State Constitutional Design and Education Reform: Process Specification in Louisiana

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I. INTRODUCTION

Among the fifty United States, Louisiana is unique in many ways. The state maintains a hybrid civil-law system, closer in many ways to the Continental European model than the traditional English-American common-law model. The state is nominally subdivided into parishes, rather than counties. The state statutes contain several references to the French origins of the state and the continuing relevance of French and its Cajun and Creole derivatives as spoken languages in the state. The food is just, well, better. The list goes on. These important differences aside, Louisiana, like every other state in the Union, lives under a ratified foundational document of primary law that the state terms its Constitution. Depending on the source one consults, the current

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2. See, e.g., 15A AM. JUR. 2D COMMON LAW § 10 (2008) (citing Dieball v. Com'l Cas. Co., 176 So. 2d 774 (La. App. 1965), writ refused, 179 So. 2d 272 (1965), and Minor v. Young, 89 So. 757 (La. 1920) for the proposition that civil codal law is the foundational law of Louisiana, but also citing State v. Kemp, 205 So. 2d 411 (La. 1967) for the proposition that the common law provides the rule of decision where no statute or code exists).
4. For example, the statutes explicitly specify that French-language contracts are of the same binding effect as English-language contracts. LA. REV. STAT. ANN. § 1:51 (2003). The statutes also require the teaching of French language and culture in all state public schools. LA. REV. STAT. ANN. § 17:272 (2001).
Louisiana Constitution is either its eleventh (the most of any state) or its ninth (tied with Georgia for the most among the states).\(^5\) It is also second to Georgia’s in recentness of ratification.\(^6\) Regardless of its relative youth or the numerosity of its antecedents, though, the current Louisiana document substantially resembles the constitutions of many other states.

As to education, the Louisiana Constitution contains the familiar general mandate for the establishment of a public school system, now ubiquitous among state constitutions.\(^7\) But unlike the founding documents of any of the other states, Louisiana’s constitution also provides for a very specific process-based allocation of the responsibilities for determining appropriations levels in education from year to year.\(^8\)

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6. See Devins, supra note 5, at 1640-41 (naming Georgia’s as the most recent). But see Rhode Island General Assembly Website, Constitution of the State of Rhode Island and Providence Plantations, http://www.rilin.state.ri.us/RiConstitution/constintro.html (last visited July 23, 2010) (recounting the constitutional revisions that occurred in the state and stating that it is the “1986 Rhode Island Constitution which appears on the General Assembly website”). If this claim is true, then Rhode Island has the most recently enacted state constitution. However, according to the site, the most recent “Constitutional Convention” held in the state “propose[d] a number of amendments to be placed before the voters, but it also prepared an updated version of the 1843 Constitution, which incorporated previous amendments and eliminated all language that had been superseded.” Id. If so, then this would most properly been seen as the comprehensive amendment of the existing state constitution, rather than the adoption of a new state constitution. See Richard E. Berg-Andersson, Rhode Island in The Green Papers: State and Local Government (2010), http://www.thegreenpapers.com/slg/st.phtml?state=RI (describing the 1843 constitution as the state’s current document).

7. See La. Const. art. VIII, § 1 (“The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system.”); see also id., pmbl. (“The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential.”).

8. See La. Const. art. VIII, § 13(B) (providing for a specific allocation of powers in developing an absolute funding amount each year and setting the previous year’s funding amount as the default in the case of impasse).
It is well-known that state constitutions often treat numerous—sometimes trivial—subjects, or contain provisions that seem hyper-specific and statutory, rather than foundational and constitutional, and state constitutions have been roundly criticized (and sometimes defended) for these features. In this Article, I argue that one form of specification—process-based specification—found in many state constitutions, and in the Louisiana education article itself, can be defended normatively as a way of establishing effective checks and balances where socioeconomic policy development is concerned. In particular, in cases of potential political crisis or exigency, process-based specification (in contrast with no specification or substance-based specification) enables the judiciary to be a legitimate check on the legislature’s policy choices without making the judiciary into the oft-maligned “super-legislature” of judicial activism lore.

In Part II, I examine the role of state constitutional design in shaping the challenges of educational reform. I begin with a brief discussion of state constitutional design in general, and I expand this discussion to include the specific drafting approaches used in promulgating state constitutional education duties. I continue from this point with a review of how these provisions have been used in school finance litigation—the principal vehicle for enforcing education rights in the states—and how they have been modified in response to such litigation. From this review,

9. See, e.g., G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 2 (1998) (explaining that inclusion of “prosaic” subjects in state constitutions causes scholars to neglect them); Wilkinson, supra note 1, at 573. (“Constitutions should be articulations of fundamental law, not second layers of positive law.”); Christopher W. Hammons, State Constitutional Reform: Is It Necessary?, 64 ALB. L. REV. 1327, 1327 (2001) (recounting these critiques as presented by the League of Women Voters in a New York constitutional debate); Ann Lousin, Challenges Facing State Constitutions in the Twenty-First Century, 62 LA. L. REV. 17, 26 (2001) (arguing that state constitutions containing excessive detail will unduly constrain legislatures in the coming years); Donald S. Lutz, Toward a Theory of Constitutional Amendment, 88 AM. POL. SCI. REV. 355, 366 (1994) (concluding, based on empirical analyses, that “constitutional brevity and a moderately difficult amendment process” would serve best to protect the rationally self-interested choices of constitutional framers); See also Friedman, supra note 5, at 36 (describing the constitutions as containing a “miscellaneous storehouse of provisions, which we might call super-legislation”); John Kincaid, State Constitutions in the Federal System, 496 ANN. AM. ACAD. POL. SCI. 12, 18 (1988) (“A common criticism of state constitutions is that they are too long.”); id. at 19 (“As many critics have argued, state constitutions ordinarily contain ‘a great deal of matter which is in no distinctive sense constitutional law, but general law . . . fit to be dealt with in ordinary statutes.’”) (quoting JAMES BRYCE, THE AMERICAN COMMONWEALTH 443 (1907)) (omission in Kincaid). But see Hammons, supra, at 1338-40 (defending proximity in state constitutions based on empirical evidence that proximity is linked to longevity in the document’s lifespan).

I conclude that this litigation has caused at least some state reformers to secure changes to the constitutional text, but that these reforms have secured few of the results intended by reformers. In Part III, I outline the education provisions in Louisiana's current state constitution. I review both the drafting strategies used in the initial education article, and the unsuccessful school finance litigation that gave rise to the most prominent recent changes to the education article. I conclude from this Part that Louisiana's reformers have chosen a decidedly unique, process-oriented path in amending Louisiana's education article, as compared with reformers in other states.

In Part IV, I present both general and situational arguments in support of the specification of process-based limitations as a strategy appropriate for drafting or amending state constitutional education articles. I base the general argument on the unique features of state constitutions and state governments, which leave courts well-positioned for review of legislative processes. I base the situational argument on a case study of Louisiana’s constitution in light of the current funding realities in the New Orleans school system. I argue that the specific, process-based limitations in the Louisiana Constitution could prove very useful in the coming years as federal relief funding largely disappears, and Louisiana is left to fund the state’s schools based mostly on state-derived revenues. Based on these arguments, I conclude with the suggestion that those drafting and amending state constitutions containing affirmative legislative duties should consider specific, process-based limitations as a useful element of state constitutional design.

II. SCHOOL REFORM AND STATE CONSTITUTIONS

In today's legal climate, school reform generally occurs through one of three vehicles. The first is state legislation, which in recent years has cemented the standards and accountability movement into education policy; has enabled the rise of charter schools, vouchers, homeschooling, and other school choice mechanisms; and most recently, has begun

to alter the tenure system and teacher retention. The second is federal legislation, most prominently exemplified through the No Child Left Behind Act, the Elementary and Secondary Education Act (of which NCLB is a recent amendment), and the Individuals with Disabilities Education Act. The third, and the most controversial, is the courts.

This latter vehicle for education reform, as I will explain below, derives its power over educational policy from state constitutional provisions imposing legislative duties to provide for education. Much scholarship has examined the workings of this litigation, but little of it has focused on questions of state constitutional design ex ante. Here, I contend that focusing a bit more attention on state constitutional design, and possibly becoming involved in the formal process of constitutional change—whether through amendment or revision—might aid reformers in accomplishing the systemic changes they desire in education. Below, I consider the most salient unique features of state constitutional design and how they have affected the state constitutional provisions most important to education reform litigation—the education articles—with an eye toward informing the efforts of education reformers and state constitutional framers.

A. State Constitutional Design

State constitutions and state constitutionalism have become very important in recent decades, spawning an entire school of studies falling...
under the banner, the "New Judicial Federalism." Of course, the recent prominence of state constitutionalism has also caused it to draw significant scholarly criticism. The most familiar critique of state constitutions as foundational documents is that they are needlessly prolix in scope, often covering fairly trivial matters best reserved for legislation and administrative rulemaking. A subset of this critique holds that, even as to the subjects that state constitutions cover, the documents are overly detailed and statute-like, often detailing the most minute aspects of particular policies, resulting in a reduction of legislative discretion in adapting state policy to changing times.

Clearly, some state constitutions, including the Louisiana Constitution, attempt to cover subjects and policy areas best reserved for a document other than the fundamental law of the state, and do so in statute-like detail. For example, the Louisiana Constitution contains detailed civil service rules for police officers, including rules for reductions in force based on classifications of employees, as well as a "penal-

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20. See, e.g., TARR, supra note 9, at 2 (explaining that inclusion of "prosaic" subjects in state constitutions causes scholars to neglect them); Wilkinson, supra note 1, at 573. ("Constitutions should be articulations of fundamental law, not second layers of positive law."); Hammons, supra note 9, at 1327 (recounting these critiques as presented by the League of Women Voters in a New York constitutional debate); Lutz, supra note 9, at 366 (concluding, based on empirical analyses, that "constitutional brevity and a moderately difficult amendment process" would serve best to protect the rationally self-interested choices of constitutional framers); Friedman, supra note 5, at 36 (describing the constitutions as containing a "miscellaneous storehouse of provisions, which we might call super-legislation"); Kincaid, supra note 9, at 18 ("A common criticism of state constitutions is that they are too long."); id. at 19 ("As many critics have argued, state constitutions ordinarily contain 'a great deal of matter which is in no distinctive sense constitutional law, but general law . . . fit to be dealt with in ordinary statutes.'") (quoting BRYCE, supra note 9, at 443 (omission in Kincaid). See also Devins, supra note 5, at 1641 (pointing out that, due to their inclusion of much greater detail over actions of legislatures, "state constitutions are, on average, nearly four times longer than the Federal Constitution"). But see Hammons, supra note 9, at 1338-40 (defending prolixity in state constitutions based on empirical evidence that prolixity is linked to longevity in the document's lifespan).
21. See, e.g., Devins, supra note 5, at 1640 (referring to such provisions as "super-legislation"); Lousin, supra note 9, at 26 ("Clearly, the state constitutions with the constraints of time-bound 'legislative detail' will not succeed in meeting the flexibility needed to face the major challenges of the next century."); Carleton, supra note 5, at 576-77 (criticizing several provisions of the Louisiana Constitution for their statutory character, brought about through the lobbying efforts of special interest groups during the 1973 constitutional convention).
22. See generally Carleton, supra note 5.
ties” section and a section on appealing adverse employment decisions. The Florida Constitution, perhaps the most striking example of this prolixity, even contains a provision banning the caging of pregnant sows during gestation.

Although these subjects are most likely better reserved to non-constitutional state lawmaking, it is beyond cavil today that education is not such a subject. As Chief Justice Warren famously wrote, “Today, education is perhaps the most important function of state and local governments.”

Every state constitution contains an education provision, and most of the national constitutions enacted or revised after World War II do, as well. However, within their covered legislative subjects, state constitutions also contain significant textual specification, both as to the lawmaking function in general, and as to the accomplishment of enumerated policy ends. This sort of “statutory detail” has also subjected state constitutions to criticism and commentary. I refer to this detail-oriented strategy here as specification.

Outside of education provisions, specification as to the legislative function in general tends to involve process-based limitations. Examples of provisions aimed at placing specific limitations on the legislative process include the bicameralism and presentment requirements familiar to federal constitutional law. But there are also numerous such limita-

23. See LA. CONST. Part IV.
24. See FLA. CONST. art. X, § 21. Referring to a similar provision (this one protecting chickens) inserted into the California Constitution by public referendum, the Honorable Ronald M. George of the California Supreme Court quipped, “Chickens gained valuable rights in California on the same day that gay men and lesbians lost them.” Hon. Ronald M. George, Keynote Address: Symposium on State Constitutions, 62 STAN. L. REV. 1515, 1517 (2010).
28. See WILLIAMS, supra note 18, at 28 (introducing the idea of specificity in both procedure and policy requirements).
30. Every state except Nebraska specifies that a bill must be approved by both legislative houses and presented to the governor for signature in order to become a law. Michael E. Libonati,
tions that can only be found in state constitutions. Among these are balanced budget requirements;\textsuperscript{31} supermajority requirements, especially to pass revenue-raising measures\textsuperscript{32} or measures imposing debt on the state;\textsuperscript{33} prohibitions against “local” or “special” legislation;\textsuperscript{34} single-subject rules for legislation;\textsuperscript{35} and rules against altering a bill’s purposes during the legislative process.\textsuperscript{36}

Such provisions would seem to present no problems of judicial enforcement—a judge can easily determine whether a piece of legislation has a single subject or whether it was enacted by a supermajority. But interestingly, states show different levels of willingness to enforce specific, process-based limitations.\textsuperscript{37} Often, these differences come down to whether a particular state’s courts follow the “enrolled bill rule,” which holds that the text of the enrolled bill, as passed and signed into law, is the only evidence that a court will consider of the legislature’s compliance with procedural restrictions in the state constitution.\textsuperscript{38} It appears that some state courts, by utilizing the enrolled bill rule, render some process-oriented specifications in state constitutions effectively non-justiciable.\textsuperscript{39}


32. See Williams, supra note 18, at 279 (discussing supermajority requirements in general); Briffault, supra note 31, at 931-32 (discussing supermajority requirements to pass certain revenue measures).

