices of power.” \textit{Id.} at 4055.
\item \textit{Afroyim v. Rusk}, 387 U.S. 253, 257 (1967).
\item The Constitution’s structural and textual provisions—such as the division of sovereignty between the States and the National Government, the separation of powers between the three branches, the enumeration of legislative powers, explicit textual guarantees of rights, bicameralism, the executive veto, the advise and consent requirement for appointments, and treaty ratification process—all express a fundamental distrust of humanity and a desire to avoid concentrations of power.
\item Our constitutional system “protects us from our own best intentions” by preventing the concentration of “power in one location as an expedient solution to the crisis of the day.” \textit{New York v. United States}, 505 U.S. 144, 187 (1992).
\item As Texas Supreme Court Justice Willett observed:
\begin{quote}
Texans are doubly blessed, living under two constitutions sharing a singular purpose: to secure individual freedom, the essential condition of human flourishing. In today's age of staggering civic illiteracy—when 35 percent of Americans cannot correctly name a single branch of government—it is unsurprising that people mistake majority rule as America's defining value.\textsuperscript{3} But our federal and state charters are not, contrary to popular belief, about “democracy”—a word that appears in neither document, nor in the Declaration of Independence. Our
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These limitations on sovereign discretion take two forms—prohibitions and requirements. The National Constitution illustrates the point. Many constitutional clauses expressly prohibit certain actions; other provisions require—at least implicitly—government to act in a particular way. Some clauses contain both a prohibition and a requirement for affirmative governmental action. For example, the Free Exercise Clause prohibits government from punishing particular beliefs.

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enlightened 18th- and 19th-century Founders, both federal and state, aimed higher, upended things, and brilliantly divided power to enshrine a promise (liberty), not merely a process (democracy).

*Patel v. Texas Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 92 (Tex. 2015) (Willett, J., joined by Lehman & Devine, JJ., concurring).

19 *Compare* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”), *with* U.S. CONST. amend XVI (“The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”); U.S. CONST. amend. XX, § 2 (requiring Congress to meet at least once per year).

20 As the Supreme Court explained:

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all “governmental regulation of religious beliefs as such.” The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

but also mandates a religious exemption from otherwise applicable laws in some circumstances. 21 Similarly, the Equal Protection Clause not only requires heightened scrutiny for discrimination based on immutable characteristics,22 but also requires the government to act affirmatively to eliminate the present-day effects of past discrimination by the government.23

While Americans are familiar with the idea of constitutional provisions as prohibitions, they are less familiar with the notion of constitutional provisions that impose requirements on government to act in a particular way.24 Yet, the fifty State Constitutions25 frequently require government to act in a particular way.26 Most

21 Compare Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (holding that the ministerial exception makes federal discrimination statutes inapplicable to the employment decisions of religious organizations concerning their ministerial employees), with Smith, 494 U.S. at 877–78 (stating that religious conduct is not exempt from generally applicable laws).


25 State Constitutions are fundamentally different from the National Constitution—the National Constitution is a grant of power and the state constitutions are limitations on power. Hornbeck v. Somerset County Board of Education, 458 A.2d 758, 785 (Md. 1983); Board of Educ. v. Nyquist, 439 N.E.2d 359, 366 n. 5 (N.Y. 1982). Thus, the presumptions concerning legislative authority are reversed. Congress may not act unless it can identify a specific enumerated power, United States v. Morrison, 529 U.S. 598, 607 (2000), but the State Legislature may act unless there is an explicit restriction. Almond v. Rhode Island Lottery Comm’n, 756 A.2d 186, 196 (R.I. 2000). Moreover, because state constitutions are frequently amended or even completely revised, Robert F. Utter, Freedom and Diversity In a Federal System: Perspectives on State Constitutions and the Washington Declaration
significantly, for purposes of this Article, every State Constitution contains an Education Clause,\(^{27}\) which generally requires the legislature to establish a public school system of a particular quality.\(^{28}\) In the absence of such a state constitutional provision, state legislatures would have absolute discretion whether to pursue the end of a public school system and to choose the means of achieving that end.\(^{29}\) The Education Clause limits that discretion—state legislatures may not decline to have

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\(^{28}\) See Ala. Const. art 14; § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI; § 1; Ark. Const. art. XIV, sec 1; Cal. Const. art. IX, § 5; Colo. Const. art. IX; § 2; Conn. Const. art. VIII; § 1; Del. Const. art. X, § 1; Fla. Const. art. IX; § 1; Ga. Const. art. VIII, § VII, para. 1; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, sec. 1; Iowa Const. art. IX, § 3; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, § 1; Me. Const. art. 8, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5; Mich. Const. art. VIII, § 2; Minn. Const. art. XIII, § 1; Miss. Const. art. VIII, § 201; Mo. Const. art. 9. § 1(a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 2; N.H. Const. pt. 2, art. 83; N.J. Const. art. VIII, § 4; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VII, § 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.


