

**EDUCATION AND THE CONSTITUTION:
SHAPING EACH OTHER & THE NEXT CENTURY**

by

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This issue proudly presents the University of Akron's Constitutional Law Center Symposium on Education and the Constitution. We are pleased to have assembled such an impressive array of scholars in both education and constitutional law to address many of the issues in which educational policy and constitutional law overlap.

I. PROLOGUE

Thinking about the interaction between the Constitution and education reveals that they are deeply interconnected, at profound levels of interdependence and complexity. Those connections are often strikingly visible, but are sometimes quite subtle.

A fundamental interdependence was formed with the decision to formulate our governmental structure as a democratic republic. The Constitution created the necessity for adequate public education to prepare the citizenry to exercise the role of self-government.¹ An educated voting public underpins a successful democratic structure, as was explicitly recognized in *Brown v. Board of Education*, in which the Court acknowledged:

the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities It is the very foundation of citizenship. Today it is the principal instrument for awakening the child to cultural values, in preparing him for later

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¹ Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 182, 187-88 (1995) (noting that responsible citizenship depends upon education). Thurgood Marshall's argument in *Cooper v. Aaron* eloquently raises the question of the values we teach by what we do. 358 U.S. 1 (1988).

Several state constitutions and courts have explicitly made this link, *e.g.*, *California Ass'n for Safety Educ. v. Brown*, 36 Cal. Rptr. 2d 404 (1994) (noting that when the free school guarantee in California was enacted at the 1878-1879 Constitutional Convention. Joseph Winans, the chairperson for the convention's Committee on Education, stated that "public education forms the basis of self-government and constitutes the very cornerstone of republican institutions." DEBATES & PROCEEDINGS, CAL. CONST. CONVENTION 1878-1879 1087); *Hartzell v. Connell*, 679 P.2d 35 (1984); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 532 n.14 (Texas 1992), (Cornyn, J., concurring and dissenting) (declaring that a primary goal of public education embraced by the founders of the Republic of Texas, which is also an axiom of political science, is that unless a people are educated and enlightened, it is idle to expect the continuance of civil liberty, or the capacity for self-government. VERNON, THE DECLARATION OF INDEPENDENCE OF THE REPUBLIC OF TEXAS 519, 520).

professional training, and in helping him to adjust normally to his environment.”²

But it is not only our political system that is dependent upon a viable and successful educational system. Our economic system also proclaims its reliance upon well-trained and educated workers.³ And our social system rests on two largely accepted goals that each require access to education – the “melting pot” which requires the successful absorption of diverse immigrant populations into a pluralistic social and cultural structure, and “upward mobility” which requires the permeability of class barriers.⁴ Both goals are achieved substantially through the education system.⁵

II. ROADMAP TO THE SYMPOSIUM

We chose education as the central issue for this Symposium because of its undoubted importance in the lives of the people in this country, and because of the many high-profile policy debates about education currently capturing the attention of the public. As we enter the twenty-first century, many issues of profound importance confront us: school finance;⁶ racial and gender equality in access and outcomes;⁷ home schooling;⁸

² *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

³ *See, e.g., Sheff v. O'Neill*, 678 A.2d 1267, 1290 (Conn. 1996) (recognizing that adequate education has an impact on the “entire state and its economy . . . [which is] . . . dependent on more skilled workers, technically proficient workers, literate and well-educated citizens” The court held that the state, which already played an active role in managing public schools, must take further measures to relieve the severe racial and poverty inequities that burden public elementary and high school students' education); *Abbott v. Burke*, A.2d 575 (N.J. 1994) (recognizing that adequate education has an impact on the entire state and its economy, the court held the Quality Education Act unconstitutional because it failed to assure parity of regular education expenditures between the special needs districts and the more affluent districts).

⁴ *See, e.g., THE NATIONAL COMM'N ON EXCELLENCE IN EDUC., UNITED STATES DEP'T OF EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 7 (1983) (“[a] high level of shared education is essential to a free democratic society and to the fostering of a common culture, especially in a country that prides itself on pluralism and individual freedom”); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 121-22 (1970) (Public schools are a “secular, nationalizing, assimilationist agent . . . [charged] with the task of Americanization, of melding backgrounds, and creating one nation.”); ARNOLD ROSE & CAROLINE ROSE, *AMERICA DIVIDED: MINORITY GROUP RELATIONS IN THE UNITED STATES* 105 (1953) (“The United States has always prided itself on not being a class society, . . . [people] could move from one class to another.”); THOMAS SOWELL, *ETHNIC AMERICA: A HISTORY* 3 (1981) (“A massive stream of humanity . . . came speaking every language and representing every nationality, race, and religion.”); Jessica J. Josephson, *TV and the Not-So-Soft Sell*, Special to WASH. POST, June 12, 1977, at D3 (“culture within our culture has different sets of symbols which evolved from different original frames of reference – it's the concept of America as a melting pot. And our culture has been and is very fundamentally defined by upward mobility and money as positive values”); Pico Iyer, *The Global Village Finally Arrives*, TIME, Sept. 22, 1993, at 86 (“Calvinists – import all-American values of hard work and family closeness and entrepreneurial energy to America, America is sending its values of upward mobility and individualism and melting-pot hopefulness to Taipei and Saigon and Bombay.”).

⁵ *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982) (finding it unconstitutional to completely deny free public education to children not legally admitted to the United States; education is important for maintaining our basic institutions, and its deprivation has lasting impact on a child's life); *see also* Sherry, *supra* note 1.