33. See Briffault, supra note 31, at 916-17 (discussing supermajority requirements as a means of limiting debt).

34. See Williams, supra note 18, at 277-79 (discussing provisions limiting local or special legislation); Libonati, supra note 30, at 57-59 (same).

35. See Williams, supra note 18, at 261-63 (discussing single-subject rules).

36. See id. at 263-67 (discussing alteration rules).

37. See Williams, supra note 18, at 267-77 (discussing enforcement).

38. See Robert F. Williams, \textit{State Constitutional Law Processes}, 24 WM. & MARY L. REV. 169 (1983) (reviewing the disparate approaches to the enrolled bill rule and its alternatives among the states). I discuss one of these alternatives, the “journal entry rule,” which limits judicial review to the text of the bill itself and the entries in the legislative journal indicating that procedural restrictions have been followed, in the penultimate Part of this Article. See infra Part IV.B.2.

39. Id. at 204. As Professor Williams points out, restrictions on how many subjects a bill can address, the inclusion of a title, and other restrictions apparent in the text of the bill may be enforced, but restrictions on processes, such as prohibitions against changing the purpose of the bill during the legislative process, are outside the reach of courts following the strict enrolled bill rule. Id.
Specification may also be more substance-based, requiring or forbidding the pursuit or accomplishment of particular public policy goals. Prominent examples of such substance-based specifications are the growing number of state constitutional provisions defining marriage as a union of one man and one woman,\footnote{\textit{E.g.}, \textsc{Ohio Const.} art. XV, § 11 ("Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions"). More than half of state constitutions have such provisions, and each election cycle, more are added to the total. \textit{See}, \textit{e.g.}, Human Rights Campaign, "Statewide Marriage Prohibitions" http://www.hrc.org/documents/marriage_prohibitions_2009.pdf (last visited Oct. 20, 2010).} or the even more common provisions prohibiting direct or indirect public subsidies to religious educational institutions.\footnote{\textit{E.g.}, \textsc{Ky. Const.} § 189 ("No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school."). More than three-fourths of state constitutions have such provisions.} These provisions do not require anything of the legislature. Rather, they preempt substantive legislation favoring homosexual rights in the former case, and entangling religion with the state in the latter case, by enshrining an otherwise permissible (but certainly not required) policy choice in the state’s foundational law. State constitutions contain many such provisions, some covering important and appropriate subjects such as the extent to which state sovereign immunity is waived\footnote{\textsc{Ga. Const.} art. I, § 2, ¶ 9.} and others covering the irretrievably prosaic, such as the kinds of nets that one may use to catch fish in state waters.\footnote{\textsc{Fla. Const.} art. X, § 16.}

Another form of substance-based specification exists in state constitutions, however, one which attempts to allow for legislative discretion in determining the content of public policy, but which also attempts to cabin that discretion through the imposition of qualitative standards. Overwhelmingly, these substance-based specifications appear in the affirmatively stated social welfare provisions found uniquely among state constitutions, including state education articles.\footnote{For a thoughtful analysis of non-education-related welfare provisions, see Burt Neuborne, \textit{State Constitutions and the Evolution of Positive Rights}, 20 \textsc{Rutgers L.J.} 881, 893-95 (1989).}

B. State Education Provisions

The most common locus of substance-based specifications of qualitative standards is a state constitution’s education article. Each of the fifty United States has a provision in its constitution mandating, encouraging,
or at least authorizing, the establishment and funding of a system of public schools.\textsuperscript{45} Some of these education provisions are directive and vague.\textsuperscript{46} Others are hortatory and vague.\textsuperscript{47} Still others are permissive and vague.\textsuperscript{48} A few, mostly in states that have experienced school finance litigation, are both directive and highly specific.\textsuperscript{49} I briefly outline the provisions in the sections that follow.\textsuperscript{50}


The overwhelming majority of state constitutions provide explicitly for a legislative duty to establish and maintain an educational system. For example, the Minnesota Constitution provides:

The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.\textsuperscript{51}

\textsuperscript{45} See R. Craig Wood, Educational Finance Law: Constitutional Challenges to State Aid Plans—An Analysis of Strategies 103-08 (3d ed. 2007) (listing the fifty state provisions). In this Article, I refer to each state’s general mandate or grant of power to develop an education system as its “education clause.” Where I mean to refer to an article of the state constitution that contains many clauses relating to education, I use the term, “education article.” For example, the Louisiana Constitution’s education clause can be found in article VIII, section 1. The Louisiana Constitution’s education article is Article VIII.

\textsuperscript{46} See, e.g., Tex. Const. art. VII, § 1 (“A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”).

\textsuperscript{47} See, e.g., Vt. Const. ch. II, § 68 (“Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth.”).

\textsuperscript{48} See Ala. Const. art. XIV, § 256 (“The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such circumstances and upon such conditions as it shall prescribe.”).

\textsuperscript{49} See, e.g., Fla. Const. art. IX, § 1(a)(1)-(3), (b) (mandating detailed class size limitations in each grade, as well as a detailed scheme of providing free preschool education to all children in the state).

\textsuperscript{50} The material in this section is adapted from my prior work. See Scott R. Bauries, State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation, 18 Geo. Mason L. Rev. ___ (forthcoming 2011).

\textsuperscript{51} Minn. Const. art. XIII, § 1.
Most of the other state education provisions take similar forms, using directive and mandatory terms such as “shall” or “duty” to impose obligations and directing these terms toward the establishment and maintenance of a system of schools.52

In some states, in addition to placing an explicit duty on the state to provide for education, the constitutions specify detailed requirements for the substantive provision of specific educational services and programs. Florida’s provision—the most substantively detailed by far—provides for minimum class sizes and universal free preschool.53 North Dakota’s directs the inclusion of specific curricular content.54 Texas’s provision mandates sufficient money to ensure free text books for the school children of the state,55 as does Louisiana’s.56 Virginia’s also provides for free textbooks, but only for children who have no ability to pay for them.57 Oregon’s requires that the legislature fund the education system sufficiently to allow for the universal achievement of the content standards adopted for each grade.58 California’s sets a floor under which school expenditures may not be allowed to fall,59 as does Missouri’s.60

Nevertheless, the vast majority of state constitutional education provisions share the common qualities of vagueness and indeterminacy. They use words such as “thorough,” “adequate” and “suitable” to define the duties imposed, and they contain no definitions of such indetermin-

52. ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 6; ARK. CONST. art. XIV, § 1; Colo. CONST. art. IX, § 2; Conn. CONST. art. VIII, § 1; Del. CONST. art. X, § 1; Fla. CONST. art. IX, § 1(a); Ga. CONST. art. VIII, § 1; Haw. CONST. art. X, § 1; Idaho CONST. art. IX, § 1; Ill. CONST. art. X, § 1; Ind. CONST. art. IX, § 1; Ky. CONST. § 183; La. CONST. art. VIII, § 1; Me. CONST. art. VIII, Pt. 1st, § 1; Md. CONST. art. VIII, § 1; Mass. CONST. ch. V, § 2; Mich. CONST. art. VIII, §§ 1, 2; Miss. CONST. art. VIII, § 201; Mo. CONST. art. IX, § 1(a); Mont. CONST. art. X, § 1; Neb. CONST. art. VII, § 1; Nev. CONST. art. XI, § 2; N.J. CONST. art. VIII, § 4(1); N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1, 2, 4; Ohio CONST. art. VI, § 2; Or. CONST. art. VIII, §§ 3, 8(1); Pa. CONST. art. III, § 14; R.I. CONST. art. VII, § 1; S.D. CONST. art. VIII, § 1; Tenn. CONST. art. XI, § 12; Tex. CONST. art. VII, § 1; Utah CONST. art. X, § 1; Va. CONST. art. VIII, § 1; Wash. CONST. art. IX, §§ 1, 2; W. Va. CONST. art. XII, §§ 1, 12; Wis. CONST. art. X, § 3. For the complete text of each state constitution’s main education clause, see Wood, supra note 45, at 103-08.

53. Fla. CONST. art. IX, § 1(a)(1)-(3), (b).

54. N.D. CONST. art. VIII, § 3 ("In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind.").

55. Tex. CONST. art. VII, § 3(b) (amended 1999).

56. La. CONST. art. VIII, § 13(A).

57. Va. CONST. art. VIII, § 3.

58. Or. CONST. art. VIII, § 8.


60. Mo. CONST. art. IX, § 5.
As discussed below, this indeterminacy has proven very important to school finance litigation.


Several state constitutions employ terms that appear directive on a first reading, as they use terms such as "shall," but they direct the force of such duties to hortatory purposes, such as to "encourage" education. For example, the California Constitution provides, "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."\(^6\) A few other state constitutions use similar combinations of mandatory and hortatory terms.\(^6\) In Vermont, the commitment to education is presented in purely hortatory terms.\(^6\)

Each of these hortatory provisions, like the more directive provisions outlined above, contains specifications of substantive standards to be pursued in the policy realm of education, but each couches its standards in the language of discretion. Interestingly, despite their textual deference to legislative prerogatives, these less directive provisions have been the subject of similar rates of school finance litigation, as compared with the more directive provisions discussed above.\(^6\)

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\(^{61}\) See infra notes 99-101, 186-188 and accompanying text.

\(^{62}\) CAL. CONST. art. IX, § 1. This is a quotation of California’s main education provision. However, that state’s constitution also contains significant amounts of directive content, such as a provision mandating the maintenance of a free school for at least six months of each year in each school district in the state. CAL. CONST. art. IX, § 5; see also infra Part II.D. (discussing several more directive provisions of California’s constitution adopted through the amendment process).

\(^{63}\) IOWA CONST. art. IX, § 3; NEV. CONST. art. XI, § 1 (amended 1956); N.H. CONST. art. 83 (amended 1903); N.C. CONST. art. IX, § 1; WYO. CONST. art. 1, § 23 (amended 1988).

\(^{64}\) V.S.A. CONST. § 68 (2010) ("Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth.").

\(^{65}\) For example, of the five states listed in note 63, the highest courts in all but Nevada have addressed and ruled on traditional school finance suits. Nat’l Access Network, State By State, available at: http://www.schoolfunding.info/states/state_by_state.php3 (last visited Nov. 3, 2010). And Nevada’s highest court has adjudicated a non-traditional case brought by the Governor to challenge a legislative impasse that prevented school funding legislation from being passed. See Guinn v. Legislature of Nev., 71 P.3d 1269, 1272 (Nev. 2003), overruled in part by Nevadans for Nev. v. Beers, 142 P.3d 339 (Nev. 2006).
C. School Finance Litigation

Beginning with *Brown v. Board of Education* and its progenitors, the courts have taken a role in ensuring that political processes do not operate to deprive politically powerless groups of children of the educational services to which they are entitled under state constitutions and state laws. The early cases, of course, involved racial segregation and discrimination, but litigation-based reformers eventually altered their approaches by seeking to attack education policies providing unequal services based on socioeconomic status. These latter claims fell short in federal courts, and as a result, reformers looked to state constitutions to ground their challenges.

Initially, state constitutional challenges largely mirrored those in federal courts, as reformers challenged denials of "equal protection," based on state constitutional equal protection clauses, or similarly worded and intended "uniformity" clauses, often contained within state education articles. These early challenges did little to illustrate the uniqueness of state constitutional design, other than to illustrate that, though the claims were similar to those in federal court, it was possible from time to time to achieve different results under state constitutions. For example, a school finance plaintiff might prevail in state court because a state might recognize education as a fundamental constitutional right, where the federal courts never have.

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68. For a complete overview of the types of challenges brought against state school funding plans, see generally WOOD, supra note 45, at 53-87.
70. See, e.g., William E. Thro, Judicial Analysis During the Third Wave: The Massachusetts Decision as a Model, 35 B.C. L. Rev. 597, 601-03 (1994) (discussing the movement from federal to state courts).
71. Id. at 602.
72. Bauries, supra note 50, manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1598523 (surveying the early cases and finding that, although the doctrinal approaches to the cases were generally similar to the federal "scrutiny" approach under the Fourteenth Amendment, reformers were sometimes able to achieve better results in state courts).
73. See Kadrmas v. Dickinson Publ. Sch., 487 U.S. 450, 458 (1988) (declining to recognize a "fundamental right" to education under the U.S. Constitution). This case had the effect of reaffirming Rodriguez, 411 U.S. 1 (1973), which had arguably been called into question by subsequent Supreme Court case law relating to education. See Papasan v. Allain, 478 U.S. 265, 285-86 (1986) (declining to decide whether education is a federal fundamental right); Plyler v. Doe, 457 U.S. 202, 227-30 (1982) (applying a form of heightened scrutiny to invalidate a Texas law denying public educational services to undocumented immigrant children). As other scholars have pointed out,
Ultimately, though, the similarity in interpretation of equality provisions between state and federal courts—what state constitutional law scholars sometimes term “lockstepping”74—made these sorts of challenges less efficacious than reformers would have liked.75 Equality-based challenges were also plagued by remedial concerns.76 As a result, the litigation-based reform of education shifted to focus almost exclusively on the substantive terms of state constitutional education provisions, which are unique to state constitutions in our federal system.77 Reformers used these provisions to seek “adequacy” of spending, rather than, or in addition to, equality.78 At this point, the divergences between state and federal constitutional design should have begun to become apparent and influential, but litigation-based reformers generally focused only on the main difference—that state constitutions have education articles, while the federal Constitution does not mention education.79


75. See Bauries, supra note 50 (discussing numerous equality-based cases in which state defendants achieved victories, despite the cases being brought under state constitutions specifying the importance of education).