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\(^{27}\) See Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 Geo. Mason L. Rev. 301, 358–59 (2011) (arguing that state legislatures, by default, have all power not given to the federal government and are thus constrained, not enabled, by specific grants of power in state constitutions).
a public school system. By limiting legislative discretion, the provision effectively compels the legislature to perform an affirmative act—establishing a school finance system.

B. The Judiciary Must Enforce the Constitution’s Limits

Advocating the ratification of the Constitution, Hamilton observed:

[T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents . . . where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

Hamilton’s words suggest three critical points. First, although the written Constitution often speaks “majestic generalities,” it also contains limits stated with “elegant specificity.” Second, when constitutional actors violate the Constitution’s limits when the judiciary—not the legislature or the executive—must intervene. Third, in determining whether the Constitution’s limits are violated, the judiciary should be guided by the words of the Constitution.

30 Federalist 78 (Alexander Hamilton).

31 In nations with unwritten constitutions, such as the United Kingdom, there can be a fair amount of uncertainty and ambiguity regarding the limits on government. By reducing the limitations on government to writing, a written Constitution removes much of that uncertainty and ambiguity. When the limits are clear, the need for an enforcement mechanism, such as judicial review, becomes more necessary.


34 Of course, courts “must never forget that it is a constitution we are expounding.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). Constitutions are
Hamilton’s first point—the Constitution contains clear limits—recognizes the purpose of a written Constitution is:

to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.\(^{35}\)

The Constitution’s words represent a permanent political consensus.\(^{36}\) While the political winds will shift, there are some initiatives beyond the reach of a temporary political majority. Merely winning an election—or several elections—does not confer absolute power. There are some initiatives beyond the reach of temporary political majority; some things will not change despite the ever-shifting political winds. The Will of the People—as expressed in the words of their Constitution—will always prevail over the Will of the People’s Agents—the actions of constitutional actors who have political power for a time.

Hamilton’s second point—the judiciary has the last word on the meaning of constitutional limits—foreshadowed Tocqueville’s observation that “scarcely any political question arises in the United States which is not resolved, sooner or later,

\[\text{“intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” Id. at 415. They “are not ephemeral enactments, designed to meet passing occasions. . . . The future is their care and provision for events of good and bad tendencies of which no prophecy can be made.” Weems v. United States, 217 U.S. 349, 373 (1910). Mistakes in statutory interpretation require only a legislative amendment, but mistakes in constitutional interpretation endure until overruled by the court or the amendment process.}\]


\(^{36}\) Of course, the People may choose to change their Constitution, but doing so requires an extraordinary political consensus. See U.S. Const. art. V.
into a judicial one.” 37 Two centuries after Marbury v. Madison, 38 litigants routinely argue that legislators or executive branch officials have violated the National or State Constitutions and ask the judiciary to intervene as a means of ensuring constitutional accountability. 39 While Lincoln 40 and some contemporary academics 41 insist that judicial opinions do not necessarily bind other constitutional actors, the

38 5 U.S. (1 Cranch) 137 (1803).
39 As the Supreme Court of Kentucky explained, the Government

is not immune from suit in a declaratory judgment action to decide whether the [Legislature] has failed to carry out a constitutional mandate and that members of the [Legislature] are not immune from declaratory relief of this nature simply because they are acting in their official capacity. . . . [A] declaratory judgment over constitutionality is not limited to deciding the constitutionality of statutes, but extends to failure to enact statutes complying with constitutional mandate. While it would be a violation of the separation of powers doctrine . . . in the Kentucky Constitution, Sections 27 and 28, for our Court to tell the [Legislature] what to do, i.e., what system or rules to enact, it is our constitutional responsibility to tell them whether the system in place complies with or violates a constitutional mandate, and, if it violates the constitutional mandate, to tell them what is the constitutional “minimum.” But by its very nature, judicial exercise of this responsibility requires great restraint.

Beshear v. Haydon Bridge Co., 416 S.W.3d 280, 287-88 (Ky. 2013)


Supreme Court has declared its rulings to be “supreme in the exposition of the Constitution.”

Hamilton’s third point—in determining the constitutional limits, the judges should be guided by the words of the Constitution—acknowledges the potential dangers of judicial review in a democratic republic. There is a real chance that judges will become “a bevy of Platonic Guardians,” who “substitute their predictive judgments for those of elected legislatures and expert agencies.” “What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle.”

Although there is a variety of other

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43 As Justice Scalia explained during his confirmation hearings:

[A] constitution has to have ultimately majoritarian underpinnings. To be sure, a constitution is a document that protects against future democratic excesses. But when it is adopted, it is adopted by democratic process. That is what legitimatizes it . . . [I]f the majority that adopted it did not believe this unspecified right, which is not reflected clearly in the language, if their laws at the time do not reflect that the right existed, nor do the laws at the present date reflect that society believes that the right exists, I worry about my deciding that it exists. I worry that I am not reflecting the most fundamental, deeply felt beliefs of our society, which is what a constitution means, but rather, I am reflecting the most deeply felt beliefs of Scalia, which is not what I want to impose on society.

Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States, 99th Cong. 89 (1986) (statement of Antonin Scalia).