⁶ Representative state cases include: *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994) (holding that the system for financing public schools did not satisfy the constitutional mandate of a general and uniform school system); *Butt v. State*, 842 P.2d 1240 (Cal. 1992) (holding that the State has a constitutional duty, aside from the equal allocation of educational funds, to prevent the budgetary problems

of a particular school district from depriving its students of "basic" educational equality); *Coalition For Adequacy & Fairness In Sch. Funding v. Chiles*, 680 So.2d 400 (Fla. 1996) (holding that plaintiffs failed to demonstrate that the legislature failed to provide an adequate and uniform system of free public schools); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170 (Kan. 1994) (holding that the School District Finance and Quality Performance Act was constitutionally permissible legislation); *McDuffy v. Secretary of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993) (holding that the Massachusetts Constitution imposed an enforceable duty to provide education in the public schools for all children, rich or poor, and without regard to the fiscal capacity of the community or district in which such children live, and declaring that the constitutional duty was not being currently fulfilled by the Commonwealth, which must take steps to devise a plan and sources of funds sufficient to meet the constitutional mandate); *Council of Orgs. & Others for Educ. About Parochial v. Governor*, 566 N.W.2d 208 (Mich. 1997) (holding that PA Charter Schools Act, which authorized the creation of public school academies, did not violate Michigan Constitution article VIII, §§ 2-3); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993) (holding that the state constitutional provision requiring the legislature to establish a "general and uniform system of public schools" indicated that education is a fundamental right in Minnesota and that the current system of state educational finance satisfied that fundamental right because all plaintiff districts provided an adequate level of education to meet or exceed the state's basic educational requirements and were given sufficient funding to meet their basic needs); *Fiscal Equity v. State*, 655 N.E.2d 661, (N.Y. 1995) (holding that New York Constitution, article XI, § 1 required the State to offer all children the opportunity of a sound basic education consisting of the basic literacy, calculating, and verbal skills necessary to enable them to eventually function productively as civic participants capable of voting and serving on a jury; the State satisfied its constitutional obligation if the physical facilities and pedagogical services and resources were adequate to provide children with the opportunity to obtain these essential skills); *Leandro v. State*, 488 S.E.2d 249 (1997) (holding that the "equal opportunities" clause of Art. IX, § 2(1) of the North Carolina Constitution did not require substantially equal funding or educational advantages in all school districts, and that the current state system for funding schools which resulted in unequal funding among the school districts of the state did not violate constitutional principles); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997) (holding that Ohio's elementary and secondary public school financing system violated § 2, art. VI of the Ohio Constitution, which mandates a thorough and efficient system of common schools throughout the state), *DeRolph v. State*, 728 N.E.2d 993 (Ohio 2000) (holding that legislative funding schemes to date, although good faith starts, were not sufficient, and providing an additional year for the governor and legislature to find adequate solutions); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995) (holding the public school finance system enacted in Senate Bill 7 constitutional, but emphasizing that the judgment in this case should not be interpreted as a signal that the school finance crisis in Texas had ended); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995) (holding that the legislature must be afforded ample time for adequate study, drafting of appropriate reform legislation, and debate on and passage of that legislation to achieve constitutional compliance with school finance); *see also* cases cited in Sherry, *supra* note 1, at 194, n.269.

⁷ *See, e.g., Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996) (holding that the state must take further measures to relieve the severe racial and poverty inequities that burden public elementary and high school students' education); *Sheff v. O'Neill*, 733 A.2d 925 (Conn. 1999) (holding that the State had devised a comprehensive, interrelated, well-funded set of programs and legislation designed to improve education for all children, with a special emphasis on urban children, while promoting diverse educational environments); *Pennsylvania Human Relations Comm'n v. School Dist.*, 638 A.2d 304 (Pa. 1994) (holding that the School District had not provided Black and Hispanic students equal access to, among other things, the best qualified and most experienced teachers, equal physical facilities and plants, equal access to advanced or special admissions academic course offerings, equal allocation of resources, or a commitment to eliminating racial imbalances in the schools to the extent feasible).

⁸ *See, e.g., Donald D. Dorman, Michigan's Teacher Certification Requirement As Applied To Religiously Motivated Home Schools*, 23 U. MICH. J.L. REF. 733 (1990); Jon S. Lerner, *Protecting Home Schooling through the Casey Undue Burden Standard*, 62 U. CHI. L. REV. 363 (1995); Lisa M. Lukasik, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C.L. REV. 1913 (1996); Jack MacMullan, *The Constitutionality of State Home Schooling Statutes*, 39 VILL. L. REV. 1309 (1994); Joseph P. Tocco, *Home Schooling in Michigan: Is There a Fundamental Right to Teach Your Children at Home?*, 71 U. DET. MERCY L. REV. 1053 (1994).

vouchers;⁹ charter schools (and their manifold manifestations including single-race, single-sex, and racially-conscious balanced admissions);¹⁰ curricular autonomy and the teaching of doctrines associated with religious beliefs;¹¹ high-stakes proficiency testing of students;¹² and the First Amendment¹³ and Fourth Amendment¹⁴ rights of school

⁹ See, e.g., Jo Ann Bodemer, *School Choice Through Vouchers: Drawing Constitutional Lemon-Aid From The Lemon Test*, 70 ST. JOHN'S L. REV. 273 (1996); Dominick Cirelli, Jr., *Utilizing School Voucher Programs To Remedy School Financing Problems*, 30 AKRON L. REV. 469 (1997); Douglas A. Edwards, *Cleveland and Milwaukee's Free Market Solution for the "Pedantic Heaps of Sophistry and Nonsense" That Plague Public Education: Mistakes on Two Lakes?*, 30 AKRON L. REV. 687 (1997); Scott A. Fenton, *School Voucher Programs: An Idea Whose Time Has Arrived*, 26 CAP. U. L. REV. 645 (1997); Molly Townes O'Brien, *Private School Tuition Vouchers And The Realities Of Racial Politics*, 64 TENN. L. REV. 359 (1997).

