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American School Finance Litigation and the Right to Education in South Africa

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American school finance litigation and the right to education in South Africa

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Ruta. Hlalefiša. Opvoed. Fundisa.¹

1 Introduction

This paper addresses the South African Constitution's invitation to the Constitutional Court to 'consider foreign law' when interpreting its provisions.² Focusing on the education provisions found in section 29 of the Constitution, I make two claims. Firstly, contrary to the developing consensus,³ American state supreme court jurisprudence in school funding cases makes a poor resource to aid the interpretation of the basic South African right to education, regardless of the quantum of education that the Constitutional Court decides is encompassed by the word 'basic'.⁴ Secondly, however, certain aspects of these same American decisions, particularly the space they provide for a fiduciary theory of socioeconomic duties, could provide the Constitutional Court with a principled theory to undergird its ongoing rights-protective project that seeks to operationalise socioeconomic rights while also respecting institutional boundaries.

In the United States, to the extent that there exists any constitutional right to education or a duty to provide it, the source of that right or duty lies within the

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¹The words most closely approximating the English word 'educate' in the Sesotho, Sepedi, Afrikaans, and isiZulu languages, respectively. Exemplifying the multifarious nature of education, and of overall public policy in South Africa, these are but four of the eleven official languages specified in the national Constitution. See Constitution of the Republic of South Africa 1996 ch 1, s 6 specifying these four, along with Setswana, siSwati, Tshivenda, Xitsonga, English, isiNdebele, and isiXhosa as 'official languages of the Republic'. An illustration of the complexity of South African education rights, among the other educational rights one has under the South African Constitution, is the right to be educated in the language of one's choice (as long as it is one of the official languages), a right completely absent from most American conceptions of education rights. See the 1996 South African Constitution ch 1, s 29(2) (hereafter Constitution).

²See Constitution (n 1) ch 1, s 39(1).

³See sources cited (n 60).

⁴See Constitution (n 1) ch1, s 29(1).

constitutions of the several states, rather than the national Constitution.⁵ South Africa's national Constitution, in contrast, contains a distinct section protecting what most would recognise as individual 'rights to education'. The South African Constitution's education provisions provide for two principal entitlements. One is a right to 'basic education'.⁶ The other is a right to 'further education', which the state must act 'reasonably' to make 'progressively' available over time.⁷ Examining these rights in light of the American school funding cases, it becomes clear that the latter of these rights is very similar, in both purpose and structure, to the systemic affirmative education duties that American state constitutions impose, and that American state supreme courts have attempted to enforce over the past four decades.⁸ In contrast, the former of these – the basic education right – does not resemble anything found in any American constitutional document or jurisprudence, state or federal.

This distinction ought to make a difference in the adjudication of education rights in the South African Constitutional Court, once the day for such adjudication inevitably comes. In the first place, the Constitutional Court should not consult the American state supreme court decisions – other than as a cautionary tale – when interpreting the 'basic' education right because no right resembling that right exists in American constitutional law, and the actions of American state supreme courts show a strong preference *not* to recognise or even imply any such right. The American decisions, I will show, are not about individual rights – they are about systemic legislative duties, so they are inapposite to the 'basic' education right in South Africa. In the second place, in interpreting the 'further' education right, the Court ought to consider the salience of the differences in its structure and purpose and its 'basic' counterpart with an eye toward avoiding the mistakes of American state constitutional jurisprudence.

⁵Education rights litigation has not historically been limited to the state courts in the United States. *Brown v Board of Education* 347 US 483 (1954), eg, is a seminal precedent on the subject of rights to educational services containing strong, though qualified, language about 'the right to education'. See *id* 493:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, *where the state has undertaken to provide it*, is a right which must be made available to all on equal terms (emphasis added).

However, since the United States Supreme Court's decision in *San Antonio v Rodriguez*, 411 US 1 (1973), it has been the general rule that education rights *qua* education rights do not exist under the federal Constitution. Rather, the provision of educational services may create equality claims or due process claims under the federal Constitution, but there is no independent federal rights-based interest in education itself. As a result, most litigation over education rights as constitutional rights has occurred in state courts in the United States, and this trend shows no sign of weakening. Accordingly, the American portion of this paper focuses most of its comparative analysis on the judicial decisions of state supreme courts.

⁶Chapter 1, s 29(1).

⁷*Ibid*.

⁸See generally Dayton and Dupre 'School funding litigation: Who's winning the war?' (2004) 57 *Vanderbilt LR* 2351.

The right to 'basic education' in South Africa is an immediate and unqualified right. Unlike almost every other socioeconomic right in the South African Constitution,⁹ it does not call for deference to legislative discretion.¹⁰ It establishes an immediate claim in each individual South African, and therefore it calls for individualised relief where it is violated. The 'further' education right is just the opposite – the enshrinement of a general goal that the legislature should pursue in good faith and with due care as the fiduciary of the people – a qualified and practical entitlement, rather than an absolute command for a certain defined benefit – and therefore a goal that, where violated, calls for systemic relief. The overwhelmingly system-oriented American cases in light of a fiduciary-based theory developed in recent scholarship could, therefore, prove very useful to the Constitutional Court when it comes to the interpretation, enforcement, and possibly remediation of this 'further' education right.

This paper proceeds in five subsequent parts. Part 2 sketches out some terminology developed by Wesley Newcomb Hohfeld that will aid in discussing this paper's claims. Part 3 illustrates that, contrary to a good deal of conventional wisdom, American state constitutions do not provide for individual rights to education, nor have they ever been enforced as such. Rather, based on state constitutional text and the actual outcomes of cases seeking to enforce such text, they provide for systemic legislative duties that do not correlate to any individual rights. Part 4 shows that this focus on systemic duty in American state courts makes that jurisprudence a particularly poor resource for the South African Constitutional Court to consult when interpreting the right to 'basic education' in South Africa. Part 5 illustrates, however, that aspects of this American jurisprudence and the scholarship it has spawned could prove useful, mostly as a cautionary tale, as the Constitutional Court develops its jurisprudence of socioeconomic rights and separation of powers. Indeed, much of this jurisprudence and scholarship is of a piece with the Constitutional Court's developing jurisprudence on qualified, systemic socioeconomic rights – what this Article prefers to term 'socioeconomic duties'. Part 6 concludes with a discussion of a course of correction that could ground a better approach to the enforcement of socioeconomic duties in both countries.

⁹The only other socio-economic rights that are similarly unqualified are the child's rights to nutrition, shelter and health care. See Constitution (n 1) ch 1, s 28(1)(c).

¹⁰It is true that all rights in the Bill of Rights may be limited, but only through a 'law of general application', and only where that law is 'reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom ...' Constitution (n 1) ch 1, s 36(1). Of course, the only way to 'limit' an otherwise unqualified individual right to receive a service from the state is to qualify that right. It is unlikely that adding a qualification to a right carefully left unqualified by the framers of the South African Constitution would be viewed as consistent with the considerations of s 36(1).

2 Education rights and education duties

This article begins with the words most closely approximating the English word 'educate' in four of the eleven official languages listed in the South African Constitution.¹¹ Each of the mandates of the South African Constitution's education provisions can be reduced to a simple command for the government to provide education to the people, regardless of their race, economic circumstances, language, or preference for private or public schooling. However, these commands are grounded in the language of rights. Under the South African Constitution, '(e)veryone has the right' to these benefits.¹² This phrasing arguably makes education something that an individual may legitimately demand – or claim – from the state for himself.

In contrast, only one American state constitution (North Carolina's) contains language explicitly conferring such a right to education on individual learners.¹³ Rather than securing rights, American state constitutions generally impose on state legislatures affirmative duties to provide for an education system.¹⁴ Whether such legislative duties in American state constitutions give rise to individual rights to education accordingly depends on an analysis of 'jural correlativity'.

In the early twentieth century, Wesley Newcomb Hohfeld gave us an important and still-influential way of thinking about what we generally term 'rights' which is a term that Hohfeld contended actually sought to describe eight different conceptions, each of which relates to two of the others, either as a 'jural opposite' or as a 'jural correlative'. Jural opposites are statuses that cannot simultaneously exist in the same holder as to the same object. Jural correlatives are statuses that a holder and another person hold in relation to each other.