46 McCreary County v. ACLU, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting).
theories of constitutional analysis that could provide such a consistently applied principle constitutional interpretation.\textsuperscript{47} Originalism provides the best methodology for limiting judicial discretion.\textsuperscript{48} This Article now turns to a detailed description of Originalism.


\textsuperscript{48} As Texas Supreme Court Justice Willett explained:

There are competing visions, to put it mildly, of the role judges should play in policing the other branches, particularly when reviewing economic regulations. On one side is the Progressive left, joined by some conservatives, who favor absolute judicial deference to majority rule. Judge Robert Bork falls into this camp. A conservative luminary, Bork is heir to a Progressive luminary, Justice Holmes, who also espoused judicial minimalism. Both men believed the foremost principle of American government was not individual liberty but majoritarianism. As Judge Bork put it, “majorities are entitled to rule, if they wish, simply because they are majorities.”

The other side advocates “judicial engagement” whereby courts meaningfully enforce constitutional boundaries, lest judicial restraint become judicial surrender. The pro-engagement camp argues the judiciary should be less protective of Leviathan government and more protective of individual freedom. Government exists, they contend, to secure pre-existing rights, as the Declaration makes clear in its first two paragraphs.\textsuperscript{25} Thus, when it comes to judicial review of laws burdening economic freedoms, courts should engage forthrightly, and not put a heavy, pro-government thumb on the scale.

This much is clear: Spirited debates over judicial review have roiled America since the Founding, from \textit{Marbury v. Madison}, to \textit{Worcester v. Georgia}\textsuperscript{27} (against which President Jackson bellowed, “John Marshall has made his decision—now let him enforce it.”), to the late 19th and early 20th centuries, when Progressives opposed judicial enforcement of economic liberties, all the way to present-day battles over the Patient Protection and Affordable Care Act. In the 1920s and 1930s, liberals began backing judicial protection of \textit{noneconomic} rights, while resisting similar protection for property rights and other economic freedoms. The Progressives' preference for judicial nonintervention was later embraced by post-New Deal conservatives like Judge Bork.
II. ORIGINALISM AS A METHOD OF CONSTITUTIONAL ANALYSIS

A. Originalism and Constitutional Interpretation

Under the method of constitutional analysis known as Originalism, “the words of the Constitution should be interpreted according to the meaning they had at the time they were enacted.”\(^{49}\) Technically, what this Article calls “Originalism” is original meaning Originalism, which is separate and distinct from original intent Originalism.\(^{50}\) “Whereas original intent originalism seeks the intentions or will of the lawmakers or ratifiers, original meaning originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”\(^{51}\) Indeed, it is “impossible for a court—even one that knows each legislator’s complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact.”\(^{52}\) While knowing what the authors of a particular constitutional provision intended

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The judicial-review debate, both raucous and reasoned, is particularly pitched today within the broader conservative legal movement. A prominent fault line has opened on the right between traditional conservatives who champion majoritarianism and more liberty-minded theorists who believe robust judicial protection of economic rights is indispensable to limited government.

*Patel v. Texas Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 96–97 (Tex. 2015).


\(^{50}\) *Id.* at 88-92.

\(^{51}\) *Id.* at 91 (internal quotation marks omitted).

can be helpful in ascertaining the original meaning of the provision,\textsuperscript{53} “it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated.”\textsuperscript{54} Since all Constitutions were “written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning,”\textsuperscript{55} the judiciary may embrace “an idiomatic meaning” but must reject “secret or technical meanings that would not have been known to ordinary citizens” at the time the National or State Constitution was adopted.\textsuperscript{56} Thus, original meaning of the words, not original intent, is the touchstone.

Moreover, in my understanding of Originalism, “fidelity to original meaning does not require fidelity to original expected application.”\textsuperscript{57} “What judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law.”\textsuperscript{58} For example, America’s adoption of the Equal Protection Clause\textsuperscript{59} in 1868

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\item \textsuperscript{53} Steven G. Calabresi, Julia T. Rickert, \textit{Originalism and Sex Discrimination}, 90 Tex. L. Rev. 1, 7 (2011).
\item \textsuperscript{57} Jack M. Balkin, \textit{Framework Originalism and the Living Constitution}, 103 N.W. L. Rev. 549, 552 (2009).
\item \textsuperscript{58} Steven G. Calabresi & Livia G. Fine, \textit{Two Cheers for Professor Balkin’s Originalism}, 103 N.W. L. Rev. 663, 669 (2009).
\item \textsuperscript{59} U.S. Const. amend. XIV, § 1.
\end{itemize}
prohibited racially segregated schools\textsuperscript{60} and miscegenation laws\textsuperscript{61} even though the authors of the Equal Protection Clause probably never intended these results.\textsuperscript{62} In short, “it is not necessary that [constitutional drafters] understand what they have done when they enact [a constitutional provision] than it is necessary that individuals understand all aspects of what they have done when they sign a contract.”\textsuperscript{63}