¹⁰ See, e.g., Lesley C. Barlow, *Review of Selected 1998 California Legislation: Education: Chapter 34: Initiative Threat Induces Progressive Charter School Legislation*, 30 MCGEORGE L. REV. 597 (1999); Justin M. Goldstein, *Exploring "Unchartered Territory": An Analysis of Charter Schools and the Applicability of the U.S. Constitution*, 7 S. CAL. INTERDISC. L.J. 133 (1998); William Haft, *Charter Schools and The Nineteenth Century Corporation: A Match Made in the Public Interest*, 30 ARIZ. ST. L.J. 1023 (1998); Jay P. Heubert, *Schools Without Rules? Charter Schools, Federal Disability Law, and the Paradoxes of Deregulation*, 32 HARV. C.R.-C.L. L. REV. 301 (1997); Kevin S. Huffman, *Charter Schools: Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290 (1998); Denise M. Kazlauskas, *Education: Elementary and Secondary Education: Provide for Charter School Statutes; Remove Certain Limitations Regarding Advance Capital Outlay Funding for Construction Projects to Consolidate or Reorganize Schools; Provide for Contents of Petition Charter; Provide for Approval of Charter Schools by Local and State School Boards; Provide for Operational Requirements of Charter Schools; Provide for Charter Renewals; Provide for Amendment and Termination of a Charter; Establish Duties of State Board of Education and Local School Board with Respect to Provision of Funds to Charter Schools; Establish an Office of Charter School Compliance and Provide for Its Responsibilities; Provide for Continuing Validity of Certain Charters in Effect on July 1, 1998*, 15 GA. ST. U. L. REV. 101 (1998); Peter J. Perla, *The Colorado Charter Schools Act and the Potential for Unconstitutional Applications Under Article IX, Section 15 of the State Constitution*, 67 U. COLO. L. REV. 171 (1996); James A. Peyser, *Symposium, Issues in Education Law and Policy: School Choice: When, Not If*, 35 B.C. L. REV. 619 (1994); Jennifer J. Ridley, *Charting a New Course for Public Education in Michigan – Charter Schools: A Significant Step Toward Meaningful Education Reform*, 76 U. DET. MERCY L. REV. 607 (1999); Karla A. Turekian, *Traversing the Minefields of Education Reform: The Legality of Charter Schools*, 29 CONN. L. REV. 1365 (1997); Jennifer T. Wall, *The Establishment of Charter Schools: A Guide to Legal Issues for Legislatures*, 1998 B.Y.U. EDUC. & L. J. 69 (1998); Sheri Williams, *State Foundation of Charter Schools in Kansas*, 6 KAN. J.L. & PUB. POL'Y 103 (1997); Jason Lance Wren, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action Doctrine to These Innovative Schools*, 19 REV. LITIG. 135 (2000); Note, *The Hazards of Making Public Schooling A Private Business*, 112 HARV. L. REV. 695 (1999); Recent Legislation, *School Reform – Charter Schools – Connecticut and South Carolina Pass Charter School Statutes*, 110 HARV. L. REV. 1651 (1997).

¹¹ E.g., Charles Krauthammer, *The Real Message of Creationism*, TIME, Nov. 22, 1999, at 120 (discussing the Kansas School Board resolution removing evolution from the science curriculum as driven by limitations on teaching values through sectarian texts); Margaret Talbot, *A Mighty Fortress*, THE NEW YORK TIMES MAG., Feb. 27, 2000, at 23 (profiling a fundamentalist Christian family that chose home schooling to ensure curricular and methodological control and the teaching of parental values); see also Sherry, *supra* note 1, at 160-61 (discussing the pitfalls of parental control for citizenship education).

¹² E.g., N.Y. EDUC. LAW §§ 340-348 (McKinney 2000) (requiring students to complete tests in order to graduate); OHIO REV. CODE ANN. § 3301.0711 (Anderson 2000) (requiring testing of students and clarifying when that should take place); TEX. EDUC. CODE ANN. § 39.025 (West 2000) (requiring students to complete assessment testing in order to receive diploma).

¹³ See *infra* notes 55-58 (cases).

¹⁴ See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995) (holding that the school district's mandatory drug testing of student athletes did not violate their 4th Amendment rights because the school acts in the capacity

students. There are manifold competing views on the wisdom and constitutional acceptability of the strategies now being used and proposed for the future. What is clear is that any policy and practice will be subject to constitutional scrutiny and the parameters of acceptability will be set in constitutional terms. The choices we make will both reflect who we *are* and have a lasting impact on who we *become* as a people.

The theses of the Symposium are first, that the Constitution, especially as interpreted by the Supreme Court, has a significant effect upon public education, and second, that the way we educate about the Constitution, implicitly and explicitly, has a significant effect upon its meaning.

The first part of the Symposium will concentrate upon the first thesis. These articles¹⁵ primarily explore how the Constitution has affected public education in the twentieth century and how it will likely affect public education in the twenty-first century.