76. See, e.g., Scott R. Bauries, Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions, 61 ALA. L. REV. 701 (2010) (summarizing the findings of previous scholars that equity-based remedies gave rise to certain problems, among them backlashes against the overriding of local taxing judgments in politically powerful, wealthier school districts, the perceived political infeasibility of recapture of funds from wealthy districts to supplement funding in less wealthy districts, and a practical failure to achieve increased expenditures for higher-spending, but especially needy, urban districts).

77. Id. at 704.

78. Id. at 705. But see, e.g., William S. Koski, Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation, 43 SANTA CLARA L. REV. 1185, 1283-96 (2003) (explaining that no clear line divides equality theories from adequacy theories, and that in fact, both theories are present in most education finance cases).

79. See, e.g., Serrano v. Priest, 557 P.2d 929, 950-51 (Cal 1976) (agreeing with the plaintiffs that the state constitution’s version of an equal protection provision is to be interpreted independently of federal equal protection doctrine, and that California’s provision, due to the explicit importance of education in the text of the state constitution, views education as a “fundamental interest” for the purposes of equal protection analysis). Serrano II, as this decision is commonly called, ushered in the “equality” wave of school finance litigation, which was based on the same sorts of arguments presented in that case. See, e.g., Thro, supra note 70, at 601 (describing the equality wave, which Thro terms the “second wave”).
As a result of this obvious difference, reformers have had some measure of success in state courts, while the federal courts have been closed to claims not directly attempting to enforce the principles of *Brown*. However, neither the successes nor the failures of school finance litigation have escaped the attention of reformers. In some cases, these successes and failures have even led directly to changes in state constitutional text. I discuss these changes next.

D. Constitutional Change in Response to School Finance Litigation

State constitutions are far more easily, and thus far more frequently, amended than the federal document. As to education provisions, the amendment process has rarely been used. When it has been used, it has most often been used to alter bureaucratic arrangements, changes outside the scope of this Article. However, some notable amendments to the central legislative duty-based educational provisions in state constitutions have also been adopted. Such amendments most often are responses to school finance litigation and school finance decisions.

For example, responding to *Brown v. Board of Education*, arguably the most important of all school finance decisions, segregationists in Mississippi accomplished an amendment to the state constitution altering the language of the state’s education clause from mandatory to discretionary in character. The proponents of the amendment were obviously taking note of the language in *Brown* proclaiming that “[Education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” Apparently, the

81. *E.g.*, Tarr, *supra* note 9, at 3; Williams, *supra* note 18, at 28.
82. Where changes have been made to education provisions, they have mostly resulted from constitutional revision, as opposed to constitutional amendment. *See generally* Richard E. Berg-Andersson, *The Green Papers: State and Local Government* (2010), http://www.thegreenpapers.com (last visited July 5, 2010) (outlining the many constitutional revisions that have occurred among the American states, and linking to state constitutions).
proponents of the 1960 amendment concluded that the way to evade *Brown* was to remove the requirement that the state “undertake[] to pro-
vide [education].” However, years passed, and ultimately, this language could not withstand the test of historical progress.

The Mississippi state constitution was amended to correct this historical embarrassment in 1987, restoring the original mandatory “shall,” and arguably strengthening the original mandate from one requiring the legislature to “encourage” education to one requiring the legislature to “provide for” education. The cycle of change in Mississippi, then, has been decidedly substance-based, with the general intent of each cycle of amendment in response to *Brown* being either to eliminate or to restore the basic legislative duty to provide for education. Interestingly, despite the clear and recently expressed intent of the Mississippi public to impose a directive obligation on the state legislature, Mississippi is one of only four states never to have experienced a school finance-based state constitutional suit.

As with most other state constitutional topics, Florida and California—which have the most easily amendable constitutions among the fifty states—have experienced extensive amendment efforts directed at their education articles. In Florida, the amendment process has been used to alter the substantive terms of the education article three times, the first of which was in direct response to an unsuccessful school finance suit. In *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, the Florida Supreme Court held the meaning of the terms of the educa-

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87. Id. Interestingly (and thankfully) the amended provision was ignored judicially by the Mississippi Supreme Court in the one case in which it should have been implicated. See Mills & Quin, supra note 85, at 1526-27 (reviewing the court’s decision in *Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So. 2d 237 (Miss. 1985)). In *Byrd*, the court read the statutes of Mississippi to create a limited fundamental right to a “minimally adequate” education, ignoring the amended constitutional text’s discretionary legislative language. *Id.*

88. Compare Miss. CONST. art. VIII, § 201 (1890) with Miss. CONST. art. VIII, § 201 (1987); see Mills & Quin, supra note 85, at 1527 (describing the 1987 amendment).

89. Bauries, supra note 50 at n.19. The others are Delaware, Hawaii, and Utah. *Id.*

90. See generally Cal. CONST. art. VIII (providing for several mechanisms of amendment and revision, including the popularly proposed initiative petition); Fla. CONST. art. XI (same, but also mandating periodic constitutional revision by a specially appointed Constitutional Revision Commission).

91. See, e.g., Jon Mills & Timothy McClendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make “Adequate Provision” for Florida Schools*, 52 FLA. L. REV. 329 (2000) (describing the process of adoption of the first amendment, and indicating that it was adopted in response to the Florida Supreme Court’s decision in favor of the state in *Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400 (1996)).
tition article to present a non-justiciable political question, as these terms were devoid of judicially discoverable and manageable standards. Following that decision, the Florida Constitutional Revision Commission held its constitutionally mandated periodic convention, and one of the proposals that it considered and adopted was titled "Revision 6."

Revision 6 altered the text of Article IX, Section 1 of the Florida Constitution to read as follows:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

This text was viewed by its framers as more demanding than the prior text, which merely mandated, "Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require."

As Dean Jon Mills, a member of the Revision Commission, pointed out after its passage, the amendment was intended both to increase the legislative funding duty and to make that duty judicially enforceable.

No challenge to the adequacy-based terms of the amended provision has reached the Florida Supreme Court to date, but currently, such a

92. Chiles, 680 So.2d at 408. See also Fla. Const. art. IX, § 1 (1968) ("Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require.").
93. Mills & McClendon, supra note 91, at 331. This procedure of periodic, scheduled constitutional revision is, as far as I can tell, unique among state constitutions. See Robert F. Williams, Foreword: Is Constitutional Revision Success Worth its Popular Sovereignty Price?, 52 Fla. L. Rev. 249, 252 (2000) (describing this procedure as “unique”).
94. Fla. Const. art. IX, § 1 (1998) (emphasized text was substantially added through the 1998 revision).
96. Mills & McClendon, supra note 91, at 331.
97. The Florida Supreme Court, in its landmark school voucher decision Bush v. Holmes, referred to the amendment and even discussed its importance, but the disposition of the case depended only on terms that have been in the education clause since 1968. For a brief analysis of
challenge is working its way through the Florida court system.\textsuperscript{98} However, as I have pointed out elsewhere, if the Florida Supreme Court remains concerned about the nebulosity of the terms in the education clause, and their indeterminacy or judicial unmanageability, then the amended text does little to assuage these concerns.\textsuperscript{99} Comparing the original 1968 text with the text as amended in 1998 reveals that the amendment merely added several indeterminate terms to the ones already present in the 1968 text. Now, instead of being required to make "adequate provision" for a "uniform" system of "public" schools, the Legislature has "a paramount duty" to "make adequate provision" for a "uniform, efficient, safe, secure, and high quality" system of public schools.\textsuperscript{100} No argument can be made that the new terms do not give the text more rhetorical force, but if the court's main concern continues to be indeterminacy, then the 1998 amendment has not addressed this concern.\textsuperscript{101}

Two other amendments to the education article have been adopted in Florida since the 1998 effort, and these amendments deserve attention due to their uniqueness among state constitutional education provisions. The first, adopted by the voters in 2002, resulted from a popular initiative and referendum. The 2002 amendment was directed at imposing very specific limitations on the number of students that could be assigned to each classroom in the different levels of schooling used in Florida.\textsuperscript{102}

\begin{footnotesize}
\begin{enumerate}
\item The decision, see Scott R. Bauries, Florida's Past and Future Roles in Education Finance Reform Litigation, 32 J. EDUC. FIN. 89 (2006).
\item See Bauries, supra note 97 (making this argument).
\item Id.
\item Id.
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\item The 2002 amendment adds the following text to the previously amended text:
To assure that children attending public schools obtain a high quality education, the legislature shall make adequate provision to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms so that:
(1) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for prekindergarten through grade 3 does not exceed 18 students;
(2) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 4 through 8 does not exceed 22 students; and
(3) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 9 through 12 does not exceed 25 students.
The class size requirements of this subsection do not apply to extracurricular classes. Payment of the costs associated with reducing class size to meet these requirements is the responsibility of the state and not of local schools districts. Beginning with the 2003-2004 fiscal year, the legislature shall provide sufficient funds to reduce the average number of students in each classroom by at least two students per year until the maximum number of students per classroom does not exceed the requirements of this subsection. FLA. CONST. art. IX, § 1 (2002).
\end{enumerate}
\end{footnotesize}
amended text limits the enrollment in each classroom in the primary grades to no more than eighteen students, in the intermediate grades to no more than twenty-two students, and in the secondary grades to no more than twenty-five students. This provision would seem to suffer from none of the indeterminacy-based flaws of the original education clause, and indeed education clauses nationwide. It is therefore puzzling that no legal challenge has yet been successfully brought to enforce it.

The most plausible explanation for the lack of judicial activity is that, as a clear, statute-like provision, the amended text is largely being complied with. Based on recent media reports, this appears to be the case, but in the midst of a recession, such compliance has placed an onerous burden on school budgets. In fact, in the election cycle just completed, a proposed Florida constitutional amendment directed at modifying (some would say “undercutting”) the class size requirements narrowly fell short of passage. Thus, while it was a promising attempt to introduce determinacy into the legislative duty to fund and provide for education in the state, the 2002 amendment might ultimately stand as a lesson that statute-like substantive provisions are vulnerable to the winds of political change.

One further amendment to the Florida Legislature’s substantive duties bears mention here. In 2002, alongside the class size amendment, the voters of Florida adopted additional provisions intended to impose a legislative duty to provide free preschool education to students in the state. Like the class size amendment, this amendment sought to pre-

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103. Id.
105. See Revision of the Class Size Requirements for Public Schools, Florida Dept. of State, Division of Elections (2010 Initiative Page), available at http://election.dos.state.fl.us/initiatives/initdetail.asp?account=10&seqnum=75 (last visited July 27, 2010) (presenting the text of an amendment proposing to create certain exceptions to the requirement, and to modify it from being a classroom-based limitation to being a school average-based limitation); Florida Election Watch, Unofficial Election Results, Amend. No. 8 (Rejected by the voters Nov. 2, 2010), available at: http://enight.elections.myflorida.com/contestdetails.aspx?con=900800 (last visited Nov. 5, 2010). The vote was 54.49% for approval, and 49.51% for rejection, but the Florida Constitution requires a 60% majority for approval of an amendment. FLA. CONST. art. XI, § 5.
106. The second 2002 amendment added two new sections to Section 1, which provide as follows:

(b) Every four-year old child in Florida shall be provided by the State a high quality pre-kindergarten learning opportunity in the form of an early childhood development and education program which shall be voluntary, high quality, free, and delivered according to professionally accepted standards. An early childhood development and
emptively enshrine in the constitutional text one of the commonly sought, but infrequently awarded substantive remedial prescriptions for educational quality in school finance litigation.107 In this case, the effort appears to have worked. Evidenced by legislative enactments complying with the new constitutional command, the legislature has put the preschool requirement into operation, and no attempts are currently afoot to modify or repeal it.108

One reason for this apparent success could be the language of the amendment, which explicitly establishes an individual right to preschool education, and leaves the statutory material relating to establishing preschools themselves mostly to the legislative process.109 In contrast, the class size amendment, like the main education clause, omits any mention of individual entitlements and limits itself to setting forth legislative duties. Whatever the viability of political attacks against substantive provisions prescribing programmatic policies, it is very difficult to make such an attack against a specific right presently possessed by an individual.

However, both the class size provision and the preschool provision could lead to unintended consequences. As others have pointed out, once a substantive legislative policy choice is enshrined in the constitutional text, it can have the effect of hamstringing legislative efforts to respond to changing circumstances.110 Although it is difficult to imagine the elimination of an organized program designed to address and enhance each child’s ability to make age appropriate progress in an appropriate range of settings in the development of language and cognitive capabilities and emotional, social, regulatory and moral capacities through education in basic skills and such other skills as the Legislature may determine to be appropriate.

The early childhood education and development programs provided by reason of subparagraph (b) shall be implemented no later than the beginning of the 2005 school year through funds generated in addition to those used for existing education, health, and development programs. Existing education, health, and development programs are those funded by the State as of January 1, 2002 that provided for child or adult education, health care, or development.

FLA. CONST. art. IX, § 1 (2002).

107. See, e.g., James E. Ryan, A Constitutional Right to Preschool?, 94 CAL. L. REV. 49, 52 (2006) (reviewing school finance decisions in which preschool remedies were considered by the courts).


109. I have pointed out elsewhere that state supreme courts are loathe to discover and actually enforce individual rights to educational resources under state constitutions, but such rights are not often so specifically set forth as they are in the Florida 2002 preschool amendment. See Bauries, supra note 50.