\textbf{B. Originalism and Constitutional Construction}

Constitutional interpretation involves ascertaining the original meaning of words, but there are times when interpretation of the constitutional provisions does not resolve the issue. The original meaning of the text may be clear, but the question of whether the legislature has acted in accordance with the text is ambiguous. “When interpretation has provided all the guidance it can but more guidance is needed, constitutional interpretation must be supplemented by constitutional construction—within the bounds established by original meaning.”\textsuperscript{64} In other words, if the plain language of the constitutional provisions does not

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\item\textsuperscript{60} \textit{Brown v. Board of Education}, 347 U.S. 483 (1954).
\item\textsuperscript{61} \textit{Loving v. Virginia}, 388 U.S. 1 (1967).
\item\textsuperscript{62} Calabresi & Fine, \textit{supra} note 58, at 669-72. \textit{See also} Calabresi & Rickert, \textit{supra} note 53, at 7-8.
\item\textsuperscript{63} Calabresi & Fine, \textit{supra} note 58, at 671.
\item\textsuperscript{64} Barnett, \textit{supra} note 49, at 120.
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provide a definitive answer, then the Court must build upon the framework established by the constitutional text.\textsuperscript{65}

In developing a constitutional construction, courts must give “a fair construction of the whole instrument.”\textsuperscript{66} The judiciary must harmonize often-competing constitutional values.\textsuperscript{67} Provisions mandating a balanced budget,\textsuperscript{68} limiting the growth of government,\textsuperscript{69} setting priorities among governmental functions,\textsuperscript{70} or guaranteeing local control,\textsuperscript{71} must inform and influence the meaning

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\textsuperscript{66} McCullough v. Maryland, 17 U.S. (4 Wheat) 316 (1819).
\textsuperscript{67} One cannot focus on the guarantees of individual freedom while ignoring the mandate to treat every person equally. Conversely, the government’s obligation to treat everyone equally does not justify a diminishment of the individual rights explicitly granted in the text. Indeed, the canons of legal and constitutional interpretation require consideration of the whole text and a command to harmonize any conflicting interpretations. Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 27 (2012).

If the State requires a balanced budget, increases in educational spending must be offset by new revenues or cuts in other areas. Dayton, Dupre, & Houck, supra note 9, at 953 (noting the tension between balanced budget provisions and school finance decisions mandating more expenditures).

\textsuperscript{69} See COLO. CONST. art. X, § 1. If there are limits on the growth of government and if educational expenditures grow faster than the prescribed limits, then the rate of growth in other areas must be limited. Thro, Judicial Humility, supra note 28, at 735-36.

\textsuperscript{70} See Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1, ¶ 1; Ill. Const. art. X, § 1. Me. Const. art. 8, § 1; § 1(a); Wash. Const. art. IX, § 1.

\textsuperscript{71} “No single tradition in public education is more deeply rooted than local control over the operation of schools.” Milliken v. Bradley, 418 U.S. 717, 741 (1974). Americans distrust any concentration of power. Just as the National Constitution divides power between the States and National Government, the state charters
of other provisions requiring or prohibiting the government from certain actions. Moreover, although differences between the Constitutions of two different States may reflect differences in values, \(^\text{72}\) the language of one State’s constitutional

divide power between the centralized state governments and local governments. While some states have explicit textual provisions guaranteeing local control of the schools, see, e.g., Colo. Const. art. IX, § 15; Va. Const. art. VIII, § 7, this division of responsibility reflects more the state constitutional structure and historical understandings than the actual text. Nevertheless, “local control remains an important norm in American education,” Aaron Saiger, Note, *Disestablishing Local School Districts As A Remedy For Educational Inadequacy*, 99 Colum. L. Rev. 1830, 1865 (1999) (footnote omitted), and “courts view local control as a fundamental constitutional value, comparable to equal protection or the right to a basic education found in many state constitutions.” Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 Conn. L. Rev. 773, 785 (1992).

The constitutional value of local control constrains both the judiciary’s ability to declare the school finance system unconstitutional and, if there is a violation, order a sweeping remedy. Dyson contends “[m]ost of the courts that have refused to invalidate the local property tax-based system of school finance have relied on local control as the principal justification for sustaining the status quo.” Maurice Dyson, *Playing Games With Equality: A Game Theoretic Critique Of Educational Sanctions, Remedies, And Strategic Noncompliance*, 77 Temple L. Rev. 577, 599 (2004). In determining whether there is a violation, a court must reconcile the constitutional provision regarding free public education with the constitutional value of local control. See *Board of Educ. v. Booth*, 984 P.2d 639, 646 (Colo. 1999) (discussing the need to reconcile state constitutional provisions concerning power of the local school board with state constitutional provisions concerning power of the State).

\(^{72}\) As Professor Howard observed:

Those who contend for independent norms of [state constitutional] analysis should not lightly disregard the case for nationwide norms, especially as regards individual rights. The lay citizen, not tutored in the nuances of constitutional law, is apt to think of rights as rights. He might find it unsettling to think that one’s “rights” [or the status of education] ... may vary from state to state. This notion of a “common market” of constitutional rights has strong moral overtones. Any principled theory of state constitutional litigation that invites standards that may vary (as they do) from state to state certainly should take account of this issue.