The Constitution has had a fundamental impact upon the way we structure and deliver public – and by implication, private – education in this country. Many boundaries set by the Constitution, as it is interpreted, have resulted directly or indirectly in the existence and viability of alternative schooling opportunities.¹⁶ Allowing alternative opportunities

of the children's guardian); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that the 4th Amendment standard of probable cause for conducting a search was not the standard necessary for searches conducted in the school environment, and that the search conducted for drugs in the student's purse qualified under the lower standard of "reasonable under the circumstances.").

¹⁵ Kevin Brown, *Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Public Elementary and Secondary Student Enrollments*; Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*; Rachel Moran, *Sorting and Reforming: High Stakes Testing in the Public Schools*; Molly Townes O'Brien, *Free at Last? Charter Schools and the "Deregulated" Curriculum*; William Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*; Rosemary Salomone, *Rich Kids, Poor Kids, and the Single-Sex Education Debate*, 34 AKRON L. REV. (in this volume).

¹⁶ For instance, *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925), guaranteed the right of private religious schools to both exist and to provide the mandatory education a state might require. In addition, some commentators attribute the flourishing of private schools in the latter half of the twentieth century to "white flight" from integrated public schools in the wake of *Brown* and its progeny. Compare JOHN SAMUEL COLEMAN ET AL., *TRENDS IN SCHOOL SEGREGATION 1968-73* (1975) with Thomas F. Pettigrew & Robert L. Green, *School Desegregation in Large Cities: A Critique of The Coleman "White Flight" Thesis*, 46 HARV. EDUC. REV. 1 (1976) and Christine H. Rossell, *School Desegregation and White Flight*, 90 POL. SCI. Q. 675 (1975-76); see also Diane Ravich, *The "White Flight" Controversy*, 51 PUB. INTEREST 135 (1978). Several cases have noted the "white flight" argument: *Monroe v. Board of Comm'rs*, 391 U.S. 450 (1968) (rejecting an argument in favor of "free transfers" that defended the transfers as necessary to prevent white flight); *Brunson v. Clarendon Sch. Dist. Bd. of Trustees*, 429 F.2d 820 (4th Cir. 1970) (noting the troublesome phenomenon of potential white flight).

The cases striking down school prayer (e.g., *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963)); prohibiting the posting of the Ten Commandments (*Stone v. Graham*, 449 U.S. 39 (1980)) and the teaching of the Bible (*Schempp*); and invalidating statutes mandating the teaching of creationism (*Edwards v. Aguillard*, 482 U.S. 578 (1987)), have led to a burgeoning not only of Christian schools, but also of home schooling. See, e.g., Neal Devins, *Fundamentalist Christian Educators v. State: An Inevitable Compromise*, 60 GEO. WASH. L. REV. 818 (1992); Donald D. Dorman, *Teacher Certification Requirement As Applied To Religiously Motivated Home Schools*, 23 U. MICH. J.L. REF. 733 (1990).

while furthering nation building, pluralism, and anti-discrimination has proven to be a challenge to policymakers.

The second part of the Symposium will address the influence that our teaching of the Constitution has and will have on the development of constitutional law. The articles address this issue in the law school context – how we train future judges, litigators, and civil leaders to think about and work with the Constitution - and also examine civic education in general.¹⁷

Just as the Constitution and its application has influenced the delivery of education, the way we educate has profoundly affected the way in which (and the direction in which) the Constitution has developed and will develop in the next century.

III. THE INTERACTION OF THE CONSTITUTION WITH EDUCATION

This brief essay examines part of the nature of the relationship between education and our Constitution. First, it describes the important role played by the interaction between the public education context and the development of fundamental constitutional principles that apply far beyond the confines of the schoolhouse gate.¹⁸ Second, it touches on the impact that the application of constitutional principles has had upon the face of public and private education. Finally, it notes the interrelationship between how we teach – both the explicit and the implicit curriculum – and how the Constitution is developed and applied.

Finally, the restriction of race-conscious remedies to create racial diversity and balance in public schools, *e.g.*, *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (holding that the admission process used by the city of Boston’s “examination schools,” which use race as a determining factor, are in violation of the Constitution, even though they were following a 1975 court order to maintain 35% African-Americans or Hispanic students in the schools) has led to creative ideas such as magnet schools and charter schools as methods to achieve diversity or the freedom to use race conscious policies. *See, e.g.*, *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*) (endorsing a plan of extensive educational reform such as remedial education, counseling and career guidance, to promote racial balance); *Hart v. Community Sch. Bd. of Brooklyn*, 383 F. Supp. 769 (E.D.N.Y. 1974) (endorsing a magnet school as a good way to begin desegregation).

¹⁷ Michael Kent Curtis, *Teaching Free Speech from an Incomplete Fossil Record*; Paul Finkelman, *Teaching Slavery in American Constitutional Law*; Stephen Gottlieb, *The Passing of the Cardozo Generations*; Mark Tushnet, *Thinking About the Constitution at the Cusp*; Tyll van Geel, *Citizenship Education and the Free Exercise of Religion* (admirably meshing both symposium themes); James Wilson, *Why a Fundamental Right to a Quality Education Is Not Enough*, 34 AKRON L. REV. (in this volume).