Hohfeld's typology recognises the following jural relationships as aspects of what we term 'rights':

- (1) *Claim-Right*: A claim correlative to a duty that obligates another to take or refrain from taking action. Its opposite in the holder is the absence of a claim-right (ie, a 'no-right').
- (2) *Privilege* (or '*Liberty*'): The freedom of the holder to engage in action, correlative to another's lack of any claim-right (thus, a no-right) to stop the action. Its opposite in the holder is a duty to engage in or refrain from action.
- (3) *Power*: The ability of the holder to create or change legal relationships (eg, by passing legislation), correlative to another's liability to the legal relation-

¹¹See Constitution (n 1) ch 1, s 6.

¹²*Id* s 29.

¹³See Bauries 'The education duty' (2012) 47 *Wake Forest LR* (no pagination) (forthcoming) pointing out that few American state constitutions have any rights-based language in their education provisions, and that none purports to confer an individual, non-relational right to receive educational services. North Carolina's Constitution provides: 'The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right' NC Const art I § 15.

¹⁴Bauries (n 13).

ship the holder chooses to create or change. Its opposite in the holder is a disability to create or change a legal relationship.

- (4) Immunity: A status in the holder that creates a correlative disability in another to change the holder's legal status (eg, a contractual provision forbidding termination of the holder's employment relationship without cause). Its opposite in the holder is a liability to another's action to change the holder's legal relationships.¹⁵

So, for example, a person who holds a duty to mow another person's lawn cannot simultaneously hold a privilege or liberty *not* to mow the same person's lawn; and the duty that the holder has to mow the lawn correlates with the right of the landowner to have his lawn mowed. A person who holds a power to approve a proposed construction plan, for example, cannot simultaneously hold a disability to approve the same plan; and if the power is exercised within its proper scope, then anyone interested in the particular construction project at issue holds a liability to recognise and obey the approval or disapproval of the plan. All Hohfeldian jural relationships work in this way.

It is common and helpful to express Hohfeld's typology by way of a matrix, as Hohfeld himself initially did. In a Hohfeldian matrix, conceptions that appear horizontally across from each other are correlatives; conceptions that appear diagonally from each other are opposites.¹⁶

Table 1

| | |
|---------------------|----------|
| Claim-Right | Duty |
| Privilege (Liberty) | No-Right |

Table 2

| | |
|----------|------------|
| Power | Liability |
| Immunity | Disability |

Prior scholarship has established that an affirmative right that inheres in an individual against a legislature must be a 'claim-right' as any such right is a right to a certain action from another – in Hart's terminology, a primary rule.¹⁷ Similarly,

¹⁵Bauries 'State constitutions and individual rights: Conceptual convergence in school finance litigation' (2011) 18 *George Mason LRev* 301, 307.

¹⁶See, eg, Hohfeld 'Fundamental legal conceptions as applied in judicial reasoning' (1917) 26 *Yale LJ* 710, 710, 717; Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale LJ* 16, 28-59.

¹⁷Bauries (n 15) 309-11 drawing from O'Rourke 'Refuge from a jurisprudence of doubt: Hohfeldian analysis of constitutional law' (2009) 61 *South Carolina LR* 141; Hart *The concept of law* (1961).

a duty held by a legislature to legislate on a topic must be a 'duty', as it must burden a legislature to act – to engage in primary legislative conduct.¹⁸ None of the jural relationships in Table 2 can be used to describe affirmative rights and duties because these relationships are all secondary rules – rules that govern how primary rules are made. They do not require anything of any person or entity, nor do they entitle a person or entity to anything. Rather, they both enable and place limits on the use of power to make legal changes.

How, then, do these relationships affect the ways in which we should think about enforcing educational entitlements and obligations? First and foremost, because education is viewed – and constitutionally expressed – as an entitlement or compulsion (a rule requiring primary conduct on the part of a person or entity), we should attempt to understand whether education is a claim-right, a duty, or both. Knowing the answer to this question allows us to know (1) who owns the education entitlement, and at what level of generality; (2) against whom the entitlement can be enforced; and (3) which remedies are likely to give the entitlement its fullest effects.

If education is primarily a claim-right, then it stands to reason that each individual owns this right. If we determine that the right is a right to basic education, then where an individual is denied a basic education (if we are being faithful to the concept of a claim-right), that individual ought to be able to obtain an order from a competent court requiring the state to provide the missing elements of the individual's own basic education. This is because a claim needs both a claimant and a person or entity from whom the claimant may claim. Thus, any such claim-right correlates with a duty running from the entity to which the right is directed to the individual himself, and any remedy for the deprivation of the right therefore ought to be individualised to the individual plaintiff-claimant.

If, however, education is primarily a duty, then two possibilities exist. The first is the mirror image of the scenario above – that the state possesses this duty, and that this duty runs individually to each person in the relevant polity – the state, the nation, etc – creating both an individual claim-right and an individual remedy tailored to each individual's unique personal deprivation.

The second possibility is that the duty to provide education does not correlate with any particular person's claim-right. It is not novel to say that a duty may not always correlate with an individual claim-right. Many scholars of rights have made this point convincingly, and it is well-accepted today.¹⁹ Indeed, every state is bound by numerous duties that do not correlate to the claim-rights of any individual members of the relevant polity. For example, in the United States, the President has the duty to 'take care that the laws be faithfully executed'.²⁰ However, no individual

¹⁸Bauries (n 15) 309-312.

¹⁹See, eg, Freedman *Introduction to jurisprudence* (2001) 357 criticising Hohfeld's scheme for its failure to account for non-correlative duties, and citing authorities on that point.

²⁰US Constitution art II § 3.

citizen in the United States has the right to obtain an order from a court enjoining the President to faithfully execute the laws. Of course, the people maintain the power to vote the President out of office, and the Congress – the representative of the people – possesses the power of impeachment, but none of these powers amounts to a claim-right to enjoin the President to do his job properly. Were it otherwise, the President would be besieged daily by the legal claims of individual citizens, and he would be completely unable to do his job for want of time.

Deciding whether education is a duty that does or does not correlate with an individual claim-right has profound effects on the structure of a lawsuit to enforce the education obligation, and on the remedies incident to that enforcement. If education is a non-correlative duty, then the state's obligation to provide education does not run to any individual, and the duty may be found to tolerate individual deprivations where the overall goals of the duty are met. More importantly, where the failure to provide education to the polity is successfully challenged, the proper remedy will be a collective, systemic one, rather than an individually tailored one. As the next Part will demonstrate, this latter conception matches the practical reality – if not some of the preferred rhetoric – in education litigation in American state supreme courts.

3 The American education duty

In American education, 'rights talk'²¹ is ubiquitous.²² The 'right to education' is frequently held up as a positive constitutional right created by state constitutions, and American school funding cases are held up as examples that positive constitutional rights are enforceable and are subject to effective judicial remediation.²³ But is education really enforced as a 'right' in the United States? Leaving aside what some courts say, and focusing on what most courts *do* – primarily how the courts address and remediate alleged violations of state constitutional education clauses – the answer must be 'no'.

Every state constitution imposes upon the state legislature some obligation to provide for an education system.²⁴ State constitutional education provisions generally

²¹See Glendon *Rights talk: The impoverishment of political discourse* (1993) coining the term and criticising its careless overuse.

²²See, eg, *Rose v Council for Better Education, Inc* 790 SW 2d 212 'A child's right to an adequate education is a fundamental one under our Constitution. The General Assembly must protect and advance that right.'

²³See, eg, Hershkoff 'Positive rights and state constitutions: The limits of rationality review' (1999) 112 *Harvard LR* 1131, 1186 in support of the argument that positive state constitutional welfare rights should be enforceable, explaining that positive education rights had been enforced effectively in the American states under state constitutions; Tractenberg 'The evolution and implementation of educational rights under the New Jersey Constitution of 1947' (1998) 29 *Rutgers LJ* 827, 888; Neuborne 'Foreword: State constitutions and the evolution of positive rights' (1988) 20 *Rutgers LJ* 881.