Having provided a brief overview of the constitutional methodology known as Originalism, this Article now applies Originalism to School Finance Litigation.

III. APPLICATION OF ORIGINALISM TO SCHOOL FINANCE LITIGATION

As explained above, this Article’s concept of Originalism makes three assumptions. First, a written Constitution limits the sovereign discretion of constitutional actors. Second, the judiciary must enforce those limits. Third, in determining the meaning of those constitutional limits, the judiciary must follow the original public meaning of the text or, when original meaning does not resolve the issue, develop a constitutional construction that is consistent with original meaning.

Unfortunately, in the context of school finance litigation, courts and academics often have rejected one or more of these assumptions.

First, some have questioned whether the State Constitution actually limits the legislature’s sovereign discretion. For example, the Supreme Court of Illinois

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found the Education Clause to be “a purely hortatory statement of principle.” 74 Because State Constitutions resemble regulatory statutes, prescribing social and economic policy,”75 Wood contends the state charters are merely aspirational and do not impose substantive standards which are judicially enforceable.76

Second, even when courts recognize that the State Constitution limits the legislature’s sovereign discretion, courts have refused to enforce the limits because of standing or justiciability concerns. 77 As Bauries observes, the question of

75 Wood, American Dream, supra note 12, at 745.
76 As Wood explained:

The dilemma for the various state courts is overwhelming upon any examination. It is perhaps one thing to assert the role of the court into a political-social-economic discussion absent specific constitutional language. It is entirely another to make such public policy premised on the concept of “unblocking stoppages within the democratic process” based on studies that do not meet the most minimal requirements of scientific inquiry-studies that are interwoven with advocacy while lacking scientific justification. Thus, at least in some instances, absent what we know to exist in society, advocacy groups will construct what they wish to exist in society and continue to hope the courts will enforce their definition of the “American dream” absent a constitutional standard to do so.

Id. at 778.

77 Committee for Educational Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996) (“What constitutes a ‘high quality’ education and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards.”). City of Pawtucket v. Sundlun, 662 A.2d 40, 58 (R.I. 1995) (“What constitutes an appropriate education or even an ‘equal, adequate, and meaningful’ one is ‘not likely to be divined for all time even by the scholars who now so earnestly debate the issues.’”).
justiciability turns on the court’s concept of the education clause. If a court believes the Education Clause simply imposes a duty, it is likely to find the case to be non-justiciable; if it concludes the Education Clause imposes an individual right, it probably will find the case to be justiciable.

Third, when the judiciary has recognized and enforced the constitutional limits, the interpretation of those limits has ignored the constitutional text while focusing on the characteristics of individual school districts. Instead of developing a constitutional construction that is faithful to the original public meaning, contemporary judges often have engaged in activism by interjecting their own policy preferences. For example, the Supreme Court of Kentucky adopted a standard

79 Id. at 747-49.
80 Bauries, Education Duty, supra note 12.
81 See Thro, Facial Challenges, supra note 11.
82 As Wood observes:

Given these realities and the highly political nature of adequacy claims several state courts reflect a manipulation of precedent and text in order to fit a desired result, despite the tensions marked in these opinions. It may be ventured that an interpretive framework is at play that, although decidedly consequentialist, is rooted in the philosophical foundations articulated in John Hart Ely’s “representative-reinforcing” concept of judicial review. As noted, Ely constructed a rationale premised on the responsibility of the judiciary to insist that the legislature provide citizens the rights essential to the operation of a democratic political process. To Ely, “unblocking stoppages in the democratic process is what judicial review ought preeminently to be about.” In a similar tack, Ronald Dworkin argued that “[t]he function of judges . . . [was] to secure the ‘democratic conditions’ necessary for a democracy to exist.” Key to this appreciation of judicial review,
that, if taken literally, is unattainable.\textsuperscript{84}

\section*{B. Implementing Originalism in the Context of School Finance Litigation}

If the judiciary is going to implement Originalism in the context of school evidenced in the recent case record, is the right of all citizens in a democracy to be informed participants; thus, imposing upon the state the responsibility to ensure that they are provided the opportunity to achieve what Robert Dahl characterized as “enlightened understanding.” This aggressive affirmation of the nexus between education and the fundamental rights of citizenry, dismissed in \textit{San Antonio Independent School District v. Rodriguez} in a judicial treatment utilized subsequently in courts presenting it as restrained, has become a principle characteristic of an activist state judiciary in the realm of public education finance.

Wood, \textit{American Dream}, supra note 12, at 776-77 (footnotes omitted).

\textsuperscript{83} Interpreting an Education Clause that mandated an “efficient” system of education, the Kentucky Court declared that:

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


finance litigation, then the judiciary must cease both abdication and activism. A court that refuses to recognize the limits on sovereign discretion or that insists the limits are unenforceable is abdicating its responsibilities. Conversely, a court that ignores the original public meaning of the text or that develops a constitutional construction inconsistent with the original public meaning is practicing activism.