110. E.g., Lousin, supra note 9, at 26.
ination of preschool, for example, as an appropriate response to changed circumstances, perhaps it would be advisable, given a serious situation, to scale the program down. For instance, the state may want to means test it, at least temporarily. Under the constitutional text as it currently reads, however, this action would be unconstitutional. Thus, though it would seem to make sense on its face, a substantive amendment such as the Florida preschool amendment could create fiscal problems given serious and unforeseen circumstances. The class size provision is subject to the same critique. Simply put, such provisions are ill-suited to political crises.

California offers a similar tale of constitutional change in response to school finance litigation, but one which has proceeded along different lines. The California Constitution’s basic education provision, adopted in 1879, simply provides:

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.¹¹¹

Along with this general duty provision, the 1879 Constitution initially contained two more specific duty provisions. The first (which remains in its initial form) provides:

The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.¹¹²

The second (which has since been altered substantially) originally provided:

The public school system shall include primary and grammar schools, and such high schools, evening schools, normal schools, and technical schools as may be established by the Legislature, or by municipal or district authority; but the entire revenue derived from the State School Fund, and the State school tax, shall be

¹¹¹. Cal. Const. art. IX, § 1 (1879). The text of this provision remains current.
¹¹². Cal. Const. art. IX, § 5 (1879). The text of this provision remains current, despite an unsuccessful attempt to repeal it entirely in 1968.
applied exclusively to the support of primary and grammar schools.\textsuperscript{113}

Each of these provisions has become relevant to school finance reform through both political action and litigation.

At various times, California has been the epicenter of school finance reform. During the nascent period of state school finance litigation, the California Supreme Court issued what was then a landmark decision, \textit{Serrano v. Priest}, holding that plaintiffs challenging the equality of the distribution of educational resources based on wealth disparities stated a valid claim for relief under the California Constitution.\textsuperscript{114} In deciding \textit{Serrano I}, the court first had to determine whether school finance inequality could be the basis of a state constitutional challenge at all. The court rejected the plaintiffs' proposed reading of Section 5 of the California education article as mandating strict equality in using the word "common" to describe the state's schools.\textsuperscript{115}

However, the court moved on to point out that the then-existing final paragraph of Section 6 (which had by then grown through serial amendments to six very statute-like paragraphs) clearly imposed on the legislature the duty to set local property tax limitations. The provision in question provided:

\begin{quote}
The Legislature shall provide for the levying annually by the governing body of each county, and city and county, of such school district taxes, at rates not in excess of the maximum rates of school district tax fixed or authorized by the Legislature, as will produce in each fiscal year such revenue for each school district as the governing board thereof shall determine is required in such fiscal year for the support of all schools and functions of said district authorized or required by law.\textsuperscript{116}
\end{quote}

\begin{footnotes}
\item \textsuperscript{113} \textit{CAL. CONST.} art. IX, § 6 (1879). This provision has been amended seven times since its adoption, most recently in 1974, which removed some language in response to the landmark \textit{Serrano v. Priest} decision. See infra notes 115-154 and accompanying text (discussing \textit{Serrano I} and the constitutional response).
\item \textsuperscript{114} \textit{Serrano v. Priest}, 487 P.2d 1241 (Cal. 1971) ("\textit{Serrano I}").
\item \textsuperscript{115} Id. at 1249.
\item \textsuperscript{116} \textit{CAL. CONST.} art. IX, § 6 (1952). Actually, Section 6 at one time was as long as seven paragraphs, but a 1962 amendment repealed then-Paragraph 7, reducing it to six at the time \textit{Serrano I} was decided.
\end{footnotes}
The court held that this provision "specifically authorizes the very element of the fiscal system of which plaintiffs complain," namely the legislature's enabling of wide disparities in local funding levels through wide disparities in local revenue-raising.\textsuperscript{117} The court continued to analyze the plaintiffs' equal protection claims with the state property taxation function outlined above in mind,\textsuperscript{118} ultimately holding (1) that the state system discriminated based on district wealth;\textsuperscript{119} and (2) that education was a "fundamental interest"\textsuperscript{120} in California, thus requiring the application of strict judicial scrutiny to this discrimination.\textsuperscript{121} Based on these decisions, the court remanded the case to the trial court.\textsuperscript{122}

Very shortly after \textit{Serrano I} was decided, the California Constitution was subjected to the first of several amendments made arguably in response to school finance litigation. In 1974, the voters adopted an amendment to the final paragraph of Section 6—the very paragraph that the \textit{Serrano I} court had recently used as its hook to evaluate the legislature's actions in financing the state system largely through property taxation.\textsuperscript{123} But this paragraph was not eliminated from the state constitution. Rather, the amendment bifurcated the paragraph, changed the wording slightly, and renumbered it as Sections 20 and 21 of Article XIII, the taxation article.\textsuperscript{124} In doing so, the amendment removed from the state constitution the legislature's explicit duty to set statewide limitations on local property tax rates relating to schools, but preserved substantial legislative control over the local property taxation process.\textsuperscript{125} Now, the power to limit local school taxation became the power to limit all local property taxation, but any school taxes mandated by the legislature would have to be subject to such limits.\textsuperscript{126} Soon thereafter, the court was faced with the \textit{Serrano} case again.\textsuperscript{127}

\textsuperscript{117} \textit{Serrano I}, 487 P.2d at 1249.
\textsuperscript{118} \textit{Id.} at 1249 n.12 (relying on Section 6 to construe local funding as part of the total state educational funding package).
\textsuperscript{119} \textit{Id.} at 1252.
\textsuperscript{120} The court used this term congruently with the use of the term "fundamental right" in federal court jurisprudence, though it more expansively interpreted the categories that properly fit the description of "fundamental interest" than the federal courts would have. \textit{Id.} at 1258.
\textsuperscript{121} \textit{Id.} at 1249-50.
\textsuperscript{122} \textit{Id.} at 1266.
\textsuperscript{123} \textit{Compare} CAL. CONST. art. IX, § 6 (1962) \textit{with} CAL. CONST. art. IX, § 6 (1974).
\textsuperscript{124} \textit{See} CAL. CONST. art. XIII, §§ 20, 21.
\textsuperscript{125} \textit{See} CAL. CONST. art. XIII, § 20 ("The Legislature may provide maximum property tax rates and bonding limits for local governments.").
\textsuperscript{126} CAL. CONST. art. XIII, § 21.
\textsuperscript{127} \textit{Serrano v. Priest}, 557 P.2d 929 (Cal. 1976) ("Serrano II").
In *Serrano II*, the amended taxation duties now reflected in Section 21 of Article XIII became important. The court was forced to determine whether the school finance system preserving the disparities then existing among property-rich and property-poor districts was actually *mandated* by the text of Section 21,\(^{128}\) which now provides:

Within such limits as may be provided under Section 20 of this Article, the Legislature shall provide for an annual levy by county governing bodies of school district taxes sufficient to produce annual revenues for each district that the district's board determines are required for its schools and district functions.\(^{129}\)

The state contended in *Serrano II* that this section required the legislature to preserve local differences in property tax revenues due to property wealth. Rejecting this contention, the court explained that the only mandate of Section 21 was that of legislative provision for an annual levy, and that this mandate could not be read to extend to—or even to authorize—the drawing of district lines so as to preserve wealth disparities.\(^{130}\) The court relied on another provision in the education article, Section 14, to show that the legislature bore the sole responsibility for drawing district lines, and that it was the drawing of these lines by statute that either created or preserved wealth disparities, not the more general mandates of Article XIII, Sections 20 and 21 to establish annual property tax levies and millage limits.\(^{131}\)

After applying its own state equal protection jurisprudence—and the prior holdings of *Serrano I*—to this system, the court held the current system unconstitutional.\(^{132}\) As a mandate, the court stated that the legislature would be responsible for reconstructing the system in accordance with the principles stated both in the court's opinions in *Serrano I* and *II* and with the trial court's order.\(^{133}\) However, the court did not order any specific legislative action.\(^{134}\)

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\(^{128}\) *Id.* at 955.

\(^{129}\) CAL. CONST. art. XIII, § 21.

\(^{130}\) *Serrano II*, 557 P.2d at 955.

\(^{131}\) *Id.* at 955-56.

\(^{132}\) *Id.* at 957-58.

\(^{133}\) *Id.* at 957, n.54.

\(^{134}\) This passive way of remedying constitutional violations is quite common in school finance litigation. Elsewhere, I have referred to the practice as "remedial abstention" because the court essentially steps away from the case at the remedial stage, just as a court fully abstaining...
Following the court's decision in 1976, the legislature went to work on its remedial legislation. The result was Appropriations Bill 65, a school finance statute that, while not perfect in eliminating all inequalities in the system, took a very large step in the direction of equality of educational resources.135 Had it become law, the bill would have established upper limits on property taxation, required local districts to tax themselves to a certain minimum millage rate, and "recaptured" some quantum of funds from wealthier districts to redistribute to less wealthy districts.136 The problem was that it never became the actual law of California. A.B. 65 was preemptively eviscerated by way of a popular initiative to amend the California Constitution, entitled "Proposition 13."137

Proposition 13 was placed on the ballot in late 1977 and passed by overwhelming majority vote in June of 1978.138 Proposition 13 amended the state constitution, limiting property taxation for all purposes to no more than one percent of a property's fair market value.139 The measure also rolled back assessed valuations to 1975-76 levels140 and placed a cap on future assessed valuation increases of two percent per year.141 Finally, Proposition 13 mandated that any state legislation enacted to raise revenue by altering existing taxation would have to pass by a two-thirds majority.142 The result was immediate. The measure had the effect of cutting existing property tax revenues statewide by 57% immediately.143 Because A.B. 65 relied on increased property tax revenues to succeed, it
essentially became a dead letter. Thus, from the date of its adoption, Proposition 13 impacted the legislative response to the *Serrano* opinions. It also affected education policy from that date forward.

The practical effect of Proposition 13’s substantive limits on local taxation has been to establish a uniform, statewide property tax rate of one percent of fair market value per year, initially keyed to 1975 values, and limited to growth of two percent per year. The measure also greatly reduced local revenues for other purposes, resulting in greater centralization of spending on many formerly local responsibilities through state-to-local assistance. As costs rose over the years, the state was certainly also greatly hampered in raising revenue to provide for equality in school resources due to Proposition 13’s two-thirds majority requirement for passing revenue-raising measures. One case study that suggests the truth of this conclusion finds that California’s education system has slipped from being one of the best in the nation in the early 1970s—both as to funding and as to outcomes—to being one of the worst in the nation today.

As education cuts became more common in response to Proposition 13’s restrictions during the 1980s, voters responded with a protective constitutional amendment in 1988, this one entitled Proposition 98.

144. *Id.*, at 537.

145. There has been an ongoing debate between academic economists over whether *Serrano* and its remedial legislation actually “caused” Proposition 13 to pass, especially considering that similar proposed amendments had failed to pass by popular vote several times in the recent past. See *Fischel*, *supra* note 136. Regardless of who is ultimately correct about the causal question, it is certain that one of the purposes of Proposition 13 was to limit legislative discretion over taxation, discretion that it would need in order to comply with *Serrano’s* general mandate. It is also inarguable that Proposition 13 severely limited the legislature’s ability to implement *Serrano*.

146. *Henke*, *supra* note 135, at 23.

147. *Id*.

148. *See* *Briffault*, *supra* note 31, at 927-39 (reviewing state taxation and expenditure limitations and concluding that they drive much of revenue raising toward fees, which inherently cannot be redistributive). In fact, the fees-as-replacement-for-taxes idea briefly found its way into California’s schools in the form of fees for participation in extracurricular activities, but the California Supreme Court held that this practice was a violation of Article VIII, Section 5’s requirement for “free” schools. *See* *Hartzell v. Connell*, 679 P.2d 35 (Cal. 1984).

149. *See*, e.g., Jennifer Sloan McCombs & Stephen J. Carroll, *Ultimate Test: Who Is Accountable for Education If Everybody Fails?*, RAND REV. (Spring 2005), available at http://www.rand.org/publications/randreview/issues/spring2005/ulttest.html (last visited July 28, 2010) ("Measured in year 2000 dollars, spending per pupil in California went from more than $600 above the national average in 1978 to more than $600 below the national average in 2000... The [NAEP] data, shown as units of standard deviation from the national average, place the test scores for California below those for every state except Louisiana and Mississippi.").

This measure placed a “hard floor” on educational expenditures, but under the provision as approved, this floor is indexed to a complicated set of demographic factors that make it very difficult to comprehend. A second amendment effort in 1990 added additional complexity. These spending floors must have seemed welcome when they were first enacted in the face of ever-declining school budgets, but the cuts have continued, and based on the allegations in the current adequacy litigation making its way through the California courts, it seems that as a result, the spending “floor” has functionally become a “ceiling.” Further evidence of the relative ineffectiveness of the Proposition 98 spending floors has been the filing of three adequacy-based lawsuits since its passage, two of which resulted in some relief to the plaintiffs.

The first of these, Butt v. California, was brought by a group of parents challenging their children’s school district’s announced intentions to close school six weeks early that year due to lack of funds. The plaintiffs ultimately prevailed due to the “unprecedented disparity” that six fewer weeks of school would create between the plaintiffs’ district and other districts in the state. The second was Williams v. California, which challenged the entire state system of schools, as had been done in the Serrano cases. However, Williams based this challenge not only on the equality-based grounds present in Serrano, but also on the alleged inadequacy of spending and state management of local schools. Also,
in contrast with Butt, Williams involved parties from across the state, seeking to proceed as a class defined as students "who attend or will attend elementary, middle, or secondary schools in California and are deprived of one or more basic educational necessities."159

Interestingly, the adequacy-based claims in Williams were ultimately dismissed by the trial court. Examining Sections 1 and 5 of the California education article (the only two sections discussed here that remain in their original 1879 form), the court held that these provisions stated mere "principles," and that no judicial order could be constructed to enforce them.160 The equity-based claims remained, and the parties ultimately reached a settlement four years into the litigation.161 Under the terms of the settlement, more than one billion dollars in new funding was directed to under-resourced schools, and a complaint procedure geared toward school facilities was initiated.162 However, the general condition of the California school system remains weak, so it is understandable that the state now faces a new school finance lawsuit—this one premised predominantly on adequacy.