²⁴Wood *Educational finance law: Constitutional challenges to state aid plans – an analysis of strategies* (2007) (3rd ed) 103-108 listing the education clauses of the fifty states.

state mandatory directives, in most cases requiring – and in some cases strongly encouraging – the funding of a statewide education system.²⁵ Section 183 of the Kentucky Constitution is representative, providing ‘The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State’.²⁶ Most of the other state education clause provisions take similar forms, using duty-based terms such as ‘shall’ to express the education obligation that the state holds.²⁷ Based on this common terminology, the education obligation, whether it is a duty that correlates with individual claim-rights or whether it is a non-correlative systemic duty, is unambiguously mandatory in most American states. In a small number of states, the obligation is better described as admonitory,²⁸ or at least ambiguous, but still important, as these constitutions, like the majority, generally devote an entire constitutional article to the topic.²⁹ Thus, even in these admonitory states, the legislature can be said to have an obligation to at least consider education prominently in the policy making process.

Importantly, nearly all American state constitutions direct their educational commands or encouragements to the state, the legislature, or some variant, with no mention at all of individuals.³⁰ Few courts or commentators, however, have questioned whether a legislative duty to provide education might exist independently of an individual right to receive it.³¹ Among state supreme courts

²⁵Bauries (n 15) 322-325.

²⁶Kentucky Constitution § 183.

²⁷Wood (n 24) 103-108; Bauries (n 15) 323 note 96.

²⁸See Schwartz *The great rights of mankind: A history of the American Bill of Rights* (1977) 53-54, 85-86, 90-91 reviewing the declarations of rights in several early state constitutions and criticising particularly the ‘admonitory’ nature of the provisions drafted for the Virginia Constitution by George Mason, a non-lawyer. In Schwartz’s usage, and herein, the word *admonitory* is meant to denote an admonition or strong encouragement to act, something short of a command, but more than a wish. The common meaning of the term more often denotes a warning.

²⁹See, eg, Californian Constitution art IX § 1 ‘A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement’; Iowa Constitution art IX 2d § 3 ‘The general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement’; see also Bauries (n 15) 324-325.

³⁰But see Wyoming Constitution art I § 23 ‘The right of the citizens to opportunities for education should have practical recognition’; North Maryland Constitution art XII § 5 ‘Every child of school age and of sufficient physical and mental ability shall be required to attend a public or other school during such period and for such time as may be prescribed by law’; North Carolina Constitution art I § 15 ‘The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right’; Oklahoma Constitution art XIII § 4 ‘The Legislature shall provide for the compulsory attendance at some public or other school, unless other means of education are provided, of all the children in the State who are sound in mind and body ...’.

³¹One recent article on the side of scepticism toward the value of individual rights to reform is that by Darby and Levy ‘Slaying the inequality villain in school finance: Is the right to education the silver bullet?’ (2011) 20 *Kansas JL and Public Policy* 351. Another performs a jural correlativity analysis, but does so as a way of ascertaining whether education deserves strict judicial scrutiny as a federal

that have addressed the issue, only the Supreme Court of Washington has specifically concluded after a jural correlativity analysis that an individual, positive right to education exists under the state constitution.³² Other state supreme courts have at times stated that such rights are created by educational duty provisions, but have done so unreflectively, or without conducting the type of thorough analysis that the Washington Supreme Court gave the question.³³ Moreover, numerous scholars have read these affirmative provisions to establish a judicially enforceable individual positive right to education in each state.³⁴

Scholars of state constitutional history, however, have not been so solicitous of the idea that education is an enforceable individual right. John Eastman's work over the past decade establishes that no individual rights to education existed under state constitutions, through text or through judicial interpretation, until very recently.³⁵ Eastman demonstrates that, through much of American history, the education clauses of state constitutions were stated only in admonitory, or even precatory, terms.³⁶ Only since the Civil War have most states adopted a textual approach that employs terms of command, and only since the late 1960s have

fundamental right, rather than as a way of determining whether it constitutes a state-level claim-right. See Calabresi and Agudo 'Individual rights under state constitutions when the Fourteenth Amendment was ratified in 1868: What rights are deeply rooted in American history and tradition?' (2008) 87 *Texas LR* 7, 108-109.

³² *Seattle School District No 1 v State* 585 P 2d 71, 87 (1978). It can be argued that the Washington Court, in arriving at its conclusion, committed the common Hohfeld-based fallacy of requiring a claim-right for every duty, so its conclusion may have been incorrect, but at least the court engaged the question. See (n 19) and (n 20) and accompanying text discussing non-correlative duties.

³³ Eg, *Rose v Council for Better Education Inc* 790 SW 2d 186, 209 (Ky 1989); *Helena Elementary School District No 1 v State* 769 P 2d 684, 685 (1989), *op amended by Helena Elementary School District No 1 v State* 784 P 2d 412 (1990).

³⁴ Eg, Rebell 'Poverty, "meaningful" educational Opportunity, and the necessary role of the courts' (2007) 85 *North Carolina LR* 1467; Sabel and Simon 'Destabilization rights: How public law litigation succeeds' (2004) 117 *Harvard LR* 1015; Liebman and Sabel 'A public laboratory Dewey barely imagined: The emerging model of school governance and legal reform' (2003) 28 *NYU R of Law and Social Change* 183; Hershkoff 'State courts and the "passive virtues": Rethinking the judicial function' (2001) 114 *Harvard LR* 1833; Hershkoff 'Positive rights and state constitutions: The limits of federal rationality review' (1999) 112 *Harvard LR* 1131. Helen Hershkoff's work stands alone in its attempts to defend state constitution-based institutional reform litigation as uniquely legitimate due to the structural features of state government and the unique, positive character of state constitutional rights to education and social welfare. Hershkoff 'Positive Rights'.

³⁵ See Eastman 'Reinterpreting the education clauses in state constitutions' in West and Peterson (eds) *School money trials: The legal pursuit of educational adequacy* (2007) 55; Eastman 'When did education become a civil right? An assessment of state constitutional provisions for education, 1776-1900' (1998) 62 *Am J Legal History* 1, 2.

³⁶ Eastman (n 35) 3-8. As a legal term, the word *precatory* is meant to denote a wish, a desire, or a hope, rather than a command or even a strong encouragement. Gardner (ed) 'Precatory' in *Black's law dictionary* (2009) (9th ed) 1295; see also (n 28) (discussing the use herein of the term *admonitory* to denote a strong encouragement, short of a command).

courts even become open to the idea of enforceable individual education rights.³⁷ Consistent with Eastman's claims, Jon Dinan provides a careful and comprehensive review of the available convention debates for the intent of the framers of state education provisions.³⁸ Dinan's analysis not only forecloses any interpretation of state education clauses as conferring individual rights, it also makes a strong case that the clauses were never intended to be judicially enforceable at all.³⁹

Nevertheless, as outlined above, the provisions in American state constitutions are overwhelmingly worded in mandatory terms. While such provisions do not explicitly establish individual positive rights, they certainly purport to establish affirmative legislative duties, and these duties, if they are to have meaning, should be judicially enforceable at some level. Even the more admonitory education clauses at least call for state legislatures to take education seriously as a policy matter,⁴⁰ and this obligation calls for some form of limited judicial enforcement, at least in the case of extreme failure.

American state courts have wrestled with the challenge of justiciability of state constitutional education provisions for more than four decades now, and the most recent two decades or so of this litigation have tested the courts' legitimacy in ways not seen before. These most recent two or so decades have seen the rise of 'adequacy' theory, which asks courts not just to ensure that education is provided *equally* – the main concern in *Brown v Board of Education*⁴¹ and the many cases

³⁷Eastman (n 35) 2, 31. As Eastman points out, in two states, Montana and North Carolina, the text of the state constitution provides explicitly for individual rights in education. However, as Professor John Dinan explains, the Montana provision merely guarantees individual equality in educational services. Dinan 'The meaning of state constitutional education clauses: Evidence from the Constitutional Convention Debates' (2007) 70 *Alberta LR* 927, 968.

³⁸Dinan (n 37) 929.