Originalism requires the judiciary to recognize three premises. First, the Education Clauses limit the legislature’s sovereign discretion. Second, the judiciary must enforce those limits. Third, the interpretation of those limits must be established by the original public meaning or, when interpretation is inadequate, a court must create a constitutional construction consistent with original public meaning.

1. **The Education Clauses Limit the Legislature’s Sovereign Discretion**

The Education Clauses limit the legislature’s sovereign discretion. To say otherwise is to ignore or rewrite the words of the State Constitution. “[I]t is no more the court’s function to revise by subtraction than by addition. A provision that seems to the court unjust or unfortunate . . . must nonetheless be given effect.” 85 The mere fact it is difficult to interpret language does not justify ignoring the language. “These words cannot be meaningless, else they would not have been used.” 86

Moreover, as Bauries demonstrated, Constitutions are entrustments and

legislatures are fiduciaries, particularly where there is an affirmative obligation to pursue certain policy goals. In other words, at a minimum the State Legislature has an “education duty” and citizens may enforce this duty by convincing the courts that the Legislature “has acted insufficiently, either by not legislating at all (and thereby arguably violating a duty of obedience to the legislative command), or by legislating insufficiently well (and thereby violating the duty of due care).“

2. **The Judiciary Must Enforce Those Limits**

The judiciary must enforce those limits. Since “[a]bdication of responsibility is not part of the constitutional design,” a court may determine whether the constitutional text requires a specific quality level. Such an inquiry is nothing

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87 Bauries, *Education Duty, supra* note 12, at 705-06; 718-57.

88 *Id.* at 759-60. In evaluating this fiduciary duty, the courts must inquire, “whether the state action achieves or is reasonably related to achieve the ‘constitutionally prescribed end.’” *McCreary v. Washington*, 269 P.3d 227, 248, 276 Ed.Law Rep. 1011 (Wash. 2012) (quoting Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999)). If the State Legislature cannot meet this “rational direction” test, then the State Judiciary orders the elected leaders to try again and to consider all relevant information and policy implications. While an arbitrariness standard “falls short of the many duty-based conceptions that state courts and especially commentators have articulated, but it both fits and justifies the conception that the overwhelming majority of state courts have actually applied.” Bauries, *State Constitutions, supra* note 29, at 364.


91 Rosenkranz’s articles do not address justiciability explicitly, but his theory suggests that all questions regarding the legislature’s action in making a statute are justiciable. By answering the question of who has violated the Constitution, he determines the form of judicial review. Rosenkranz, *Subjects, supra* note 10, at 1227-44. Review of legislative actions is fundamentally different from review of
more than deciding the meaning of the constitutional text. If a quality level is mandated, then a court always may evaluate whether the current system meets that level. Such an analysis is simply the application of a legal standard to particular facts. Moreover, almost all citizens have standing. As Rosenkranz explains, just as asking who violates the Constitution dictates the form of judicial review and informs the substantive inquiry, identifying the constitutional subject

executive actions. \textit{Id.} at 1227-35. Legislative review is limited to comparing the face of the statute to the constitutional limitation, \textit{Id.} at 1235-38, but executive review is more complicated, frequently involves actions that are arguably discretionary, and often dependent upon circumstances. \textit{Id.} at 1238-44.

92 Bauries observes the question of justiciability turns on the court’s concept of the Education Clause. Bauries, \textit{Elephant, supra} note 78, at 747-60. “Rather than separation of powers commands in state constitutions, the important underexamined or unacknowledged factor in education finance adjudication, and in much education finance scholarship, appears to be state courts' varying conceptions of the nature of education rights.” \textit{Id.} at 760. While Bauries is correct as to how justiciability is determined, his analysis begs the question of whether the Education Clause creates rights or duties. In a later work, Bauries persuasively demonstrates that the Education Clause creates rights and, thus, school finance claims are always justiciable. Bauries, \textit{State Constitutions, supra} note 29, at 354-56.

93 Although “judicial power includes the duty ‘to say what the law is,’” \textit{Sanchez-Llamas v. Oregon}, 548 U.S. 331, 353 (2006), there may be circumstances, such as the conduct of military operations in wartime, where judicial review of executive actions is inappropriate. Complex, context-specific decisions arguably subject to discretion are ill-suited for judicial review. In contrast, there are no circumstances where a court cannot compare the text of a statute with the text of the Constitution.