¹⁸ *Tinker v. Des Moines Independent School District*, famously noted that children do not “shed constitutional rights ... at the schoolhouse gate.” 393 U.S. 503, 506 (1969). This declaration has turned out to mean not only that the Constitution applies within the school, but that the principles developed to apply within the gates have force on the outside as well. Although *Tinker* envisioned penetrating into the school, the body of our constitutional law also makes clear that the way we apply the Constitution inside schools profoundly affects the constitutional principles used in different contexts. The schoolhouse has been a fertile context for developing principles that permeate its gates.

A. *Education as Context for Constitutional Development*

Although it is not an explicit theme of this Symposium, we cannot ignore the remarkable degree to which Constitutional cases of the twentieth century that have defined key areas of constitutional development have arisen in the context of public education. Education cases have been a breeding ground for decisions that define the nature of the relationships between the State and personal choice; the State and racial discrimination; and the State and religion. Individual autonomy, affirmative remedies for racial inequality, and the way we draw the line between church and state are all firmly grounded in education cases.

It is probably unsurprising that public education and constitutional development have been so inextricably linked to each other. Public education creates myriad interactions with citizens that constitute state action.¹⁹ Compulsory education guarantees that all children, and their parents, will interact with the state. Pluralistic society guarantees that many children and parents will disagree with the approach the state takes. In combination, these factors guarantee challenges to state authority to act. Additionally,

¹⁹ Since state constitutions usually guarantee public education, it is a universal form of direct state action: ALA. CONST. art. XIV, §256 (“liberal system of public schools”); ALASKA CONST. art. VII, §1 (“public schools open to all”); ARIZ. CONST. art. XI, §6 (“a free school shall be established”); ARK. CONST. art. XIV, §1 (“system of free public schools”); CAL. CONST. art. IX, §5 (“a free school shall be kept”); COLO. CONST. art. IX, §2 (“free public schools . . . wherein all residents . . . may be educated gratuitously”); CONN. CONST. art. VIII, §1 (“There shall always be free public elementary and secondary schools in the state.”); DEL. CONST. art. X, §1 (“system of free public schools.”); FLA. CONST. art. IX, §1 (“high quality system of free public schools”); GA. CONST. art. VIII, §1 (“public education . . . shall be free”); HAW. CONST. art. X, §1 (“a statewide system of public schools”); IDAHO CONST. art. IX, §1 (“public, free common schools”); ILL. CONST. art. X, §1 (“Education in public schools through secondary level shall be free”); IND. CONST. art. VIII, §1 (“uniform system of common schools”); IOWA CONST. art. IX, §3 (“support of common schools”); KAN. CONST. art. VI, §1 (“establishing and maintaining public schools”); KY. CONST. §183 (“provide for . . . common schools”); LA. CONST. art. VIII, §1 (“shall provide for the education of the people”); ME. CONST. art. VIII, §1 (“maintenance of public schools”); MD. CONST. art. VIII, §1 (“system of Free Public Schools”); MASS. CONST. art. III, §2 (“spreading the advantages and opportunities of education”); MICH. CONST. art. VIII, §2 (“free public elementary and secondary schools”); MINN. CONST. art. XIII, §1 (“system of public schools”); MISS. CONST. art. VIII, §201 (“free public schools”); MO. CONST. art. IX, §1(a) (“maintain free public schools for the gratuitous instruction of all persons”); MONT. CONST. art. X, §1 (“free quality public elementary and secondary schools”); NEB. CONST. art. VII, §1 (“free instruction in the common schools”); NEV. CONST. art. XI, §2 (“uniform system of common schools”); N.H. CONST. art. 83, §2 (“duty to cherish the interest of literature and the sciences”); N.J. CONST. art. VIII §4 (“free public schools”); N.M. CONST. art. XII, §1 (“free public schools”); N.Y. CONST. art. XI, §1 (“free common schools, wherein all children of this state may be educated”); N.C. CONST. art. IX, §2 (“free public schools”); N.D. CONST. art. VIII, §2 (“free public schools”); OHIO CONST. art. VI, §3 (“public school system of the state”); OKLA. CONST. art. I, §5 (“public schools, which shall be open to all the children”); OR. CONST. art. VIII, §3 (“The legislative assembly shall provide . . . common schools”); PA. CONST. art. III, §14 (“system of public education to serve the needs of the Commonwealth”); R.I. CONST. art. XII, §1 (“promote public schools”); S.C. CONST. art. XI, §3 (“free public schools open to all children”); S.D. CONST. art. VIII, §1 (“public schools wherein tuition shall be without charge”); TENN. CONST. art. XI, §12 (“system of free public schools”); TEX. CONST. art. VII, §1 (“system of public free schools”); UTAH CONST. art. X, §1 (“public schools shall be open to all children”); VT. CONST. §68 (“competent number of schools”); VA. CONST. art. VIII, §1 (“free public . . . schools for all children”); WASH. CONST. art. IX, §2 (“uniform system of public schools”); W.VA. CONST. art. XII, §1 (“efficient system of free schools”); WIS. CONST. art. X, §4 (“support of common schools”); WYO. CONST. art. VII, §1 (“embracing free elementary school of every needed kind and grade”).

two flashpoint issues are implicated when parents disagree with state education mandates: the upbringing of children in the values of the parents, and the expenditure of tax monies.

Three of the central tensions in American life are personal liberty (including self-definition and family); race relations; and the role of religion in public and private life. In each of these arenas, seminal cases have arisen in the context of education.