³⁹Dinan (n 37) 968, 979. Dinan recognises and acknowledges the likely critiques of his originalist approach. As Dinan states, the evidence he considers comes only out of debates during state constitutional conventions and does not include debates over proposed amendments to existing state constitutions. Also, roughly half of the convention debates that have occurred over United States history either were not memorialised, or the records do not exist today. *Id* 979-981. While these limitations in Dinan's data certainly counsel a cautious approach in interpreting his findings, he certainly makes out at least a *prima facie* case on originalist terms that no state constitutional drafters intended to make the substantive provisions in state education clauses judicially enforceable, and that only one state's (Montana's) drafters sought to so render an equality provision. See *id* 979. A possible counterpoint to Dinan's analysis comes out of the history of Florida's constitutional revision in 1998. One of the members of the Revision Commission convened in that year, which resulted in an amendment to the state constitution's education clause, claims that the revision was adopted with the express goal of making the clause enforceable in the courts. See Mills and McClendon 'Setting a new standard for public education: Revision 6 increases the duty of the state to make "adequate provision" for Florida schools' (2000) 52 *Florida LR* 329. But see Bauries 'Florida's past and future roles in education finance reform litigation' (2006) 32 *J of Education Finance* 89 (making the case that the revision did not accomplish this goal).

⁴⁰Bauries (n 13); see also Dinan (n 39) 946 relating comments of some conventioners that adoptions of admonitory provisions were directed at signalling the importance of education.

⁴¹347 US 483 (1954).

that followed it – but also (or instead) that the education provided meets a standard of *quality* ostensibly mandated by the state constitution.⁴² This adequacy-based focus gives rise to both interpretive and institutional legitimacy problems.

Aside from the language of duty, state constitutional education clauses often contain qualitative terms, such as ‘thorough’,⁴³ ‘efficient’,⁴⁴ ‘suitable’,⁴⁵ and ‘adequate’,⁴⁶ that describe the legislature’s duty. One of the more difficult aspects of this state constitutional language is the inherent indeterminacy in the language used to frame each state’s command. Empirical studies have repeatedly been unable to document any influence that differences in the quality terms that exist in state constitutional education clauses have on the results of cases.⁴⁷ As an example of this indeterminacy, in Kentucky, the state constitution’s education clause states minimalistically that the legislature has the duty to establish ‘an efficient system of common schools’.⁴⁸ Despite this sparse and apparently undemanding language, the Kentucky Supreme Court in 1989 ruled that the word ‘efficient’ called for a system containing nine principles, one of which incorporated seven substantive ‘capacities’ or learning goals.⁴⁹ This ruling was then adopted or relied on in nearly every other state court case for the next two decades nationwide, regardless of differences in the substantive language of the education clauses among the states.⁵⁰

In contrast, the Georgia Constitution provides in pertinent part, ‘The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia’. Yet, despite this seemingly strong command, when faced with an

⁴²See Wood and Baker ‘An examination and analysis of the equity and adequacy concepts of constitutional challenges to state education finance distribution formulas’ (2004) 27 *Univ of Arkansas Little Rock LR* 125 (2004); Bauries (n 15) 325-27 discussing the differences between ‘equality litigation’ and ‘quality litigation’. As many have pointed out, some cases ask ‘instead’ for adequacy, while others ask ‘also’ for adequacy. Eg, Koski and Reich ‘When “adequate” isn’t: The retreat from equity in educational law and policy and why it matters’ (2006) 56 *Emory LJ* 545, 570.

⁴³New Jersey Constitution art VIII § IV, ¶ 1.

⁴⁴Kentucky Constitution § 186.

⁴⁵Kansas Constitution art VI § 6(b).

⁴⁶Georgia Constitution art VIII § 1, ¶ 1.

⁴⁷See Lundberg ‘State courts and school funding: A fifty-state analysis’ (2000) 63 *Alberta LR* 1101 finding no significant relationship between education clause language, defined by the category approach, and case outcomes; Swenson ‘School finance reform litigation: Why are some state supreme courts activist and others restrained?’ (2000) 63 *Alberta LR* 1147 (same); Edwards and Ahern ‘Note: Unequal treatment in state supreme courts: Minority and city schools in education finance reform litigation’ (2004) 79 *NYU LR* 326 (same). But see Swinford ‘A predictive model of decision making in state supreme courts: The school financing cases’ (1991) 19 *American Politics Research* 336, 347 finding a relationship in the equity-based cases during the second wave; Bauries ‘Is there an elephant in the room?: Judicial review of educational adequacy and the separation of powers in state constitutions’ (2010) 61 *Alabama LR* 701, 715 note 57 explaining the limitations of Swinford’s study.

⁴⁸Kentucky Constitution § 256.

⁴⁹*Rose v Council for Better Education, Inc* 790 SW 2d 186, 212-13 (Ky 1989).

⁵⁰Bauries ‘Foreword: Rights, remedies, and *Rose*’ (2010) 98 *Kentucky LJ* 703, 709-10.

enforcement action along with fairly substantial evidence of local inadequacy of education, the Georgia Supreme Court upheld judgment against the claimants, out of an expressed fear of becoming a 'super-legislature'.⁵¹ The Kentucky and Georgia examples demonstrate that the substantive qualitative content of a particular state's education clause is basically irrelevant to its enforcement.

Despite this indeterminacy, or perhaps because of it, state supreme courts have generally interpreted these sorts of qualitative terms to require certain 'adequate' levels of resource 'inputs' funded with state revenues, and where resources have fallen short of these ostensibly required levels of inputs, courts have been faced with a very difficult separation of powers problem – whether to enjoin or mandamus the legislature to raise and appropriate additional funds for the system.⁵² Facing this problem, courts have generally selected one of three equally problematic paths to adjudication and remediation of education clause violations.

About a third of state supreme courts have simply rejected the separation of powers question, holding that the judiciary 'abdicates' its role of judicial review if it declines to address and fully remediate a rights claim.⁵³ Some of these courts have even gone as far as ordering taxation and funding increases, but these remedial orders always operate on a systemic level, never ordering funding that directly benefits or targets an individual plaintiff.⁵⁴ Another third of state courts take the opposite approach, deciding prospectively that the potential for winding up in a constitutional confrontation with the legislature completely precludes review of educational adequacy on the merits.⁵⁵ These courts generally dismiss the cases as nonjusticiable.⁵⁶ A final third of courts follow what Larry Obhof has termed a 'middle-ground approach', adjudicating the merits and finding the constitution violated, but then abstaining from the remedial process, citing separation of powers concerns.⁵⁷

Importantly, for all of the rhetoric of individual rights that exists in the American cases, few individual plaintiffs ever receive any direct relief for the proved violation of their own individual rights to education. At no point has an American state supreme court approved a court order mandating that the

⁵¹See *McDaniel v Thomas* 285 SE 2d 156, 165 (Ga 1981).

⁵²Dunn and Derthick 'Adequacy litigation and the separation of powers' in West and Peterson (eds) *School money trials: The legal pursuit of educational adequacy* (2007) 322 explaining the salience of separation of powers concerns to system-wide adequacy claims; see generally Bauries (n 47).

⁵³See Bauries (n 15) 327 discussing policy-directive remediation.

⁵⁴See, eg, *Abbott v Burke* (2005) ordering increases in funding to targeted school districts, a decision that resulted in some tax increases in New Jersey.

⁵⁵See Bauries (n 15) 327 discussing complete merits abstention.

⁵⁶See, eg, *Coalition for Adequacy and Fairness, Inc v Chiles* (Fla 1996) dismissing a school funding suit as a nonjusticiable political question and citing the federal political question case of *Baker v Carr* as authority for the decision.

⁵⁷See Obhof 'Rethinking judicial activism and restraint in school finance litigation' (2004) 27 *Harvard J Law and Public Policy* 569, 593-96; Bauries (n 15) at 327 and 327 note 121 discussing 'remedial abstention'.

educational situation of a particular named plaintiff be set right. Courts overwhelmingly default to the three approaches above: ordering systemic appropriations increases; declaring the state system unconstitutional without a remedial order; or abstaining completely. Regardless of what one might think about their relative effectiveness, none of these three options directly protects the rights of any individual, not even an individual named plaintiff in the case.⁵⁸ Despite all the talk of individual rights to education, then, education clause litigation, as currently conceived in the American states, is not really about individual 'rights'. This litigation is about systemic duties.