The plaintiffs in Robles-Wong v. California163 claim that the state is in violation of its duties (1) to "first set apart" funding for education when determining the state budget;164 (2) to provide for equal access and educational opportunity;165 and (3) to adequately fund a system of common schools for the purpose of a "general diffusion of knowledge."166 It is interesting to note that, in California, in contrast to Florida, the provisions added to the state constitution in response to (or at least in the context of) school finance litigation—whether added by proponents of greater or lesser expenditures—are not the provisions relied on for relief.

In fact, the substantive amendments accomplished by Proposition 98 and 111 are in fact treated by the plaintiffs as a contributing cause of California's continuing educational funding deficiencies.167 Of course, this could not possibly have been the intent of the proponents of either

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159. Id. at 403.
160. Id. at 410.
161. Id. at 411.
162. Id. at 411-12.
163. See supra note 154.
164. See CAL. CONST. art. XVI, § 8(a) ("From all state revenues there shall first be set apart the moneys to be applied by the state for support of the public school system and public institutions of higher education.").
165. See CAL. CONST. art. 1, § 7; art. IV, § 16. Together these provisions are treated as California's version of an equal protection clause. See Serrano II.
166. See CAL. CONST. art. IX, §§ 1, 5, 6.
167. See supra note 154, at § 101.
Proposition 98 or 111. Thus, the allegations of the Robles-Wong case present a cautionary tale for those who would seek to establish a non-negotiable spending floor as a way of preemptively securing the benefits that successful lobbying or school finance litigation would otherwise provide. It is possible that such a floor can also become a ceiling, effectively freezing spending based on the needs of the system at one discrete point in history and preventing legislative actors from responding to changed circumstances.

Disappointing and unintended consequences are not necessarily limited to substance-based amendments sought by education activists. The earlier substantive amendments accomplished in California by anti-tax activists through Proposition 13 following Serrano II have also not fully secured the stability their proponents sought. To begin with, the Proposition 13 amendments were probably not directed at centralizing education spending, but they have had that effect. Mandating such a low property tax limit and such a small annual inflation rate has greatly reduced the ability of localities to influence their own schools’ funding. These changes also have driven some courts to greatly broaden their interpretations of what constitutes a permissible “fee,” or a “special tax,” to allow the exceptions to Proposition 13 to operate more freely—certainly not the intentions of the proponents of the measure.

As to the supermajority requirement for tax increases—the procedural portion of the Proposition 13 amendment—it has certainly made tax increases harder to enact. However, it has also made balancing the state budget and responding to unforeseen crises nearly impossible, as we are seeing now in the ongoing fiscal paralysis that grips California in 2010 and 2011. Of course, this commentary leaves aside the fact that the Proposition 13 changes have also starved schools of funds, a regrettable result, but one which may have been intended by its proponents. In the final analysis, then, it seems that Proposition 13’s lessons are that narrow substantive victories can be won through substance-based amend-

169. See Briffault, supra note 31, at 937. These definitional expansions gave rise to a follow-on amendment, entitled Proposition 218 in 1996 that swept these alternative revenue-raising devices within the limitations and supermajority requirements of Proposition 13. Id. Still, courts have found ways to define certain local fees as not qualifying for these limitations. Id.
ments, but these victories may be short-lived, considering the role of the courts in constitutional interpretation. As to process-based amendments, it seems that the lesson of Proposition 13 is that such amendments should be reasonable, above all, and that they should include safety valves to account for unforeseen crises.

Another more recent litigation-related amendment focused directly on the duty imposed on the state legislature occurred recently in Oregon, and this amendment provides lessons about both substance-based and process-based constitutional design. Prior to 2000, the education article of the Oregon Constitution contained one of the more basic statements of legislative duties relating to education found among the states. Section 3 of Article VIII simply stated, "The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools." The Oregon Supreme Court decided two equity-based cases under this provision, both in favor of the state. During the 1990s, in response to the combination of (1) a much greater share of education expenses being borne at the state level, due to a constitutional amendment limiting property taxation, similar to California's Proposition 13, and (2) the development in the early 1990s of very demanding educational content standards in Oregon, reformers brought two additional successive school finance suits, neither of which reached the Oregon Supreme Court.

In the first suit, the plaintiffs contended that the state system of education violated the plaintiffs' rights to equal protection under both the Oregon and United States Constitutions, as well as the Oregon education clause, due to inequalities in resources—specifically course offerings—available across districts. The Oregon Court of Appeals ruled in favor of the state, as the Oregon Supreme Court had ruled in both prior equity-based cases to come before it. The second suit was based on a chal-

171. OR. CONST. art. VIII, § 3.
173. See OR. CONST. art. XI, § 11(b) (Created through initiative petition filed May 8, 1990, and adopted by the people Nov. 6, 1990).
176. Withers I, 891 P.2d at 677-78.
177. Id. at 679 (holding that, because Withers I presented "precisely the same arguments that the court rejected in Olsen," the state was entitled to judgment).
lenge to the legislature’s progress in achieving equality of spending throughout the state, a goal that had predisposed the court to rule in favor of the state in the first suit. Like the first suit, though, the second resulted in a decision in favor of the state, with the court applying the very deferential “rational basis” test as it had in all prior cases. Thus, as of the late 1990s, it was clear that equity-based school finance cases would not be likely to succeed in the courts of Oregon.

However, at that time, the adequacy movement was burgeoning, with recent rulings in New York, Massachusetts, and other states illustrating that the courts might be willing to look carefully at whether funding in a particular state was sufficient to allow for students to achieve state-determined goals. Against this backdrop, reformers pursued through Oregon’s petition-based initiative process an amendment to the education article of the Oregon Constitution.

The amendment—the first of its kind among the states—sought to explicitly tie the legislative duty to fund education directly to the demanding content standards that had been developed in the state over the last decade of the Twentieth Century. Specifically, the amendment created Section 8(1) of the education article, which now provides:

The Legislative Assembly shall appropriate in each biennium a sum of money sufficient to ensure that the state’s system of public education meets quality goals established by law, and publish a report that either demonstrates the appropriation is sufficient, or identifies the reasons for the insufficiency, its extent, and its impact on the ability of the state’s system of public education to meet those goals.

178. See Withers II, 987 P.2d at 1248-50 (recounting the reasoning of the Withers I court).
179. Id. at 1253.
182. Professor Ryan has convincingly called into question whether any state’s highest court has made its decision based on the state content standards. James E. Ryan, Standards, Testing, and School Finance Litigation, 86 Tex. L. Rev. 1223 (2008). However, Professor Ryan also concedes that the received wisdom at the time he wrote his article was that state content standards matter to courts in school finance suits. Id. at 1224. Undoubtedly, this received wisdom provided a backdrop to the Oregon amendment.
183. OR. CONST. art. XVII, § 1.
184. OR. CONST. art. VIII, § 8(1) (Ballot Measure 1, Approved Nov. 7, 2000, Effective Jan. 1, 2001).
185. OR. CONST. art. VIII, § 8(1).
The amendment textually accomplished two objectives. First, it established that the legislature’s funding duty is in fact a duty to fund the system such that the legislatively established content standards can be achieved. Second, it called for legislative accountability to the public for fulfilling this duty, requiring either that the legislature (1) document publicly how the standards can be achieved under the current level of funding; or (2) explain why sufficient funding cannot be appropriated.

Undoubtedly one impetus for making this sort of change was the tendency of some state supreme courts, when faced with school finance adequacy challenges, to hold such claims to be non-justiciable. The most common reason for such non-justiciability determinations is the perceived lack of “judicially manageable standards” in state education articles. State education clauses have been described as “inherently nebulous,” due to their reliance on subjective adjectives, such as “thorough,” “efficient,” “general,” and “uniform.” One way of addressing the indeterminate nature of education article language is to add more determinative language to the constitutional text, and this appears to have been the intent of the Oregon amendment.

186. See, e.g., Coalition of Adequacy and Fairness, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996) (declining to construe the then-current text of the Florida Constitution’s education clause, which at that time called for “a uniform system of free public schools,” and holding that these terms do not establish “judicially manageable standards”); see also Fla. Const. art. IX, § 1 (1968). Non-justiciability describes a situation in which the reviewing court has jurisdiction over the claims and the parties, but due to prudential considerations relating to the role of the judiciary among the three branches, the court declines to reach the merits of the case. See, e.g., Baker v. Carr, 369 US 186, 217 (1962) (describing the main tenets of the political question doctrine, the main doctrine of prudential justiciability: “Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”) (emphasis added).

187. See Bauries, supra note 76, at 741 (reviewing dismissals of school finance litigation in state highest courts based on the lack of judicially manageable standards).

188. See Clayton Gillette, Reconstructing Local Control of School Finance: A Cautionary Note, 25 CAP. U. L. REV. 37, (1996) (quoting Md. Const. art. VIII, § 1; Pa. Const. art. III, § 14; Minn. Const. art. XIII, § 1; N.J. Const. art. VIII, § 4, para. 1; Ohio Const. art. VI, § 2; S.D. Const. art. VI, § 15; W. Va. Const. art. XI, § 1; Wyo. Const. art. VII, § 9; Ariz. Const. art. XI, § 1; Idaho Const. art. IX, § 1; Ind. Const. art. VIII, § 1, each of which contains one or more of these terms). Although these are certainly good examples of nebulous terms of constitutional duty, even better examples exist among the states. See Ga. Const. art. VIII, § 1 (“adequate”), Va. Const. art. VIII, § 1 (“high quality”), Wash. Const. art. IX, § 1 (“ample provision”); Fla. Const. art. IX, § 1 (“uniform, efficient, safe, secure, and high quality”).
Contemporaneous with the passage of the amendment, scholars of education finance were engaged in an ongoing debate over judicially manageable standards in school finance adequacy cases. One proposed solution to the problem of indeterminacy was for courts to use legislatively developed content learning standards as the baseline for determining what sort of an education qualifies as "adequate." The Oregon amendment went one step further and explicitly established this approach in the constitutional text. It appears that the hope of the reformers was that, in future litigation challenging the adequacy of education spending, the existence of a substantive definition of adequacy—sufficient funding to allow for the achievement of state-adopted content learning standards—would allow a suit to succeed where the previous suits based on equity had failed in the face of judicial deference to legislatively determined educational policy goals.

In addition to the substance-based alteration of the education article, however, the Oregon amendment added process-based requirements. Specifically, each year, the constitution now requires the Oregon Legislature to publicly certify that its appropriated amounts are sufficient to achieve the constitutionally mandated substantive requirements. This "proof of compliance" procedural requirement by itself simply adds some teeth to the more important substantive requirement to adequately fund the system. However, the measure does not exist in isolation. Rather, the Legislature is provided with an alternative procedure. If funding falls short of the substantive requirements in any given year, the Legislature must publicly explain why such underfunding is necessary that year, as well as what impacts such underfunding may have on Oregon's school system. This "shaming" accountability measure seems intended to incentivize compliance through the threat of public disapproval, but it also provides the Legislature with a constitutional escape hatch. The negative implication of the "shaming" requirement is

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189. This debate arguably began with an article by Professor McUsic, who was among the first to suggest using state content standards to determine the extent of each state funding duties. Molly McUsic, The Use of Education Clauses in School Finance Reform Litigation, 28 HARV. J. ON LEGIS. 307 (1991).


191. OR. CONST. art. VIII, § 8(1).

192. Id.
that the Legislature is not actually under any duty to adequately fund the system, as long as it publicly explains its failure to do so.

In fact, when the provision became the subject of a school finance adequacy lawsuit several years after its adoption, this "escape hatch" interpretation is exactly the interpretation that the Oregon Supreme Court gave to it.193 The plaintiffs in the case asked both for a declaration that the Legislature had failed to comply with Section 8(1)'s substantive funding requirements, and for an injunction requiring funding to be increased to a level that would allow for the achievement of the state content standards.194 The court had no problem determining that the funding levels provided fell short of the standard established in Section 8(1), and the declaration issued.195 But the court nevertheless declined to issue the requested injunction to increase funding, holding that the existence of the explanation requirement was a clear indication that underfunding in some years was specifically contemplated by the terms of Section 8(1), and thus was constitutionally permissible.196

Considering the Oregon amendment in light of the court’s interpretation, the proponents of the amendment succeeded in giving content to the nebulous terms of the more general education clause in Section 3 of the Oregon Constitution,197 but they also succeeded in rendering any funding duties established in the education article completely discretionary. Thus, a process-based accountability mechanism intended to incentivize the fulfillment of the substance-based funding requirement was ultimately read to undercut it. In at least one important way, then, this case illustrates the power of constitutionally mandated procedures in the minds of judges.

Reviewing the examples above from Florida, California, and Oregon reveals that all three states experienced amendment efforts focused mostly on ensuring substantive policy results that would ordinarily be the focus of legislative policy making, and ensuring these results as a matter of state constitutional law. In Florida, the proponents of three separate amendments sought to (1) increase the legislative duty to allocate state funds to education; (2) lower class sizes; and (3) expand the scope

194. Id. at 136-37.
195. Id. at 141.
196. Id. at 141-42.
197. OR. CONST. art. VIII, § 3 ("The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.").
of time during which the state is obligated to provide free schooling to those who choose it, all as a matter of constitutional law.