First, the foundational personal liberty cases that gave rise to the rubric of “privacy” – and are still cited as the Court defines the parameters of Fourteenth Amendment “liberty” – are *Meyer v. Nebraska*²⁰ and *Pierce v. Society of Sisters*.²¹ *Meyer* and *Pierce* recognized the deep interest of parents in raising their children to share their values, and in exerting control over family life and childrearing. Thus began the Court’s more general recognition of the need to hold some autonomous decisions free from state control. The legacy of *Meyer* and *Pierce* includes the privacy decisions that culminated in *Griswold*,²² *Roe v. Wade*,²³ *Cruzan*,²⁴ and *Casey*.²⁵

Second, significant developments in equality law, especially racial equality law, began in the context of public education. Following a multivaried strategy of challenging segregation in the context in which it was both likely to be found abhorrent to ideals of equality and also likely to lead to fundamental change, Charles Hamilton Houston and Thurgood Marshall chose education.²⁶ They began by challenging exclusion in higher education,²⁷ then moved to primary education.²⁸ The moral weight of desegregating

²⁰ *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a state law prohibiting the teaching of German in schools).

²¹ *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925) (holding that a state cannot forbid parents from meeting the mandatory education requirement by using religious schools that meet secular educational standards).

²² *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing the right of married couples to practice contraception as a right stemming from the protection of privacy and intimacy, and from the power to control key life-defining decisions).

²³ *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing that personal liberty includes the right to terminate a pregnancy).

²⁴ *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261 (1990) (recognizing a liberty interest in self-determination and bodily integrity to permit withdrawal of life support).

²⁵ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirming the central holding of *Roe* and explicating the importance of a right to control one’s body and life path by making key decisions central to self-definition).

²⁶ See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION ON BLACK AMERICA’S STRUGGLE FOR EQUALITY* 132-39 (1976) (noting the NAACP and Garland American Fund for Public Service strategy to combat racial inequality by attacking segregated public education).

²⁷ See, e.g., *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (finding it unconstitutional to require a black student in a white school to occupy designated seats in classroom, library and cafeteria, as it inhibited learning and interaction with others); *Sweatt v. Painter*, 339 U.S. 629 (1950) (ordering the state to admit a black student to the University of Texas Law School, finding a separate black law school was not an equal facility providing an equal education); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (holding a state must provide an equal legal education to students of all races); *State v. Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (requiring Missouri to offer legal education to a black student at its own law school).

²⁸ E.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1958).

public schools may also have provided an impetus to accept (or require) proactive remedies to eradicate the effects of past discrimination. In *Green v. County School Board*,²⁹ the Court held that a district that has engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause by simply ending its unlawful acts and adopting a neutral stance. *Swann v. Charlotte-Mecklenburg Board of Education*³⁰ went even further, declaring that racially neutral remedies for past discrimination were inadequate if the consequences of those past acts still influenced or controlled present decisions. *North Carolina State Board of Education v. Swann* and *McDaniel v. Barresi*³¹ explicitly allowed school boards to voluntarily adopt plans to foster racial pluralism, whether or not there had been a finding of past discrimination. Although called into question by recent Circuit Court decisions,³² the case that approved the use of a race-conscious criterion to serve the interest of diversity was an education case: *Regents of University of California v. Bakke*.³³

Third, many of the primary cases that have defined – or attempted to define – the reach of the Religion Clauses, and particularly the Establishment Clause of the First Amendment, arose in the education context. Cases articulating the “wall of separation” thesis³⁴ and the “accommodation” thesis³⁵ were decided in the public education setting. Religion Clause jurisprudence developed significantly in cases addressing public funding or assistance to private schools or to religious education,³⁶ as well as in cases challenging the use of

²⁹ *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

³⁰ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

³¹ *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971) (finding that addressing the effects of discrimination permits using race as a criterion for assigning students); *McDaniel v. Barresi*, 402 U.S. 39 (1971).

³² *E.g.*, *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (holding that the admission process used by Boston’s “examination schools,” which use race as a determining factor, violated the Constitution, even though they were following a 1975 court order to maintain 35% African-Americans or Hispanic students in the schools); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that University of Texas School of Law could not use race as a determining factor in the admission process despite intent to create diversity.).

³³ *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265 (1978) (holding the admissions policy of U.C. Davis Medical School unconstitutional in its manner of using race-based standards, but recognizing a legitimate interest in the appropriate use of a race-conscious criterion to help achieve diversity).

³⁴ *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (Justice Black articulated one of the Court’s major approaches to the religion clauses and establishment, i.e., the “wall of separation” thesis [with language adopted from Jefferson] in an aid to religious schools cases (paying parents for expenses of buses for parochial school children); the court upheld paying for all busing, as it merely extended a general public welfare program nondiscriminatorily to all citizens). *See also Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (relying upon the separation thesis, the Court held that the Establishment Clause prohibits the release of some public school students to attend religious instruction in the school during the school day, given by religious leaders; also objected to the compulsory nature of attendance as demonstrating state support of religion).

³⁵ *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Old Order Amish who objected to schooling past the eighth grade on religious grounds were entitled to an accommodation from the state’s compulsory education age minimum, in order to preserve their Free Exercise rights); *Zorach v. Clauson*, 343 U.S. 306 (1952) (holding an accommodation which allowed pupils to be released during school to attend religious education elsewhere permissible).