Nevertheless, this systemic, rather than individual, focus at least partially approaches the issue as it should be approached. American state constitutions do not attempt to set forth individual rights to a certain quantum of education. Judicial review of education funding in the American states therefore is properly systemic, as are the remedies for unconstitutional funding schemes, because each state legislature is bound by a general systemic duty that does not run to any particular individual. This description generally fits the landscape of American state supreme court jurisprudence as it exists today. In the next Part, I examine whether the American jurisprudence is a suitable source from which the South African Constitutional Court should draw strength in the inevitable event that it is called upon to enforce the national Constitution's education provisions.

4 The 'basic education' right and the American decisions

Since the Constitutional Court's landmark decision in *Government of the Republic of South Africa v Grootboom*⁵⁹ that fully established the Court as engaged in a rights-protective adjudicatory project, scholars have urged that American school funding litigation could provide a useful model for the South African Constitutional Court in interpreting and enforcing the provisions of the national Constitution's education provisions.⁶⁰ In this Part and those following, I challenge those accounts.

⁵⁸Frustration over this state of affairs – declaring an individual right to exist, declaring that right to be violated, but declining to order any individual remedy for the violation – caused a group of named plaintiffs in Idaho to sue the individual justices of the Idaho Supreme Court for denying them their due process right to a remedy for a wrong. See *Kress v Cople-Trout* no CV-07-261-S-BLW, 2008 WL 352620 at *2 (D Idaho 2008-02-07), and dismissed on reconsideration, 2008 WL 2095602 (Idaho 2008-05-16). Although this suit was ultimately dismissed, the plaintiffs' apparent need to file and prosecute the matter illustrates, from a plaintiff's perspective, the problems inherent in conceptualising a constitutional provision that states an affirmative duty as a power. *Id* *3; see also *Idaho Schools for Equal Education Opportunity v State* 129 P 3d 1199, 1208 (Idaho 2005) stating the judgment of the Idaho Supreme Court in the underlying case.

⁵⁹2001 1 SA 46 (CC).

⁶⁰See, eg, Amsterdam 'Adequacy in the South African context: A concept analysis' (2006) 24 *Perspectives in Education* 25; Roithmayr 'Access, adequacy, and equality: The constitutionality of school fee financing in public education' (2003) 19 *SAJHR* 382; Berger 'Note: The right to education

Ultimately, my claim is that, in the context of what appears to be the most important, salient, and urgent provision in the education article – the ‘right to basic education’ – American state constitutional jurisprudence is of little help. On the other hand, certain aspects of American jurisprudence, read as a cautionary tale, could usefully inform the enforcement of the ‘further education’ right.

I begin by analysing the most relevant provisions of the South African Constitution to adjudication of education rights. Section 29 of the Bill of Rights provides, in pertinent part:

29 Education

- (1) Everyone has the right –
to a basic education, including adult basic education; and
to further education, which the state, through reasonable measures,
must make progressively available and accessible.⁶¹

These provisions set forth, in far greater detail and with far greater precision, the same sorts of concerns that undergird much of the litigation in American state courts over ‘adequacy’ and ‘equity’ in school finance.⁶²

What these provisions do not provide are clear guidelines as to the role of the South African Constitutional Court in securing them. However, several other provisions of the Bill of Rights arguably speak to the judicial role more specifically. Most important to the purposes of this Article is Section 39(1):

39 Interpretation of Bill of Rights

- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
must promote the values that underlie an open and democratic
society based on human dignity, equality and freedom;
must consider international law; and
may consider foreign law.⁶³

under the South African Constitution’ (2003) 103 *Columbia LR* 614; Isaacs ‘Interpreting, litigating and realising the right to education in South Africa: Lessons from America’ (2011) 27 *SAJHR* (forthcoming). At least one scholar has urged the Court to look solely to international law to enforce the education provisions. Arendse ‘The obligation to provide free basic education in South Africa: An international law perspective’ (2011) 14 *PELJ* 97. American scholars have also urged the reverse – that United States courts look to the South African Constitutional Court as a model for enforcing socioeconomic rights, as well. See, eg, Kende ‘Reviving pragmatism in constitutional law: US opportunities and South African examples’ (2010) 36 *Ohio Northern Univ LR* 679; Christiansen ‘Exporting South Africa’s social rights jurisprudence’ (2007) 5 *Loyola Univ of Chicago Int LR* 29.

⁶¹Constitution of the Republic of South Africa 1996 ch 1, s 29 (1996) available at <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#29> (accessed 2011-11-21).

⁶²The literature on this topic is voluminous. For three very recent treatments of the debates surrounding school finance litigation and the theories of equity and adequacy animating these claims, see Thro ‘School finance litigation as facial challenges’ (2011) 272 *Education Law Reporter* 687; Darby and Levy ‘Slaying the inequality villain in school finance: Is the right to education the silver bullet?’ (2011) 20 *Kansas J of L and Public Policy* 351; Bauries (n 15).

⁶³Constitution (n 1) ch 1, para 39(1).

It is this provision which has caused a rough consensus to develop in the scholarly community that the American experience in enforcing state constitutional provisions requiring the provision of education ought to be considered by the Constitutional Court.⁶⁴

Clearly, based on the text excerpted above, it is legitimate for the Court to consult the American decisions, but is it the wise path? Looking to the constitutions and constitutional jurisprudence of foreign nations when framing or interpreting a domestic constitution—what is generally referred to as ‘constitutional borrowing’ – has its supporters and detractors, and South Africa is no exception.⁶⁵ Nevertheless, the South African Constitutional Court stands on particularly strong textual footing when it chooses to consider or borrow foreign jurisprudence. But such borrowing cannot be unreflective, and must take into consideration the unique structure of the provisions at issue. As to education, the structure of the South African Constitution suggests that the Court’s role differs in the enforcement of the ‘basic education’ right, as compared with the ‘further education’ right, and that these different roles suggest different considerations over borrowing from American education jurisprudence.

The principal education right in the South African Constitution, as mentioned above, is divided into ‘basic’ and ‘further’ components. The ‘basic education’ right contains no quality-based terms, other than the word ‘basic’.⁶⁶ It unambiguously confers an individual entitlement. It also lacks any sort of qualifying language that might suggest that a reviewing court defer to legislative discretion in pursuing the right in the general balance of national priorities. In these ways, it differs greatly from the educational duties found in American state constitutions, and from the ‘further education’ right.⁶⁷

American state constitutional education clauses (with the exception of North Carolina’s) direct their terms not at a rights-holder, but at a duty-holder – the legislature, the state, or some variant. They also contain terms of quality, such as ‘thorough’, ‘efficient’, and ‘adequate’, terms that plausibly can be described as better suited to legislative interpretation than to judicial interpretation. One prominent American scholar has referred to these terms as ‘inherently

⁶⁴See (n 60).

⁶⁵See, eg, Davis ‘Constitutional borrowing: The influence of legal culture and local history in the reconstruction of comparative influence: The South African experience’ (2003) 1 *Int J of Con L* 181 explaining the influences on judicial constitutional borrowing in South Africa; Foster ‘The use of foreign law in constitutional interpretation: Lessons from South Africa’ (2010) 45 *Univ of San Francisco LR* 79 outlining the pros and cons of borrowing from foreign law; Kentridge ‘Comparative law in constitutional adjudication: The South African experience’ (2005) 80 *Tulane LR* 245 advocating the borrowing of foreign jurisprudence; *Bernstein v Bester* 1996 2 SA 751 para 133 (CC) criticising unreflective borrowing.

⁶⁶Constitution (n 1) ch 1, s 29(1) ‘Everyone has a right ... to a basic education’.

⁶⁷See, eg, Arendse (n 60) 115-17 discussing the differences between the ‘basic education’ right and the ‘further education’ right on the Constitution’s text.

nebulous',⁶⁸ and about a third of American state courts have held that such terms provide no 'judicially manageable standards' for interpretation and enforcement.⁶⁹

Further, and more importantly, the terms of quality built into American state constitutional education clauses are often inserted in such a way as to explicitly call for legislative exercise of reasonable discretion. For example, the Kansas Constitution requires that the state legislature 'make suitable provision' for the state school system.⁷⁰ What is 'suitable' in one person's eyes is, of course, going to be viewed as excessive in another's and inadequate in still another's. Because of this indeterminacy, the word 'suitable' appears as an invitation for the legislature to engage in an inquiry as to whether the funding it provides is 'suitable' for the needs of the People. The Kansas Supreme Court has at times recognised this need for legislative interpretation and the concomitant need for judicial deference to it,⁷¹ and has at other times rejected calls for judicial discretion, thus illustrating the tendency of American school finance litigation to travel without a rudder.⁷²

Happily, the South African Constitution's 'basic education' right is not burdened by any of these interpretive impediments. It does not call for the interpretation of any nebulous terms – 'basic education' has the well-accepted meaning internationally of free and compulsory primary school-level education.⁷³ It also does not call for the exercise of legislative discretion in deciding what levels of funding are 'suitable' or 'adequate' to ensure the provision of such a level of education. Rather, the 'basic education' right is a clear and simple claim-right. As such, it should be enforced very differently from both the American education duty and the South African 'further education' right.