As I have pointed out, the first two of these do not portend much in the way of securing the benefits sought by their proponents. The Florida court has yet to repudiate its justiciability holding from Chiles, and the language added to the education article in 1998 is unlikely to change the character of the court’s objections. The class size measure has already been placed in danger of being partially repealed only one year after full implementation, only narrowly surviving this challenge. The preschool measure has been successfully implemented, but it still has removed from the legislative process the discretion that the legislature would otherwise have to offer more limited preschool programs to more needy students and families and to use any savings to prevent larger systemic negative impacts to the educational system that may result from unforeseen economic crises or natural disasters (a problem that the class size amendment presents, as well).

California’s voters sought at first to constitutionally limit local taxation to levels that they saw as more reasonable and to prevent state or local tax increases from being imposed absent overwhelming political support. A different set of reformers then sought to preserve current levels of school funding as a constitutional minimum. Each of these presents the same sort of substantive freezing of the policy making process that is evident in the two Florida amendments adopted in 2002. Moreover, Propositions 13 and 98 appear to work at cross-purposes with each other—one ensuring that spending does not increase over time, and the other ensuring that it does, at least if general state wealth increases—revealing that unrestricted or unthinking substance-based specification within a state constitution can become self-defeating over time.

Finally, the Oregon amendment illustrates the preference ingrained within the judiciary for the enforcement of procedural requirements that limit the impact of substance-based specification attempts. The voters in Oregon attempted to greatly reduce the substantive discretion of the legislature in educational policy making, and to incentivize compliance partially through shaming. But the Oregon Supreme Court read in that shaming provision an implied authorization to the legislature to decide

198. It may be that these objections no longer exist, since the entire membership of the court has changed since Chiles was issued, but that is, of course, mere speculation.
199. See supra note 105 and accompanying text.
on its own whether or not to comply with the substance-based requirement intended by the amendment.

A reasonable conclusion in the face of these examples is that substance-based specifications enacted in state constitutions to address narrow concerns related to the political exigencies of the day present a substantial risk of unintended negative consequences, and indeed may ultimately work against their intended purposes. A more reasoned approach in the face of perceived abuses of legislative discretion, I will argue, is to eschew attempts at predetermining the substantive policy conclusions of the legislative process, and to instead adopt as amendments (or even to design into newly adopted or revised state constitutions) provisions that provide for reasonable, process-based specifications directed at encouraging the thoughtful exercise of legislative discretion. The Louisiana Constitution was amended in 1987 to include such a provision within its education article, and I discuss this provision below.

III. THE LOUISIANA CONSTITUTION OF 1974

In 1973, after fifty-odd years under a state constitution that had become larded with hundreds of mostly trivial and partisan amendments, the Legislature of Louisiana called a constitutional convention. The resulting document had many of the same features identified above as common to state constitutions. The initial education article was no exception. It resembled the education articles of most other states, combining a vague, but purportedly directive legislative duty provision with several more bureaucratic provisions concerning the structure of the education apparatus of the executive branch. Certain features of this initial education article merit discussion.

A. The 1974 Education Article

The 1974 version of the Louisiana Constitution’s education article contained the type of basic, general mandate that one would expect to find at varying levels of intensity in every state constitution in the coun-

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200. See Carleton, supra note 5, at 563-66 (recounting the developments leading up to the constitutional convention of 1973).
201. See supra, Part II.A.
In addition to this general mandate, though, Section 13(B) of the education article explicitly required the legislature to provide a level of funding necessary to achieve a “minimum foundation program of education in all public elementary and secondary schools.” This mandate was augmented by statutory enactments requiring the state Board of Elementary and Secondary Education to develop a proposed school funding distribution formula each year based on its own cost studies and submit it to the legislature.

In many states, the legislature delegates to the state education board or some other designee the responsibility to operationalize the provisions of the state constitution by devising and promulgating through statute a state education funding distribution formula. Education finance distribution formulas contain a series of equations intended to reflect the varying cost functions associated with the financing of an education system. The goal is to allocate state funds proportionally to state needs. These formulas also have the function of determining the percentage of education funding that will be supplied directly from state revenues and those that must be raised locally, typically through property taxation. As one might surmise, through the balancing of local cost factors, student characteristics, and comparative property wealth, these formulas can quickly become very complex.

Once a formula is constructed, the next task is typically to determine the absolute amounts of funding that will be plugged into it each year. These absolute amounts are typically expressed as a default cost per pupil or per educational unit in the education system, to which the formula may apply certain “weights” to reflect the higher and lower costs of educating particular classifications of students. Each state has a dif-

202. See LA. CONST. art. VIII, § 1 ("The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system."); see also id., pmbl. ("The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential.").

203. See Louisiana Assoc. of Educ. v. Edwards, 521 So. 2d 390, 390 (1988) (quoting the pre-amendment text of Section 13(B) of Article VIII of the Louisiana Constitution).

204. Hereinafter, the “BESE,” the “board,” or the “state board.”


206. See WOOD, supra note 45, at 19 (introducing the idea of formula-based education finance distribution plans).

207. Id. at 19-39 (discussing the varieties of state finance distribution formulas).

208. Id. at 33-34. Most school finance formulas attempt to incorporate the competing conceptions of horizontal equity, the provision of equal funds per similarly situated pupil or unit, and
ferent approach to determining the absolute amount of per-pupil fund-
ing, but the determination in every state is primarily and ultimately a legislatively function.209

Some states conduct legislative hearings, others appoint task forces, still others conduct internal studies through the state board to arrive at a number. Sometimes, legislative bodies even consider independently contracted “cost studies” to determine what providing an adequate public education system costs and base their ultimate funding provisions on such studies.210 The most basic strategy, which has fallen out of favor of late, is to begin with what was appropriated the previous year—or to average the amounts appropriated statewide the previous year—and add some percentage to it.211 Importantly, regardless of the approach, in nearly every state the authorization for this formula development process is entirely statutory, and the state constitution merely imposes on the legislature the general duty to fund the system (based on whatever quality-based terms that this duty may encompass).212

Pursuant to such a statutory procedure, prior to the 1986-87 school year the Louisiana Board of Elementary and Secondary Education (the “BESE”) submitted its proposed formula and budget for the state school system, arriving at a total requested state funding level of $974.5 million.213 In the face of a financial crisis and the accompanying revenue declines, the state legislature balked at this number and instead appropriated $934.5 million.214 Governor Edwin Edwards also issued executive orders that would have further reduced funding by five percent, but these orders were never implemented.215 In response, the Louisiana Association of Educators filed suit seeking both a declaration that the legislature was possessed of a constitutional duty to fund the state’s school system at the level requested by the BESE, and an injunction

vertical equity, the provision of sufficient funds to equalize opportunity for students based on differing needs, such that differing levels of funding are provided for differently situated pupils or units. Id. at 18.

209. Id. at 12.


211. See WOOD, supra note 45, at 72-73 (discussing average expenditure methods for determining educational funding levels).

212. See supra, Part II.B. (discussing the differing state constitutional education provisions).

213. Edwards, 521 So.2d at 391.


ordering the legislature to fully fund the minimum foundation program formula the BESE proposed in 1986.216

B. The Edwards Case and the Response

The state defendants, which included not only Governor Edwards, but also John Alario, the Speaker of the Louisiana House, Sammy Nunez, the President of the Louisiana Senate, and state Attorney General William Guste, initially moved to dismiss the action on the grounds of failure to state a claim, lack of standing, and non-justiciability.217 The district trial court deferred these motions but ultimately heard them, along with arguments on the merits, on cross-motions for summary judgment, ruling for the plaintiffs.218 The court's order both granted the declaration sought by the plaintiffs and enjoined the legislature to increase educational funding by $42,439,270, to the level proposed in the BESE's formula.219

On appeal, the Louisiana Supreme Court held that the legislature, under the education article, was possessed of the "sole responsibility" both to determine the funds required to provide the constitutionally required MFP, and to provide those funds.220 The court explained that the function of the distribution formula was simply to distribute the legislatively appropriated funds equitably, and that the courts therefore lacked the power to require the legislature to meet the proposed funding levels of the distribution formula.221 The direction of this ruling conflicted with the direction taken in several opinions issued in other states in the late 1980s.222 The most notable of these was the Kentucky Supreme Court's

216. Edwards, 521 So.2d at 391; Ducote, supra note 214 at 132.
217. Edwards, 521 So.2d at 391.
218. Id.
219. Id.
220. Id. at 394.
221. Id.
222. See Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (1989) (holding that the entire state system of education in Kentucky violates the education article, due to system-wide inadequacies in spending); Helena Elementary School Dist. v. State, 769 P.2d 684, 690 (Mont. 1989) ("We conclude that as a result of the failure to adequately fund the Foundation Program, forcing an excessive reliance on permissive and voted levies, the State has failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed under Art. X, Sec. 1, Mont. Const. We specifically affirm that portion of the District Court's Conclusion of Law 17 which holds that the spending disparities among the State's school districts translate into a denial of equality of educational opportunity. We hold that the 1985-86 system of funding public elementary and secondary schools in Montana is in violation of Article X, Section 1 of the Montana Constitution."); Edgewood Ind. Sch. Dist. v. Kirby, 777 S.W.2d 391,
ruling in *Rose v. Council for Better Education, Inc.*, a decision that most observers credit with ushering in the "adequacy" wave of school finance litigation. In *Rose*, the court, faced with a case similar to *Edwards*, held the entire state school system unconstitutional, due to system-wide inadequacies and inequities in resources. In contrast, in *Edwards*, the court held that the issue could not be decided judicially, due to the "sole responsibility" for educational funding residing with the legislature.

Before it was even decided, the *Edwards* case catalyzed an effort among educator groups in Louisiana to lobby the legislature for a proposed constitutional amendment. This effort was successful, and in 1987, prior to the district court's initial decision in the case, the amendment was placed on the ballot for voter approval. The measure passed, and the constitutional provision that was the subject of the *Edwards* case was altered, arguably nullifying the Louisiana Supreme Court's interpretation of the state constitution before it was even handed down.

As a result of this successful amendment effort, unique among the states, Louisiana now makes a significant portion of its school finance formula development process a matter of explicit constitutional text. Under amended Section 13(B), the State Board of Elementary and

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397 (Tex. 1989) ("We hold that the state's school financing system is neither financially efficient nor efficient in the sense of providing for a "general diffusion of knowledge" statewide, and therefore that it violates article VII, section 1 of the Texas Constitution. Efficiency does not require a per capita distribution, but it also does not allow concentrations of resources in property-rich school districts that are taxing low when property-poor districts that are taxing high cannot generate sufficient revenues to meet even minimum standards.").


224. *Rose*, 790 S.W.2d 186.

225. The ruling, though, was not one of complete non-justiciability, as the plaintiffs in Edwards did not challenge whether the program ultimately funded by the legislature provided a "minimum foundation." The challenge was based on whether the legislature was required to fully fund the plan proposed by the BESE, an executive branch agency. Thus, the court's ruling was based on the separation of powers, but it resolved the issue in favor of the legislature in comparison with the executive branch, rather than with the courts, as would be the case if the issue were justiciability. Importantly, this arguably leaves the door open for a future adequacy-based challenge.


229. See *LA. CONST.* art. VIII, § 13(B) (providing for a specific allocation of powers in developing an absolute funding amount each year and setting the previous year's funding amount as the default in the case of impasse).
Secondary Education must conduct an internal study to determine the cost of providing a “minimum foundation program” of education, construct a formula for distributing the funds to school districts “equitably,” and arrive at a total level of proposed funding for the year. These BESE duties—now constitutionally mandated—are similar to those once imposed only by statute in Louisiana.

Once those tasks are completed, the board submits its formula, complete with spending levels plugged in, to the legislature for approval. The legislature has three choices at this point. It can (1) approve the formula as submitted and fund the system at the levels reflected in the formula; (2) send the formula back to the board for revision; or (3) send the formula back for revision, but include its own proposals for revisions (e.g., increases or decreases in certain or overall funding levels). The legislature may not simply overrule the BESE and decide unilaterally how and at what level to fund the state’s schools. The process continues until the board submits a proposed formula that the legislature approves, which it then has the absolute duty to fully fund. Importantly, if the board and the legislature reach an impasse, then the state constitution also mandates that the formula on which the board and the legislature most recently reached agreement, including the levels of funding used, becomes the default formula for the current year.

Unlike the amendments made in other states in response to school finance litigation, which largely have imposed substance-based funding, programmatic, and resource requirements, the amendment secured by Louisiana reformers has a decidedly process-based focus. Comparing the text of the initial 1974 provision and the current provision reveals that the two substantive legislative duties found in the initial provision—the duty to provide funds sufficient to ensure a “minimum foundation program” and the duty to provide for the “equitable distribution” of the funds—are preserved. Added to these substantive legislative duties,
however, are constitutionally mandated procedures for fulfilling such duties.