94 “While the understanding of [the standing doctrine] in federal court is based upon the ‘case-or-controversy’ requirement in Article III of the United States Constitution, the source of standing rules varies from state to state, as does the specific content.” Wood, \textit{American Dream, supra} note 12, at 744. “Although some states have relied upon the federal standards, most have utilized a more tolerant approach.” R. Craig Wood & George Lange, \textit{Selected State Education Finance Constitutional Litigation In The Context Of Judicial Review}, 207 ED. LAW REP. 1, 4 (2006).

provides insights into who has standing. If the legislature violates the Constitution by making a law, “the violation is likely to affect many people. In some cases, it may affect all taxpayers, or perhaps even all citizens.” 96 Conversely, if the executive violates the Constitution in the execution of a law, then “the violation is likely to affect a much smaller number.” 97 Thus, while challenges to executive action are limited to those actually injured, any citizen, or at least any taxpayer, may challenge a legislative action. 98 When the legislature violates the Constitution by passing a statute, the very existence of the law constitutes the injury. 99

3. The Interpretation of the Limits Is Established by Original Public Meaning or, when Interpretation Is Inadequate, A Court Must Create A Constitutional Construction Consistent with Original Public Meaning

The interpretation of those limits is established by the original public meaning or, when interpretation is inadequate, a court must create a constitutional construction consistent with original public meaning. Quite simply, it is the text, not the judges' policy preferences, which control.

96 Id. at 1248.
97 Id. at 1249.
98 Id. at 1249-50 (discussing the relaxed standing requirements for standing to bring an overbreadth challenge to legislative action); Id. at 1258-63 (discussing taxpayer standing to legislative action in the Establishment Clause context).
99 Id. at 1259.
Although all Education Clauses limit the sovereign discretion of the legislature,\(^{100}\) some Education Clauses impose greater restrictions than others do.\(^{101}\) Twenty-one Education Clauses simply mandate that a public school system be established;\(^{102}\) eighteen require an educational system of a specific quality;\(^{103}\) six provisions establish a level or quality and a strong mandate to achieve it;\(^{104}\) five "high duty provisions" seem to place education above other governmental functions.


As the Supreme Court of Louisiana noted, “the provisions of the Louisiana Constitution are not grants of power, but instead are limitations on the otherwise plenary power of the people of the state, exercised through the legislature, the legislature may enact any legislation that the constitution does not prohibit.” Louisiana Federation of Teachers v. Louisiana, 118 So.3d 1033, 1048, 296 Ed.Law Rep. 665 (La. 2013).

\(^{101}\) There are four categories of Education Clauses. See Erica Black Grubb, Breaking The Language Barrier: The Right To Bilingual Education, 9 HARV. C.R.-C.L.L. REV. 52, 66-70 (1974); Gershon M. Ratner, A New Legal Duty For Urban Public Schools: Effective Education In Basic Skills, 63 TEX. L. REV. 777, 814 n. 143-46 (1985). This article refines the basic framework developed by Grubb and Ratner.

\(^{102}\) See ALA. CONST. art. 14, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; CONN. CONST. art. VIII, § 1; HAW. CONST. art. IX, § 1; KAN. CONST. art. VI, § 1; LA. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX; NEB. CONST. art. VII, § 1; N.H. CONST. pt. 2, art. 83; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3; TENN. CONST. art. XI, § 12; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68.

\(^{103}\) See ARK. CONST. art. XIV, § 1; COLO. CONST. art. IX, § 2; DEL. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; Minn. Const. art. XIII, § 1; MONT. CONST. art. X, § 1; N.J. CONST. art. VIII, § 4; N.D. CONST. art. VII, § 1; OHIO CONST. art. VI, § 3; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; TX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; W.VA. CONST. art. XII, § 1; Wis. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

\(^{104}\) See CAL. CONST. art. IX, § 5; IND. CONST. art. VIII, § 1; IOWA CONST. art. 9 2d, § 2; NEV. CONST. art. XI, § 2; R.I. CONST. art. XII, § 1; S.D. CONST. art. VIII, § 1.
such as highways or welfare. Just as the “practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people . . . occupies a place . . . in our Constitution,” the language of one State’s constitutional provisions can be relevant to determining the significance of a second State’s constitutional provisions. Since state constitutions reflect the unique values and aspirations of a State’s citizens, differences between the States logically reflect differences in values.

Historically, the courts generally have ignored these semantic differences among the State Education Clauses. Yet, if the judicial task is to determine the

105 See Fla. Const. art. IX, § 1. Ga. Const. art. VIII, § 1, ¶ 1; Ill. Const. art. X, § 1. Me. Const. art. 8, § 1; § 1(a); Wash. Const. art. IX, § 1.

106 Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., joined by Rehnquist, C.J., & White, J., dissenting). Of course, “where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.” Id.


108 Howard, supra note 72, at xviii.

109 To be sure, there were exceptions. In several instances, courts in states with establishment provisions recognized that the state constitution’s text did not mandate a particular quality standard or establish education as a fundamental right. For example, the South Carolina Supreme Court followed a similar mode of analysis and concluded that the education clause gave the legislature broad discretion and that the legislature had not violated that discretion. Richland County v. Campbell, 364 S.E.2d 470, 471(S.C. 1988). Finally, in the first New York decision, Bd. of Educ., Levittown Union Free Sch. District v. Nyquist, 439 N.E.2d 359 (N.Y. 1982), the New York Court of Appeals, combining a language analysis with a historical analysis, interpreted N.Y. Const. art. XI, § 1 (“[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”) to mean “only that the
original public meaning of text or to create a constitutional construction that is consistent with the original public meaning, the presence of words such as “thorough,” “efficient,” “uniform,” “primary,” and “paramount” should be significant, if not determinative.\textsuperscript{110} Quite simply, a constitutional provision that speaks of a “quality education” and “paramount duty” has a different original public meaning from a constitutional provision stating, “establish a school system.” The more specific provision imposes greater restrictions on legislative discretion than the more general provision. The greater restriction is the direct result of the People’s conscious choice to choose certain words and reject others. In interpreting the meaning of these restrictions, the courts must recognize that the original public meaning of the different words\textsuperscript{112} can lead to different results.\textsuperscript{113}