⁶⁸Gillette 'Reconstructing local control of school finance: A cautionary note' (1996) 25 *Capital Univ LR* 37, 37 '[School finance litigation] has embodied new heights in judicial creativity as courts have attempted to infuse specific and enforceable meaning into inherently nebulous constitutional mandates to provide a "thorough and efficient" or "general and uniform" education or to create an educational system that would "cherish the interests of literature and the sciences"'. To be sure, Professor Gillette ended the subject article on a note supporting judicial intervention as a way of giving cover to reluctant legislators to engage in funding redistribution, but retained his skepticism of the discoverability of any real meaning in the quality terms of state constitutional education clauses, acknowledging that judicial 'creativity' would be necessary. See *id* 50.

⁶⁹See Bauries (n 47) discussing the courts that have completely abstained from the merits in school finance litigation.

⁷⁰Kansas Constitution art VI § 6(b).

⁷¹*Unified School District No 229 v State (USD 229)*, 885 P 2d 1170, 1185-86 (Kan 1994).

⁷²Several Kansas decisions have gone against the state since *USD 229* was decided. Nevertheless, *USD 229* remains good law in Kansas, and the recent decisions have consistently avoided overruling it. See, eg, *Montoy v State* 112 P 3d 923, 929 (Kan 2005) 'We also reject the State's related argument that the doctrine of separation of powers limits our review to the issue of whether the legislature had the authority to pass such legislation. Any language in (*USD 229*) to this effect is inapplicable here because of this case's remedial posture'.

⁷³See Arendse (n 60) 109-115 reviewing international law on the human right to education and identifying the 'minimum core obligation' as free and compulsory primary education.

Both the American 'education duty' and, I will argue below, the South African 'further education' right call for an approach to education policy that continuously assesses and improves the system of education in the best interests of the People. The American decisions generally recognise this purpose, although these courts often overstep their judicial prerogatives in offering creative interpretations of the constitutional quality terms. Still, the American remedial approach that is currently dominant – the general order to re-engage the policy making process – is the approach best suited to the enforcement of the systemic duty found in each state constitution. This approach proceeds on a tacit assumption that fixing the system will result in greater overall utility maximisation, even if not every single learner harmed by educational inadequacy receives individual relief. The American courts have this luxury because they interpret a general and systemic duty. Under the 'basic education' right, the South African Constitutional Court has no such luxury.

Because the 'basic education' right in the South African Constitution is so immediate, so unqualified, and so individualised, the Constitutional Court should reject the American approach in enforcing this right. Rather than issuing a general order for 'meaningful engagement', as it has in the past,⁷⁴ the Court must go further where it sees a violation of the 'basic education' right. 'Progressive realisation', inter-branch 'dialogue', and 'weak judicial enforcement' have no place with such a basic and unqualified entitlement. Thus, where the Constitutional Court is faced with a successful plaintiff's claim showing a failure to provide that plaintiff with a basic, free, compulsory, primary-level education, the Court should access its power to mandamus members of the other branches of government to provide what has been denied to the individual learner-plaintiff.⁷⁵ Over time, such individualised remedial orders will serve to develop a 'constitutional common law' of basic educational entitlements,⁷⁶ and this body of law will 'percolate'⁷⁷ to affect the policy decisions of the national Legislature, but importantly, named plaintiffs with real claims and real injuries will receive direct relief. Anything less than that would debase the term 'right'.

⁷⁴See, eg, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 87 ordering the local housing authority to 'meaningfully engage' the local homeless population in developing a comprehensive housing plan.

⁷⁵See, eg, *Patson v The Attorney-General* 2008 2 BLR 66 (HC) discussing the writ of mandamus in English common law, the Dutch-Roman adjudicatory system, and South Africa, both before and after the adoption of the present Constitution, and concluding that mandamus will lie to compel 'the exercise of prerogative powers by public officials of an administrative nature which touch on the rights of the individual'.

⁷⁶See, generally, Strauss 'Common law constitutional interpretation' (1996) 63 *Univ of Chicago LR* 879 defending common law methods of interpretation in constitutional law.

⁷⁷See, generally, Gewirtzman 'Lower court constitutionalism: Circuit Court discretion in a complex adaptive system' (2012) 61 *Am U LR* 457 developing the idea of 'constitutional percolation'.

5 The 'further education' right and the American decisions

The 'further education' right in the South African Constitution calls for something closer to what the American state constitutions provide – a full education that will prepare learners for competition in the national and global economy. Despite its right-based language, the 'further education' clause appears to call for something very similar to what the American state constitutional provisions call for – the exercise of legislative discretion with an eye toward the benefit of the system in general, rather than toward a minimum quantum of education for each specific individual in that system. If this is correct, then it should be enforced and remediated similarly to the American state constitutional provisions.

In making this claim, it is first necessary to address the obvious difference between South Africa's 'further education' right and the education duty that exists in American state constitutions. The former uses the language of 'right', while the latter use the language of duty, however expressed. The South African Constitution pointedly provides that 'Everyone has the right ... to further education, which the state, through reasonable measures, must make progressively available and accessible'.⁷⁸ This language sounds like an individual entitlement, and it would be reasonable for the Constitutional Court to read it as such. There are good reasons, however, to treat ostensible 'rights' such as this one, qualified by terms of discretion and practicality, as general duties, rather than as individual 'rights as trumps' on legislative action.⁷⁹

For one, the command itself suggests that what is contained in the command is not a 'trump'. Under the South African 'further education' provision, the 'right' is limited by the legislature's prerogatives to act 'reasonably' and 'progressively', rather than immediately. These limitations suggest that the ostensible 'right' in this section is too negotiable to be considered a true claim-right. More likely, as to the individual, it constitutes an expectation or a strong interest held as a member of a polity.

For example, imagine an individual learner – call her 'Nokwazi'.⁸⁰ Nokwazi's right to basic education is being met – she is given access to a full-day primary school that teaches primary school level reading, writing, and mathematics, along with some other subjects, in her native language, isiZulu. However, that is all she receives, and she is a very smart child, so if she were to receive more, this further education would both enhance her life and add to the eventual national economy. She might even invent something one day – a new seeding technique, a weather forecasting model, a helpful device – that benefits many of her fellow South

⁷⁸Constitution (n 1) ch 1, para 29(1).

⁷⁹See Dworkin 'Rights as trumps' in Waldron (ed) *Theories of rights* (1984) coining the idea of rights as reasons to serve an individual's needs, even if there are good policy-based reasons not to do so.

⁸⁰A Zulu name for a female child meaning 'knowledgeable'.

Africans. Without this further education, however, she will learn to read and write, but will not go on to do these other things.

If Nokwazi has an individual right to 'further education' that is a claim-right – a 'trump' over policy decisions in conflict with it, then she can both demand, and obtain an injunctive judicial order requiring, provision of this further education to her personally and immediately.⁸¹ But this is demonstrably not required by the 'further education' provision. Rather, the state has the discretion to provide a system that realises the availability of further education over time – 'progressively'. And the speed and effectiveness with which the state pursues this goal of availability of further education need only be 'reasonable'. Under such circumstances, it may be true that Nokwazi makes it all the way through her school days and into adulthood before further education is available to a person in her circumstances, and importantly, if the delay is reasonable, and if further education eventually and progressively becomes available and accessible, then Nokwazi's right has not been violated.