The amended provision mandates negotiation and collaboration between the BESE and the legislature, and it specifies the order in which such negotiation shall occur. In the form of the typical negotiation give-and-take, the BESE goes first by proposing a formula, including spending requirements. The legislature has several responsive options at its disposal, including acceptance, rejection, and counter-offer. The obvious goal is to allow the different governmental units to come to an agreement based on reasoned deliberation and the consideration of alternative viewpoints, but the text also reveals the assumption that this may not always be possible. Thus, the text adds a motivational element—a provision defaulting spending and distribution to the previous year's levels if the parties cannot agree, what can be referred to as a "soft floor," because the legislature and the BESE may at any time agree to set funding levels below it.238

237. Compare LA. CONST. art. VIII, § 13(B) (amended 1987) (1974) ("The legislature shall appropriate funds sufficient to insure [sic] a minimum foundation program of education in all public elementary and secondary schools. The funds appropriated shall be equitably allocated to parish and city school systems according to formulas adopted by the State Board of Elementary and Secondary Education and approved by the legislature prior to making the appropriation.") with LA. CONST. art. VIII, § 13(B) (1987) ("The State Board of Elementary and Secondary Education, or its successor, shall annually develop and adopt a formula which shall be used to determine the cost of a minimum foundation program of education in all public elementary and secondary schools as well as to equitably allocate the funds to parish and city school systems. Such formula shall provide for a contribution by every city and parish school system. Prior to approval of the formula by the legislature, the legislature may return the formula adopted by the board to the board and may recommend to the board an amended formula for consideration by the board and submission to the legislature for approval. The legislature shall annually appropriate funds sufficient to fully fund the current cost to the state of such a program as determined by applying the approved formula in order to insure a minimum foundation of education in all public elementary and secondary schools. Neither the governor nor the legislature may reduce such appropriation, except that the governor may reduce such appropriation using means provided in the act containing the appropriation provided that any such reduction is consented to in writing by two-thirds of the elected members of each house of the legislature. The funds appropriated shall be equitably allocated to parish and city school systems according to the formula as adopted by the State Board of Elementary and Secondary Education, or its successor, and approved by the legislature prior to making the appropriation. Whenever the legislature fails to approve the formula most recently adopted by the board, or its successor, the last formula adopted by the board, or its successor, and approved by the legislature shall be used for the determination of the cost of the minimum foundation program and for the allocation of funds appropriated.").

238. I refer to the default spending level as a "soft floor" because it does not place an absolute lower limit on expenditures. Compare MO. CONST. art. IX, § 2(b) ("[I]n no case shall there be set apart less than twenty-five percent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools."). See also supra, notes
Importantly, the roles of substance and process are switched in Louisiana in comparison with Oregon. As discussed, Oregon has a substantive funding requirement incentivized by a procedural shaming device. In contrast, Louisiana has a procedural policy development requirement incentivized by a substantive spending floor. It is clear that the Louisiana reformers knew, based on past experience, that the BESE would generally seek to increase expenditures, but that the legislature would sometimes seek to decrease expenditures, so the soft floor placed in the amended text signals to both parties that recalcitrance will not allow them to achieve their goals—thus motivating the parties to negotiate in good faith. However, unlike the reciprocal Oregon provision, the soft floor does not have the effect of absolving the entities of their responsibilities. On the contrary, it incentivizes their performance. As a bonus, the soft floor also seems intended to hold harmless the students and local educational agencies in the state in the event of true political impasse or apathy.

Such process specification has the virtue of being clear and easy to understand, and it may have merit on that basis alone. However, provisions mandating procedures that must be followed in fulfilling specific affirmative legislative obligations are unprecedented in state constitutionalism. Accordingly, the question becomes whether such process specification is likely to be more effective in promoting good social policy than the more substance-based specifications imposed in Florida, California, and Oregon. A related inquiry is whether such process specification yields a better prognosis for judicial review than its substance-based alternatives. Below, based on these inquiries, I present both a general and a situational defense of the types of requirements imposed through the Louisiana amendment.

150-154 and accompanying text (discussion of Proposition 98/111’s “hard floor” in California, which the legislature cannot set funding below). If the Louisiana legislature and the BESE were to agree to lower spending from one year to the next, the state constitution would not stand in the way, but in cases of true impasse, the default spending level operates as a floor.

239. As discussed above, state constitutions contain many procedural requirements for pursuing policy in general, see supra notes 30-36 and accompanying text, but none pegged to the fulfillment of specific affirmative obligations.

240. Recall that the process-based limitations imposed in the Oregon Constitution all operate after the substantive policy decision has been made. See supra notes 184-192 and accompanying text. In contrast, as explained in this Part, the process-based limitations in the Louisiana Constitution govern how the substantive policy decision is to be made.
IV. IN DEFENSE OF PROCESS SPECIFICATION

I present two cases for process-based specification here. The general case is based on the differences between state and federal constitutions in relation to judicial review and the separation of powers. I contend that process specification serves these interests at the state level in ways that substance specification would never be able to serve them.

The situational case is premised on the current situation in New Orleans, which makes it fortuitous that process specification is used in the Louisiana Constitution, both for reasons relating to predictability and for reasons relating to possible school finance litigation. Based on these justifications, I conclude that, if used properly, process specification has the potential both to protect each branch’s prerogatives and to allow for meaningful check on each branch’s exercises of power.

A. The General Case: Process Specification and Education Reform

One of the goals of constitution-making is the anticipation of political conflicts, and the protection of the people and the existing government should such conflicts (expected or unexpected) arise. The federal Constitution approaches this function by establishing checks and balances, but also by leaving the boundaries between the powers of each branch somewhat malleable and indeterminate—what most would refer to as a “functionalist” approach to the separation of powers.

In contrast, most state constitutions approach the inevitability of conflict between the branches by specifying a very strict approach to the separation of powers—what most would term a “formalist” approach. Drafters have often included in state constitutions very explicit prohibitions against the exercise of one branch’s powers by the members of the other branches. This approach attempts to forestall conflict by holding each branch’s sphere of responsibility inviolable by the other branch-

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241. See Sanford Levinson & Jack M. Balkin, Constitutional Crises, 157 U. PA. L. REV. 707, 714 (2009) (“Disagreement and conflict are natural features of politics. The goal of constitutions is to manage them within acceptable boundaries.”).


243. See Baunes, supra note 76 (distinguishing formalist from functionalist approaches to the separation of powers and explaining that, textually, most state constitutions appear to favor the formalist approach).

244. Id. (reviewing the formalist state constitutional provisions).
In particular, the fact that strict separation of the powers of the branches is textually mandated makes it difficult to argue that such separation was not intended. But this approach might have the unintended effect of exacerbating conflict. Assuming that the general spheres of responsibility for each branch are well-defined, the formalist approach provides an incentive for a recalcitrant branch to remain recalcitrant, knowing that neither of the other branches may force it to budge.

A better approach, however, would seem to be textually mandating some amount of power-sharing, thus combining the formalist tendencies of state constitutions with the functionalist realities of policy making. The Louisiana education article does this by imposing the negotiation process on the legislative branch and the executive branch together. True, the legislative branch has the ultimate power to accept or reject any idea offered by the BESE, but the default spending floor gives this power limits, and these limits actually incentivize good faith negotiation.

Along with the separation of powers, another important consideration is that state constitutions exist both to enable and to limit the making of public policy. These functions are best supported where the constitution preserves the discretion of the policy making branches as to which policies to adopt in pursuit of proper legislative objects. This flexibility in determining the substance of state policy, however, need not require complete flexibility in the process of lawmaking. Additionally, if a state constitution means to cabin legislative discretion with an eye toward forestalling the excesses of entrenched power, it need not predetermine specific policy outcomes to accomplish this goal. Rather, the constitution can serve these goals equally well by calling for thoughtful and good-faith legislative deliberation in the enactment of public policy without mandating particular policy outcomes. One useful way to do this would seem to be the adoption of a process similar to the one set forth in Section 13(B) of the Louisiana education article, which fosters deliberative policy making by forcing two branches into dialogue with one another.

245. E.g., Ala. Const. art. III, § 43 (“In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.”).

246. See Tarr, supra note 9, at 7-8 (describing the functions of state constitutional enumerations of power).
Finally, process specification also serves the related goal of supporting a states-specific approach to judicial review, particularly in school finance litigation. As discussed above, the biggest stumbling blocks for education finance litigation plaintiffs have been the lack of "judicially manageable standards," either in interpreting the "nebulous" terms of state constitutional education clauses, or in fashioning remedies for educational inadequacy. Because it takes the substantive policy question off the judicial table, process-based specification has the potential to provide such standards. In enforcing process-based provisions, courts have little nebulous content, if any, to construe, but they do have standards that can be enforced, thus preserving the judiciary’s role as a check on legislative inaction.

Moreover, at least some evidence exists that the public prefers the enforcement of process specifications to the enforcement of more nebulous substantive provisions. In Nevada, the constitution has both a general education clause setting forth a more nebulous duty to provide for education and two specific limitations on policy making in general—a supermajority requirement for legislative tax increase measures, and a balanced budget requirement. In 1996, the Nevada legislature passed a budget, which included provisions specifying educational funding levels, a measure which only required a simple majority, but which would have required tax increases if the budget were to be balanced that year. The legislature could not come to terms such that a supermajority would

247. See Bauries, supra note 76, at 746-47 (discussing the influence of separation of powers principles on judicial decision making in school finance litigation).

248. See Nev. Const. art. 11, § 1 ("The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements, and also provide for a superintendent of public instruction and by law prescribe the manner of appointment, term of office and the duties thereof."); Nev. Const. art. 11, § 2 ("The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year.").

249. Nev. Const. art. IV, § 18(2) ("Except as otherwise provided in subsection 3, an affirmative vote of not fewer than two-thirds of the members elected to each house is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.").

250. Nev. Const. art. IX, § 2 ("The legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year; and whenever the expenses of any year exceed the income, the legislature shall provide for levying a tax sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years.").

be willing to vote for the revenue measure, so the schools remained unfunded well past the normal deadline.\textsuperscript{252} As a result, Governor Guinn petitioned for a writ of mandamus against the state legislature to force it to fund the education expenditures that had already been passed into law as part of the state budget.\textsuperscript{253} Ultimately, in \textit{Guinn v. Legislature}, the Nevada Supreme Court held that, in cases of conflict between substantive and procedural provisions, substantive provisions are given favor. Based on this principle, the court held that the supermajority requirement for tax increases would have to yield to the substantive requirement to fund the schools.\textsuperscript{254} As a result, the court issued a writ of mandamus to the legislature to vote on the tax increases by simple majority, rather than by the constitutionally mandated supermajority.\textsuperscript{255}

However, only a few years later, an election resulted in an overwhelming popular vote to remove one of the justices in the \textit{Guinn} majority, an outcome which decisively changed the court's political leanings.\textsuperscript{256} Soon after, the \textit{Guinn} decision was explicitly overruled in \textit{Nevadans for Nevada v. Beers}.\textsuperscript{257} The takeaway from \textit{Beers} is that procedural protections cannot be lightly read out of a state constitution, and that state judges—particularly elected judges—may be on safer ground in enforcing procedurally specific provisions than they are in enforcing substantively specific provisions.\textsuperscript{258} All of this counsels in favor of the Louisiana approach, but is this approach likely to bear fruit in New Orleans?

\section*{B. The Situational Case: School Reform in New Orleans}

\textit{1. Katrina, Rita, The Great Recession, and the New Orleans Laboratory}

In August of 2005, Hurricane Katrina, one of the strongest hurricanes on record, tore through the Gulf of Mexico, weakened slightly to

\begin{itemize}
\item \textsuperscript{252} \textit{Guinn I}, 71 P.3d at 1273-74.
\item \textsuperscript{253} Id. at 1272.
\item \textsuperscript{254} Id. at 1275 ("When a procedural requirement that is general in nature prevents funding for a basic, substantive right, the procedure must yield.").
\item \textsuperscript{255} Id. at 1276.
\item \textsuperscript{256} See Bronson D. Bills, \textit{A Penny for the Court's Thoughts? The High Price of Judicial Elections}, 3 NW. U. J. L. SOC. POL'Y 29, 50-53 (2008) (outlining the effects of the \textit{Guinn} decision, one of which was the ousting of a concurring justice, who was replaced by a much less qualified opponent after a misleading campaign by special interest groups opposed to the \textit{Guinn} court's suspension of the supermajority requirement).
\item \textsuperscript{257} \textit{Nevadans for Nevada v. Beers}, 142 P.3d 339 (Nev. 2006).
\item \textsuperscript{258} See Bills, supra note 256, at 50-52. For a general critique of the \textit{Guinn} decision as wrongheaded, see generally Steve R, Johnson, \textit{Supermajority Provisions, Guinn v. Legislature and a Flawed Constitutional Structure}, 4 Nev. L.J. 491 (2004).
\end{itemize}
Category Four status, and slammed into the Mississippi shoreline.259 The western side of the storm sent high winds and storm surge up the Mississippi River into New Orleans, which was protected from flooding by an elaborate system of levies—until the levies broke. The resulting flood wiped whole neighborhoods from the city map and paralyzed public services for months. It also required the evacuation of nearly every non-rescue-oriented person in New Orleans and either destroyed or rendered unsafe for use most school buildings.260 As a result, the city’s school system ground to a halt, and the children who did not leave town were left with only spotty opportunities for public education until the city could assess and respond to the damage.261

A few weeks later, as the city was attempting to rebuild, Hurricane Rita administered another dose of wind and water-based natural fury, temporarily stopping—and permanently compounding—the Katrina-based rebuilding effort.262 Three years after that, the U.S. economy nearly collapsed, unemployment soared, and state tax revenues began to decline.263 Now, with the fifth anniversary of Katrina’s arrival in the recent past, Louisiana again must weather an environmental catastrophe—this one caused by human factors—and the effects of this latest harm have yet to be fully calculated.264 Each one of these successive harms has directly affected both the funding and the operations of the

259. See Kristi L. Bowman, Rebuilding Schools, Rebuilding Communities: The Civic Role of Mississippi’s Public Schools After Hurricane Katrina, 77 Miss. L.J. 711, 712 (2008) (correctly pointing out that the storm actually made landfall in Mississippi, not Louisiana, and that the damage in Mississippi was so extensive that, had New Orleans not flooded, the disaster story would have centered on Mississippi).


New Orleans public schools, and each has compounded the effects of the previous harms.