The semantic differences are significant in three ways. First, the semantic differences establish the scope of the restrictions on the legislature. If the provision

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\textsuperscript{111} Thro, \textit{New Approach, supra} note 84, at 540-44.

\textsuperscript{112} Of course, while different words may have different meanings, the practical impact of the different words may be negligible. A “thorough and efficient” educational system may not be substantively distinguishable from a “thorough” educational system or an “efficient” educational system. Yet, the fact that semantic differences have no practical effect does not excuse the judiciary from ascertaining the original public meaning of the words.

\textsuperscript{113} Thro, \textit{New Approach, supra} note 84, at 543-44.
\end{footnotesize}
simply requires the establishment of an educational system, then Bauries’ arbitrariness/rational direction standard is appropriate. Conversely, if the clause imposes a quality standard, such as “thorough and efficient,” then something more than just mere arbitrariness or rational direction is required. The legislature action—the statutes—must show an awareness of the quality standard and some sort of affirmative effort to achieve the quality standard.

Second, the semantic differences dictate the burden of proof. Normally, the parties challenging the constitutionality of the legislature’s actions has the burden of proving the action is unconstitutional. However, in some circumstances, such as when the government uses a racial classification, the burden is on the governmental actors to prove that their actions conform to the Constitution. If the State Constitution contains a quality standard and a strong mandate to achieve it, it is

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114 A typical example of such a provision is the Tennessee Education Clause, which provides: “The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools.” TENN. CONST. art. XI, § 12.

115 See supra notes 87-88 and accompanying text.

116 A typical example is the Pennsylvania education clause, which provides, “The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.” Pa. Const. art. III, § 14.

117 Generally, the specific quality is “thorough and/or efficient.” As the West Virginia Supreme Court observed, Illinois, Maryland, Minnesota, New Jersey, Ohio, and Pennsylvania require “thorough and efficient” systems; Colorado, Idaho, and Montana require thorough systems; and Arkansas, Delaware, Kentucky, and Texas require “efficient” systems. Pauley v. Kelly, 255 S.E.2d 859, 865 (W.Va. 1979).


119 The provisions of the California Constitution provide a typical example: “A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people [purposive preamble], the Legislature shall
appropriate to place the burden of proof on the constitutional actors. Conversely, if there is no strong mandate, the burden of proof should remain with the challengers.

Third, the semantic differences establish a hierarchy of constitutional values. If the constitutional text is a “high duty provision,” then the People of the State have said that quality education is a higher value than other governmental functions such as roads or welfare. In such an instance, the burden of proof should be on the constitutional actors to prove that the quality standard has been met and that education is a higher priority than other constitutional obligations. In States with high duty provisions, the legislature’s sovereign discretion is constrained to the greatest degree.

By using both original public meaning and constitutional constructions consistent with original meaning to determine standards, burdens of proof, and constitutional hierarchies, the judiciary can enforce the constitutional limits without substituting personal policy preferences for the decisions of elected officials.

encourage by all suitable means [stronger mandate] the promotion of intellectual, scientific, moral, and agricultural improvement.” Cal. Const. art. IX, § 1. Similarly, the Rhode Island education clause demands that the state legislature will “promote the public schools and to adopt all means . . . to secure . . . education.” R.I. Const. art. XII, § 1.

120 For example, Washington’s Education Clause provides that “it is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.” Wash. Const. art. IX, § 1 A second example is Georgia’s Education Clause that reads, “[t]he provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia, the expense of which shall be provided for by taxation.” Ga. Const. art. VIII, § 1, ¶ 1.
CONCLUSION

Almost half a century after the first cases and almost three decades after the rise of the adequacy theory, school finance litigation remains both incoherent and incomprehensible. Courts can bring both coherence and comprehension to school finance litigation by using Originalism to determine the meaning of the State Constitutions. Originalism assumes that written constitutions impose limits on sovereign discretion, the judiciary must enforce those limitations, and, most significantly, the courts determine the meaning of those limits through original public meaning or a constitutional construction consistent with original public meaning. In the a school finance case, Originalism will use original public meaning and constitutional constructions to determine quality standards, allocate burdens of proof, and establish constitutional hierarchies.

Ultimately, courts that use Originalism in school finance litigation are likely to conclude there is no constitutional violation, but there will be times—particularly in those States with strong mandate or high duty provisions—when the judiciary will find a constitutional violation.