Moreover, the provision at issue not only uses the language of rights, but also the language of duties. Indeed, most of the operative language of the provision is duty-based, not rights-based. Under the 'further education' provision, 'the state, through reasonable measures, must make [further education] progressively available and accessible'. This is, to be sure, a strongly worded command. It is stronger than many affirmative duty statements found in American state constitutions, but it still retains the hallmarks of those state constitutional commands – a mandate limited by a reservation of legislative discretion and prerogative. Importantly, the discretion afforded to the state under the 'further education' provision – permission to act 'reasonably' in making such education 'progressively available and accessible' – points the state's efforts toward ensuring a greater level of overall utility, rather than ensuring that no single person is deprived. The idea that something must be made 'progressively available and accessible' suggests a status quo in which that thing is presently not 'available and accessible' to all. The discretion to act 'reasonably' and 'progressively' suggests that this flaw need not be remedied immediately, as long as legislative efforts are truly directed at remedying it over time.

⁸¹Of course, not even a pure claim-right against the government is ever absolute. See 'Rights' in *Stanford encyclopedia of philosophy* (2011) available at: <http://plato.stanford.edu/entries/rights/> (accessed 2012-06-01) pointing out that the only candidate for an absolute right that has been widely acknowledged is Gewirth's suggestion of a right 'not to be made the victim of a homicidal project'. See Gewirth 'Are there any absolute rights?' in Waldron (ed) *Theories of Rights* (1984). However, even this suggestion is controversial. With all other rights, the government can always meet some burden to show that the general interests of the citizenry outweigh the right in a particular circumstance, but the showing that must be made is typically very demanding, and here, this legislative discretion is literally part of the right itself. See, eg, Gunther 'The Supreme Court, 1971 term – Foreword: In search of evolving doctrine on a changing court: A model for a newer equal protection' (1972) 86 *Harvard LR* 1, 8.

The differences between the 'basic education' right and the 'further education' right call for different approaches to enforcement and remediation. The similarities between the 'further education' right – and especially the discretionary duty this provision places on the South African government to act reasonably to progressively pursue that right – and the American education duty call for careful consideration of the American school funding decisions. Indeed, examining these decisions in light of the Constitutional Court's landmark ruling in *Grootboom* reveals that the two countries have, for at least the last decade, been involved in a similar project. This project has involved giving force judicially to constitutional commands to the legislature to act to make the lives of the people better overall.

However, the multi-decade American experience presents some important cautionary lessons for South Africa in enforcing the 'further education' right. First, the American courts choosing to engage the merits of the constitutional question have uniformly seen their proper role as evaluating the substantive correctness of the legislature's enactments on education, rather than focusing on the legislative process. That is, the American courts have measured the constitutionality of state education legislation by evaluating whether the education system is in fact 'adequate', 'suitable', 'thorough', 'efficient', et cetera. The inherent indeterminacy of these terms has provided space for the twin dangers that worried Justice Albie Sachs in the context of socioeconomic rights enforcement – the dangers of over enforcement due to a judicial desire to seek headlines as protectors of the poor, and under enforcement due to undue judicial formalism.⁸²

Facing these dangers, the American courts have overwhelmingly fallen victim to the former.⁸³ The American school finance cases are littered with lofty expressions of the value of education, its vitality in the democratic system, and the need for it to keep American citizens competitive in the world economy. No conscientious person can reasonably disagree with these platitudes, of course. But the decisions also tend to read very minimalistic constitutional terms as imposing very high standards of legislative performance. Kentucky's Supreme Court, as mentioned above, turned the word 'efficient' into a system requiring nine principles, one of which incorporated seven substantive 'capacities' or learning goals.⁸⁴ The Wyoming Supreme Court read language that is arguably merely admonitory, and that contains only the quality term, 'suitably', as requiring an

⁸²See Sachs *The judicial enforcement of socio-economic rights: The Grootboom case* Lecture, Human Rights Committee, Law Society of Ireland (2009) available at: <http://www.lawsociety.ie/documents/committees/hr/lectures/23.6.2005.pdf> 15 discussing these dangers in the context of the *Grootboom* case.

⁸³As pointed out above, however, about a third of states have fallen victim to the danger of underenforcement due to judicial formalism – in the American cases, this formalism has taken the form of the unreflective application in state constitutional law of the federal constitutional doctrine termed the 'political question doctrine'. See Bauries (n 15) 340-342.

⁸⁴*Rose v Council for Better Education Inc* 790 SW 2d 186, 212-13 (Ky 1989).

education system that is no less than 'visionary and unsurpassed'.⁸⁵ Other examples of judicial adventurism in setting substantive educational standards abound among the cases.⁸⁶ Education is an area that is particularly susceptible to this danger, as few judges would relish the idea of minimising the importance of education or the legislature's responsibility for it. Thus, even though state constitutions textually tend to provide for minimally demanding standards of legislative conduct, courts that choose to engage the education clause substantively tend to reach for lofty-sounding, but unrealistic and extremely counter-textual and ahistorical interpretations of such language.⁸⁷ This form of 'interpretation' takes a significant amount of both discretion and responsibility away from where it should reside – with legislatures.

Compounding the effect of the natural inclination of state judges to include aspirational language about education in their opinions is the tendency of American state courts to issue systemic remedial orders that fail to specify any particular relief for a constitutional violation, but instead call for the consideration of multiple goals or factors.⁸⁸ As a result of this remedial choice, the courts are largely freed from having to realise and individually enforce their lofty interpretations of the substantive constitutional commands, and the normal pressure that the anticipation of supervising a lengthy injunctive process imposes does not operate to forestall judicial overreach.⁸⁹

Finally, the American decisions that address the substantive meaning of state constitutional education clauses as mandatory fiscal standards evince judicial ignorance of the principles of deliberative democracy. Constitutional law in general ought to incentivise deliberative communication between the people and their elected representatives in policy making.⁹⁰ A vaguely worded constitutional provision that calls for the legislative provision of services to the People could benefit greatly from the non-adversarial contributions of the People in defining its content. But deciding the substantive meaning – and the fiscal and resource-based implications of that meaning – in the narrow crucible of an

⁸⁵See *State v Campbell County School District* 19 P 3d 518, 538 (Wyo 2001); see also Wyoming Constitution art I § 23: 'The right of the citizens to opportunities for education should have practical recognition. The legislature shall suitably encourage means and agencies calculated to advance the sciences and liberal arts.'

⁸⁶See, eg, Eastman (n 35) 55-74.

⁸⁷See, eg, Thro 'A new approach to state constitutional analysis in school finance litigation' (1998) 14 *JL and Pol* 525, 548 'If (the Kentucky Supreme Court's) standard is taken literally, there is not a public school system in America that meets it'.

⁸⁸See, eg, *Rose v Council for Better Education Inc*, 790 SW 2d 187, 212 (Ky 1989) setting forth a number of elements and competencies that make up part of an 'efficient' education and calling upon the General Assembly to re-make the Kentucky education system with these elements in mind.

⁸⁹A prominent American legal scholar has developed a theory of a form of this pressure that he terms 'remedial equilibration'. See, generally, Levinson '*Rights essentialism and remedial equilibration*' (1999) 99 *Colum LR* 857.

⁹⁰See generally Ponet and Leib '*Fiduciary law's lessons for deliberative democracy*' (2011) 91 *BLR* 1207.

adversarial court case removes the voices of most of the polity from the debate and gives special prominence to the parties who happen to bring suit, their lawyers, the special interest groups who join or support the suit, and the expert witnesses they choose to employ.⁹¹ The substantive meaning of highly contestable terms such as 'suitable', at least in the context of the affirmative duties of the state, should not be defined in such a narrow context.

So, does this all mean that I propose no judicial role in the enforcement of affirmative systemic education duties, and that I would relegate the role of the courts completely to the enforcement of the 'basic education' right in South Africa? By all means, no. The courts must be the final arbiter of the meaning of a constitution, but they are not limited to deriving such meaning through the means employed by the American state courts. The next (and final) Part briefly sketches out a course of correction that will prove fruitful for socioeconomic policy making in South Africa and in the American states.