³⁶ *E.g.*, *Agostini v. Felton*, 521 U.S. 203 (1997) (general and neutrally-provided supplemental and remedial education can be provided to parochial school students); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (holding that sign language interpreters for all students, including those in private sectarian schools, is not prohibited by the Establishment Clause); *Committee for Pub. Educ. and Religious Liberty v. Regan*,

religious speech, such as prayers,³⁷ Bible reading,³⁸ the posting of the Ten Commandments in public schools,³⁹ and the mandatory teaching of creationism alongside evolution.⁴⁰ In fact, the classic late twentieth century Establishment test (although criticized and sometimes ignored)⁴¹ was formulated in an aid to parochial schools case: *Lemon v. Kurtzman*.⁴²

Fourth, by refusing to recognize a fundamental constitutional right to an education, and thus deflecting the arguments of poor parents challenging the use of property taxes to fund school districts on a differential basis, the Supreme Court left the significant issue of school finance to the states.⁴³ Debate still rages over the existence – or nature – of some guarantee to an education, and of the role of finances in providing it.⁴⁴ Wrestling with the challenges of these issues has been a significant source of state constitutional development.⁴⁵ As Professor Heise earlier noted, the Supreme Court’s avoidance of the issue of equality has had an important effect, as state courts have found that the resolution of school finance issues may be more profitably examined under the rubric of the adequacy of the education provided as opposed to funding equity in comparison with wealthier districts.⁴⁶

B. *The Impact of the Constitution on the Delivery of Public Education*

444 U.S. 646 (1980) (a New York statute reimbursing private schools for state-required testing and reporting costs is constitutional when those costs are verifiable); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973) (a New York statute was held unconstitutional as promoting religion because the aid for secular functions was not identifiable and separable from aid to sectarian activities); *Helms v. Picard*, 151 F.3d 347 (5th Cir. 1998), *rev’d sub nom. Mitchell v. Helms*, 120 S. Ct. 2530 (2000).

³⁷ *Engel v. Vitale*, 370 U.S. 421 (1962) (school prayer invalidated as violative of Establishment Clause); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (striking down Bible reading and Lord’s Prayer requirement); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that prayer by clergy at public school graduation ceremonies, even under nonsectarian guidelines, is violative of Establishment as being coercive, potentially divisive, state support for religion); *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, (invalidating a policy of student-led, student-initiated prayer before football games).

³⁸ *Abington Sch. Dist.*, 374 U.S. 203 (1963) (striking down Bible reading and Lord’s Prayer requirement).

³⁹ *Stone v. Graham*, 449 U.S. 39 (1980) (striking down a requirement that schools post the Ten Commandments).

⁴⁰ *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down a Louisiana law requiring that creationism be taught along with evolution as the religious establishment of a particular view due to there being no “genuine” secular purpose).

⁴¹ *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 106-113 (1985) (Rehnquist, J., dissenting); *Leading Case, Public Funding of Special Education in Parochial Schools*, 111 HARV. L. REV. 279 (1997) (critiquing the *Lemon* test).

⁴² *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (articulating the three-pronged inquiry for Establishment Clause purposes of secular purpose, no primary effect to advance or inhibit religion, and no excessive entanglement as the key to future Establishment jurisprudence).

⁴³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁴⁴ *See, e.g., Sherry, supra* note 1, at 186, n.230 (articles).

⁴⁵ *See supra* note 8.

⁴⁶ Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: *From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995).

Beyond these conceptual and pragmatic links between our constitutional system and education lies the story of the actual impact that our Constitution has had upon the delivery of public education.

The very face of education, and the mix of public, private, quasi-public experimental, and home-based schooling have been influenced by Constitutional decisions. *Meyer* and *Pierce* establish not only that nonpublic schools can exist and deliver compulsory education, but also that curricular autonomy, including providing religious training, is constitutionally protected. Together with *Yoder*, these decisions also form some of the basis for the permissibility of (and perhaps the requirement for) the home schooling option to parents.⁴⁷

In response to the legal and moral mandate to desegregate, school districts developed strategies for integration ranging from race-conscious placements of students to reconceptualized school designs and programs, like magnet schools.⁴⁸ New strategies for providing equal and quality education to all children are still being developed at the local school level and are continually subjected to scrutiny.⁴⁹

⁴⁷ See, e.g., Lerner, *supra* note 8; Lukasik, *supra* note 8, at n.1; MacMullan, *supra* note 8; Tocco, *supra* note 8.

⁴⁸ See, e.g., *Davis v. School Comm'rs*, 402 U.S. 33 (1971) (endorsing results-oriented remedies such as restructuring attendance zones); *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*) (adopting a plan of extensive educational reform measures to help equalize education and balance racial composition in schools); see also *Reed v. Rhodes*, 472 F.Supp. 615 (N.D. Ohio 1979) (discussing magnet school and selection methods to attract "appropriate" racial composition); *Stanton v. Sequoia Union High Sch. Dist.*, 408 F.Supp. 502 (N.D. Cal. 1976) (closing a high school in a predominately black neighborhood to achieve "racial balance"); *Moss v. Stamford Bd. of Educ.*, 356 F.Supp. 675 (D. Conn. 1973) (discussing cross-district bussing); *Hart v. Community Sch. Bd.*, 383 F.Supp. 769 (E.D. N.Y. 1974) (discussing magnet schools). See also Mary Jane Lee, *How Sheff Revives Brown: Reconsidering Desegregation's Role In Creating Equal Educational Opportunity*, 74 N.Y.U. L. REV. 485 (1999); Angela G. Smith, *Public School Choice and Open Enrollment: Implications for Education, Desegregation, and Equity*, 74 NEB. L. REV. 255 (1995).