Following Katrina, and continuing to this day, the leaders of Orleans Parish, along with state political leaders, local activists, and interested parents, have reconstituted the school system in a way unprecedented among major American cities. The city schools have been reformulated into a system of districts and direct educational providers, each of which subsists on public funding, but each of which operates under differing rules and standards. The Orleans Parish School Board ("OPSB") continues to operate only four traditional public schools, along with several charter schools.

Almost half of the public schools formerly operated by the OPSB are now operated by what has been termed the Recovery School District. The Recovery School District was actually authorized by way of state constitutional amendment prior to Hurricane Katrina to enable state takeovers of schools that were deemed "academically in crisis." Hurricane Katrina allowed the Louisiana legislature to use the Recovery School District to accomplish an expanded mission—to recover not only the previous "crisis" schools placed under its jurisdiction, but also other schools affected by Hurricane Katrina and subsequent events. The Recovery School District, like the OPSB, contains both traditional public schools and charter schools.

The result of this reorganization has been that about half of the public schools in New Orleans are now charter schools. This proportion far surpasses the proportion in the next closest comparable metropolitan area. Thus, it presents a laboratory of experimentation for alternative

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267. Id. at 179.
268. Id. at 165; see also LA. REV. STAT. § 17:10.7 (implementing, in part, the constitutional amendment and providing this term as label for academically underperforming schools).
269. Id. at 168.
270. Id. at 169.
models of schooling, and some of the results of this experimentation have been encouraging. The system also shows promising signs of local support and buy-in, indicating that it should be maintained, at least for the time being.

However, this system—like all school systems—is supported by a funding system. To date, the New Orleans schools have enjoyed funding increases in every year since Katrina hit.273 This is true even though tax revenues have declined in most years, and have declined very sharply in the most recent year—32.8 percent in the first quarter of 2010, as compared with the first quarter of 2009, and since that time, the BP oil spill disaster has impacted the state’s finances and revenues even more.274 In the face of declining state revenues, these funding increases have been largely enabled by massive infusions of federal funding—first as disaster relief for Hurricanes Katrina and Rita, and then as part of The American Recovery and Reinvestment Act275 following the start of the Great Recession.276

2. The Coming Funding “Cliff” and the State Constitution

The federal funding currently supporting the New Orleans experiment will, if nothing changes before then, disappear after the current fiscal year. This inevitable point has been referred to as the “cliff” because current levels of state funding, held artificially high by federal appropriations, will plummet once the federal funding disappears.277 Nearly all

273. Schwam-Baird & Mogg, supra note 266, at 163.
276. This term has been commonly used to describe the economic downturn and near collapse that began in 2008 and continues to this day. See, e.g., Michael Elsby, Bart Hobijn, & Aysegul Sahin, The Labor Market in the Great Recession, Paper Prepared for Brookings Panel on Economic Activity, March 18-19, 2010 (version April 15, 2010), at 2, available at http://www.brookings.edu/~media/Files/Programs/ES/BPEA/2010_spring_bpea_papers/spring2010_elsby.pdf (last visited June 29, 2010) (“The depth and duration of the decline in economic activity have led many to refer to the downturn as the Great Recession”) (emphasis in original).
states face the "cliff," but in Louisiana, its effects will likely be more pronounced for two reasons.

The first is that the state has subsisted on federal assistance for more than twice as long as the other states have.278 This fact alone is likely to make the cliff more politically jarring in Louisiana as the state budget has benefitted from some form of large-scale federal exigency-based assistance for more than half of the past decade, while most other states began receiving such exigency-based help only as of the passage of the Recovery Act in 2009. However, this fact does not stand alone.

The other reason that the cliff in Louisiana is likely to be higher, steeper, and more treacherous is that the education budget in New Orleans has seen increases every year since Katrina hit due to this federal largesse.279 First targeted to necessary rebuilding and safety measures, the funds now seem to buoy the expenditure levels of the Recovery School District's charter division, to the point that Recovery District charters, according to the most recent study, spent nearly twice as much per pupil as traditional public schools in the Orleans Parish School District.280

With these points in mind, it is worth considering whether the major amendment to the state legislature's education duties accomplished in 1987 portends a positive or negative influence on the state's ability to cope with the certain budget reductions to come. The 1987 amendment to Article VIII, Section 13(B) sought to entrench constitutionally the power-sharing that had been fairly common before that time, reacting to the dispute that had developed between the legislature and education officials as to who possessed the duty to set expenditure levels.281 Based on the generalized language of legislative duty contained in both Section 13 and Section 1, the main education clause, the Edwards court held that the duty to determine expenditure levels was exclusively lodged with the legislature.282 Rather than reverse this determination and lodge the duty in the executive or judicial branch, the proponents of the amendment to Section 13(B) sought another approach—one geared toward mutual deliberation.

However, the amendment actually may have added meaningful content to the state constitution's distribution of powers provision in a way

278. Schwam-Baird & Mogg, supra note 266, at 163.
279. Id.
280. Id.
282. Id. at 394.
that (a) might be enough to forestall future adequacy litigation; or (b) might be helpful in the event of future adequacy litigation. Louisiana's distribution of powers clause, like the clauses in many state constitutions, explicitly forbids the members of one branch of government from exercising any of the powers of the other branches. This highly formalistic conception of the separation of powers is quite common among the states, and it (textually, at least) stands in stark contrast to the approach primarily followed in the federal courts, referred to as the functionalist approach. A functionalist approach to the separation of powers requires reviewing courts to balance the needs of the branches and to make a determination of whether too much power of one branch is subsumed by another. Where a formalist approach is called for, the main interpretive quandary is the determination of which powers belong to which branches. The amendments to Section 13(B) may have resolved this latter quandary as to educational duties and powers in Louisiana.

The changes wrought by the 1987 amendment might prove sufficient to prevent future adequacy litigation from being brought, because the provision's main import is to eschew power compartmentalization and to encourage negotiation. Much of educational adequacy litigation results from the political branches failing to work effectively with each other, and once a case is brought, political realities may make such collaboration even more problematic. In adequacy litigation that results in a plaintiff judgment, however, the remedial phase (whether formal or informal) nearly always involves some dialogue between the legislative and executive branches (and sometimes the courts, as well). Legal scholars have referred to the role of the courts in such cases as one of "destabilization," where such destabilization leads to collaborative reform involving a community of stakeholders in the government and

283. LA. CONST. art. 2, § 2.
284. Bauries, supra note 76, at 737.
285. Id. at 737-38.
286. Id.
287. See Joshua Dunn & Martha Derthick, Adequacy Litigation and the Separation of Powers, in SCHOOL MONEY TRIALS 325 (Martin R. West & Paul E. Peterson ed., The Brookings Institute 2007) (pointing out that the officials of the executive branch have little incentive to mount a vigorous defense against educational expenditure increases).
288. See, e.g., Michael Heise, Preliminary Thoughts on the Virtues of Passive Dialogue, 34 AKRON L. REV. 73, 97-98 (2000) (describing the choice that state courts have whether to participate in the dialogue between the political branches during remediation).
the populace.\textsuperscript{289} If these scholars are correct, then what better time to induce such collaboration than before litigation even occurs? It is possible that the force of the clear responsibilities set forth in Section 13(B) could forestall litigation entirely by textually mandating the sort of procedure that a school finance judgment might explicitly or implicitly require anyway.

The current reforms in New Orleans also have as their backstop the constitutional guarantee that the budget will not deadlock, and that if it does, the prior budget will apply. Education finance suits, for good or ill, are inherently political events.\textsuperscript{290} In most cases such suits arise from a perceived legislative disinvestment in education, either over time, or more commonly, through decentralization, which results in a lower proportion of educational expenses being funded directly by the state.\textsuperscript{291} Louisiana’s constitutional provision goes a long way toward preventing any such state-level disinvestment in any given year because it textually defaults the state budget to the prior year’s spending levels.

Nevertheless, it is certainly still possible that such disinvestment could occur either in one year or over time if both the legislative and executive branches were to desire it. That is, even the state constitution’s process-based provisions may not be enough to prevent an actual political crisis from occurring in Louisiana once the funding cliff reaches the state, and New Orleans is likely to bear the brunt of this crisis if it occurs. The crisis could take the form of a legislative enactment calling for reductions in spending that does not result from the mandated negotiation process. It could also result from total legislative and executive inaction or apathy. Or, it could result from collaboration between the legislature and the executive branch to reduce spending due to an agreed exigency that makes maintenance of current spending levels impossible. In any case, New Orleans is likely to see significant funding decreases. If so, then litigation may result, just as it resulted from sharp spending decreases in 1986. But will the result be the same as the result of the Edwards litigation? Will judicial deference approaching abstention rule the day?

\textsuperscript{289} See, e.g., William S. Koski, The Evolving Role of the Courts in School Reform Twenty Years After Rose, 98 Ky. L.J. 789, 793 (2010) (describing the courts’ role as one of “experimentalism,” which begins when the courts “destabilize the institutional status quo”).

\textsuperscript{290} Dunn & Derthick, Adequacy Litigation, supra note 287, at 324.

\textsuperscript{291} See, e.g., Citizens for Strong Sch., Inc. v. Fla. Dept. of Educ., Case No. 09-CA-4534 (Fla. Cir. Ct. 2d Jud. Cir. Nov. 18, 2009), Complaint at ¶ 34 (averring that the state share of educational spending has recently declined from over sixty percent to less than forty-five percent).
Unfortunately, the answer is still unclear. However, there are reasons to be optimistic. By altering the duties under the education article, the people of Louisiana may have sent the judiciary a message of permission. The clear allocation of textual authority would support a reasonable interpretation that the drafters/people wanted the process, as opposed to the substance, of the legislative act to be reviewable. If so, then political crises resulting from unilateral legislative action to defund education may be subject to judicial resolution without presenting any separation of powers problems. If the legislature has ignored its duty to negotiate, then the court ought to possess the textual authority to order the legislature to engage in the negotiation process. This should also be true for the executive branch through the BESE.

Importantly, this authority would not allow the judiciary to “correct” educational disinvestments that occur due to successful negotiations between the branches. In such cases, it seems clear that the authority of the two co-equal branches to make state policy on education funding and general state appropriations are out of the reach of judicial control, unless the court is prepared to explicitly overrule Edwards. Indeed, the 1987 changes might also be reasonably read to indicate a purposeful intention not to confer authority on the judiciary. In the traditional “political question” sense of “textual commitment” of a power or duty to a coordinate branch of government, the 1987 amendments may be read to textually commit the negotiation process to the legislative and executive branches, leaving no role for the judiciary. Considering the process-based mandates and how these mandates directly track the court’s concerns in Edwards, though, this reading would seem to be a less plausible reading of the text.

Alternatively, the courts of Louisiana may have the power to reach the negotiation process, but lack access to the evidence necessary to perform such review. This is because Louisiana may continue to follow the “jour-

292. See Baker v. Carr, 369 U.S. 186, 217 (1962) (“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”).
nal entry rule," a now-disfavored alternative to the stricter “enrolled bill rule” discussed above. It is purest form, the journal entry rule holds that the entry on the journal of the legislature that the procedural requirements for passage of a law have been met is the only evidence (other than the bill itself) that a court will consider of the law’s validity, in a procedural sense. The Louisiana courts have recognized and applied the journal entry rule in the past, but they have not taken a strict approach. In fact, in applying the rule, the state’s courts have drawn a distinction between procedural restrictions placed on the passage of law by the rules of the legislature itself (to which the journal entry rule apparently continues to apply) and procedural requirements imposed by the state constitution (to which the journal entry rule is inapplicable).

Thus, it appears that the most likely approach that the Louisiana courts would take is to enforce the procedural restrictions and requirements added to Section 13(B) in 1987. Where the legislature cynically ignores the BESE’s prerogatives and legislates outside the negotiation process, this approach could serve as a useful corrective. However, it cannot be repeated too often that Section 13(B) will not allow the court to reverse a collaboratively developed budget reduction, and this sort of budget reduction may be the most likely reaction to the funding cliff. Nevertheless, the process-based specification in the Louisiana education article at least ensures that this inter-branch collaboration will occur.

V. CONCLUSION

Legislative and executive policy making is messy. State constitutional framers and reformers should find ways to make it less so, and to
make it more predictable and fair. Assigning specific policy making roles constitutionally serves that purpose, particularly since the separation of powers is so important in state courts and is so textually prominent in most state constitutions. Specifying substantive outcomes perverts the process and Hamstrings the legislature and executive, as is evident in Florida and California. Striving for provisions similar to the Louisiana education article, and avoiding provisions similar to the Florida class size provision, should be the focus of future constitutional reformers.

Exigencies may make it more likely that courts will enforce legislative substantive duties, including duties to fund education. The experience in Nevada illustrates this tendency. There, the legislature was not even sued explicitly based on the education funding duty, but the court nevertheless ordered its performance, putting to the side a more recently enacted procedural restriction. However, enforcement of substantive requirements without regard to procedural protections can lead to political backlash, as is also evident from the Nevada experience. Here, I have argued that a potentially useful drafting strategy involves process-based specification of the education duties distributed between the political branches of government. Such specification allows courts to enforce duties by enforcing the procedural requirements to fulfill such duties, rather than by providing content for the duties.

Substance-based specification—as we have seen it in California, Oregon, and Florida—for some reason does not provide the clear path to the courthouse that it should. Possibly this is because the idea of judicial restraint is so ingrained in the role conceptions of state judges that even a clear substantive requirement will be side-stepped if it requires the court to mandamus a vote from the legislature. Knowing this tendency, a better approach is to spell out the desired good-faith negotiation process and have the courts enforce that process, as the courts likely would in New Orleans under the Louisiana Constitution. Although no strategy of constitutional design is a panacea for the problems related to the allocation of resources in a representative government, the Louisiana strategy of process specification merits the attention of state constitutional drafters.