6 Systemic duties and enforcement

The foregoing discussion establishes both points of convergence and points of concern that South African and American courts have reason to consider, at least where systemic government duties to provide education are concerned. One obvious question from this point is who should seek to learn from whom? It is no secret that the American school finance litigation reform project has been far from a smashing success.⁹² But it is also no secret that the problem of homelessness in the Western Cape has not disappeared in the decade since *Grootboom* was decided.⁹³

The South African Constitutional Court could be said to have avoided a deviation into an overly aspirational test for the substantive 'reasonableness' of a governmental housing plan in *Grootboom*.⁹⁴ Nevertheless, the Court, perhaps

⁹¹See, generally, Sandler and Schoenbrod *Democracy by decree: What happens when courts run government* (2003) 113-138 developing the idea of the 'control group', which consists of these participants, who typically share the direct role in shaping a judicial decree in a public law case, often to the exclusion of local or state voters, local or state elected officials, and institutional personnel.

⁹²See, eg, Berry 'The impact of school finance judgments on state fiscal policy' in West and Peterson (eds) *School money trials: The legal pursuit of educational adequacy* (2007) 235-236 summarising empirical results and concluding that school finance litigation over four decades of reform has generally resulted in small and relatively insignificant differences in fiscal policy, save a large increase in the share of school spending borne at the state, rather than at the local level and a modest decrease in measured inequality.

⁹³Eg, Chenwi 'Socio-economic gains and losses: The South African Constitutional Court and social change' (2011) 41 *Social Change* 427.

⁹⁴See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 99 imposing a duty to enact 'reasonable' measures 'such as, but not limited to' the measures imposed in the Accelerated Land Management Programme, and holding that the Cape Metropolitan

necessarily, did elect to pass judgment on the overall substantive 'reasonableness' of the housing plan challenged. The gravamen of the critique of this sort of judicial action is well-stated by the Honourable Dennis Davis:

First, to conceive of social democracy solely in terms of the provision of goods and services by state machinery alone is to fail to heed the lessons of the problems encountered by social democracy over the past fifty years. It suggests an obliviousness to the need to strengthen the individual's capacity to reshape the state – chiefly through political and economic struggle by way of civic associations, and not by viewing state institutions as the panacea for the attainment of social justice.⁹⁵

Judge Davis directs his eye at the people, who may become burdened with a diminished view of their own political power where their main recourse for political failures is seen as seeking the help of the courts. Additionally, however, this burden is compounded by a similar form of 'learned helplessness'⁹⁶ in the legislative body of a state where judges are willing to decide whether a policy resulting from the political process is substantively 'good enough'. Over time, a legislature subject to such judgments – even declaratory judgments – would likely come to expect such judicial approval or disapproval of its own priority setting, and might reasonably discount its own responsibility to take care in making policy.

My own recent scholarly work has attempted to address these concerns by urging constitutional courts to approach systemic affirmative legislative duties as fiduciary duties of care.⁹⁷ The fiduciary character of the legislative duties to provide for social and economic needs derives from the structure and political theory underlying representative republican democracy in general, and American government in particular.⁹⁸ It is also evident in the text of American state

Council's housing plan at the time of the suit was not 'reasonable' due to its failure to provide for the most needy first.

⁹⁵Davis 'Socioeconomic rights: Do they deliver the goods?' (2008) 6 *Int J of Con L* 687, 709.

⁹⁶For discussions of the phenomenon of learned helplessness in political activity, see Winch 'Will American voters succumb to "complaining learned helplessness" in 2010?' (2010) 26 *Psychology Today* available at: <http://www.psychologytoday.com/blog/the-squeaky-wheel/201010/will-american-voters-succumb-complaining-learned-helplessness-in-2010> (accessed 2012-06-01).

⁹⁷Bauries (n 13). I leave to the side, for present purposes, the notion that the affirmative duties may actually be collective rights. See Bauries (n 47) 759 asking: 'Are education rights, if they exist, individual or collective?' In practical terms, there is little to no distinction between a 'collective right' and a systemic legislative duty. See Sanders 'Collective rights' (1991) 13 *Human Rights Q* 368, 370 explaining that, unlike group rights, such as affirmative action, collective bargaining, and class action rights, which use the power of the group to achieve rights-enhancing goals for the group's individual members, collective rights seek to advance the group as a whole, an interest that the author describes in the human rights context as 'ensuring the distinct group's survival', but which can be thought of in the school finance context as enhancing the system itself, rather than (or in addition to) the interests of the individuals within the system.

⁹⁸The fiduciary theory of representative government is now ascendant in the scholarship not only of constitutional law, but also of other areas of public law. See, eg, Fox-Decent *Sovereignty's promise: The state as fiduciary* (2012); Lawson *et al The origins of the necessary and proper clause*

constitutions, which use the language of fiduciary entrustment as a way of describing the responsibilities of government officials, in particular the safeguarding of educational funds, which are often referred to as being held 'in trust'.⁹⁹

Under this theory, the systemic legislative duty to provide for an education system is really a fiduciary duty of care, and it should be enforced as such.¹⁰⁰ The proper enforcement approach might be modeled on the business judgment rule, as stated in the American Law Institute's *Principles of Corporate Governance*.¹⁰¹ Like its private law counterpart, the legislative duty of care is a substantive duty, but it is judicially reviewed procedurally, with an eye toward good governance, rather than particular results, funding targets, or resource levels.¹⁰² Viewed in this way, the jurisprudence of American state supreme courts – at least as to remediation – begins to make more sense. If the legislature is bound only by a systemic duty to exercise due care in providing for the state education system, then systemic approaches to remediating constitutional violations seem warranted, as the relevant entrusting party to whom the legislature's duty is owed is not any particular individual, but the body politic – the People.

Applying a fiduciary duty-of-care approach in South Africa would not take us far beyond Justice Yacoob's 'reasonableness' approach in *Grootboom*, albeit with one major difference. A fiduciary approach does not ask the Court to engage in qualitative evaluation of the choices the state has made, or their results, beyond examining (1) the information considered; and (2) whether the resulting policy appears to be based on that information. Thus, only in the extreme case where a state policy appears not to be based on the information considered by the legislature (thus indicating that the legislature did not really consider the information in good faith) should a court invalidate the policy.

Remedially, the fiduciary approach calls not for the judicial direction of any policy choices, and certainly not for a judicial mandamus of the legislature. Rather, where a court engages in review of affirmative legislation for whether the legislative body has exercised due legislative care in enacting it, and the court concludes that the legislature has failed to exercise due care, the appropriate remedy is to invalidate the legislation and remand it to the legislature so material and relevant information can then be considered and publicly debated, and policy can be developed based on that information.

Treating these education duties of the legislative branch as duties of care that require consideration of material and relevant information therefore invites the sharing of such information between the interested public and the legislative branch, and it further invites the legislature's public debate over such information.

(2010); Bauries (n 13) citing numerous other recent sources.

⁹⁹Bauries (n 13).

¹⁰⁰*Ibid.*

¹⁰¹See ALI Principles of Corporate Governance § 4.01(c) (American Law Institute 2008).

¹⁰²Bauries (n 13).

Perhaps, under these standards (and considering *Grootboom* as the prime example), the South African Constitutional Court has more to teach American state supreme courts than the American courts have to teach. *Grootboom* certainly enforced a norm of engagement with the affected community, and the Court certainly was interested in the ultimate consideration by the national, state, and local legislative bodies of the facts on the ground, including the reality of vulnerable people living in intolerable conditions.¹⁰³ But by focusing on the substantive reasonableness of the *policy* versus the reasonableness of the policy making *process* used to arrive at that policy, the Court may have invited in later socioeconomic duty cases the sort of interpretive overreach found in many American school finance decisions.

Understanding that South Africa needs both its own unique approach to the 'basic education' claim-right, as well as some theoretical grounding for its approach to 'progressive realisation', the bifurcated approach to the education provisions proposed herein allows for immediate realisation of the 'basic education' right – primary-level education (whether taken as a child or as an adult) for literacy and numeracy. It calls for an aggressive judicial approach to making that basic core right a reality. But it also calls for allowing the national Parliament and local legislatures the space to develop as deliberative bodies on the broader policy questions of 'further education'. In a nation left with so many problems from its prior period of historical tumult, it makes sense to focus the judiciary's political capital on the needs that are most immediate and vital. And 'basic education' may be the most vital of all needs.

¹⁰³See *Grootboom* 2001 1 SA 46 (CC) para 99.