⁴⁹ See, e.g., Stuart Biegel, *School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment*, 46 HASTINGS L.J. 1533 (1995); Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace*, 29 J. MARSHALL L. REV. 75 (1995); Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can The Polemic of Legal Problems Be Overcome?*, 43 DEPAUL L. REV. 1 (1993); Victoria J. Dodd, *Symposium, American Public Education and Change: Not an Oxymoron*, 17 ST. LOUIS U. PUB. L. REV. 109 (1999); Elizabeth Garrett, *Symposium, Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845 (1999); Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare As We Knew It*, 49 DUKE L.J. 493 (1999); Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257 (1999); Paul E. Peterson, *School Choice: A Report Card*, 6 VA. J. SOC. POL'Y & L. 47 (1998); Joe Price, *Educational Reform: Making The Case For Choice*, 3 VA. J. SOC. POL'Y & L. 435 (1996); Kelly C. Rozmus, *Education Reform and Education Quality: Is Reconstitution the Answer?*, 1998 B.Y.U. EDUC. & L.J. 103 (1998); Joseph P. Viteritti, *School Choice: Reaching For Equality: The Salience of School Choice*, 14 J. L. & POL. 469 (1998). Note that one district court has invalidated vouchers as used, finding them so heavily used for parochial education as to violate the Establishment Clause. *Simmons-Harris v. Zelman*, 72 F.Supp. 2d 834 (N.D. Ohio 1999) (holding that school vouchers were unconstitutional because a majority of the participating schools were sectarian, creating a situation of governmental endorsed religious education.).

The explosion of private educational opportunities is sometimes attributed to dissatisfaction with public education.⁵⁰ These reasons range from the illegitimate (fleeing schools deemed to be “too integrated”), to the legitimate (fashioning alternatives to schools deemed too devoid of spiritual and religious content, or too inadequate at delivering quality basic education in an environment conducive to safety and learning). The availability and attractiveness of manifold private and public schooling options may have been fueled by the Constitutional mandates and restrictions imposed on public schools.

But the quest for quality education transcends the issues of racial and religious diversity or hegemony. Many scholars urge increasing parental control over (or input into) curricular matters and the methodology of teaching.⁵¹ Race- and class-based gaps in educational achievement have led to the search for more effective learning for all children.⁵² These goals have fueled the policy debates for mandatory testing of fundamental educational achievement, as well as for creating alternative schools to serve public school children’s needs. Proponents of alternatives seek more state financial support with less state control of the content and methodology of the educational experience. These desires coexist in tension with each other.

Underlying many of these issues, and existing independently of them, is the concern about finding appropriate mechanisms for funding schools that will provide adequate support, fairly distributed, while holding individual schools accountable for the learning of their students. School finance choices, from direct funding to supporting parental choice, will all be the subject of state policymaking and constitutional scrutiny in the next century.

C. The Impact of Educating on the Development of Constitutional Law

Ultimately, education may have significant, and even determinative, input into what the Constitution means. The first experience of what the Constitution means may well be in the role it plays in shaping the educational experience and lives of the students in the public schools. Learning by example has always been one of the most powerful methods of learning.

The Constitution has affected the lives of public school students while they are in the buildings in a number of ways likely to influence their civic education. First Amendment

⁵⁰ See *supra* notes 8-11 and *infra* note 51-52.

⁵¹ E.g., Anne Dodd, *Parents as Partners, Not Problems*, 63 THE EDUC. DIG. 36 (1998) (urging involving parents and developing communication to avoid conflict over curriculum and methods); Mary Sue Johns, *The New Crusade: Parent Involvement*, 94 SCH. ARTS 16 (1994) (“ . . . number one priority in public school education is to reinvolve all parents. . .”); Jennifer Sabourin, *Parental Rights Amendments: Will a Statutory Right to Parent Force Children to “Shed Their Constitutional Rights’ at the Schoolhouse Door?”* 44 WAYNE L. REV. 1899 (1999) (describing the controversy over parental control of education in the schools, especially over curriculum and discipline and questioning parental control); Deborah Wadsworth, *Parents Parent, Teachers Teach*, 10 THE PUB. PERSP. 15 (1999) (“ . . . getting parents more involved . . . has become a basic tenet among educators . . .”).

⁵² See, e.g., UNITED STATES DEPT’ OF EDUCATION, *AMERICA LOSS: AN EDUCATION STRATEGY* 7 (1991); James Traub, *What No School Can Do*, NEW YORK TIMES MAG., Jan. 16, 2000, at 52.

free expression rights, although subject to modification in the schooling context, have been applied to permit unpopular, but nondisruptive political speech,⁵³ to protect against library censorship motivated by disagreement with ideas expressed,⁵⁴ to provide equal access to school facilities to religious as well as secular student groups,⁵⁵ and to limit editorial control over school newspapers to actions reasonably related to pedagogical concerns.⁵⁶ Following the line of reasoning permitting more limited application of rights, Fourth Amendment cases have permitted random drug testing and “reasonable” purse searches, citing pedagogical and disciplinary reasons, and finding lowered expectations of privacy for children in school-controlled settings.⁵⁷ Setting the parameters of student rights will no doubt continue into the next century.

Constitutional values are conveyed by the way in which schools are designed, funded, and populated, as well as by the rights accorded to students within the walls of the buildings.

Outside of the public school context, the way we teach the Constitution (and the process of Constitutional interpretation and enforcement) to its future interpreters and civic leaders will profoundly influence Constitutional development. Several commentators have noted the importance of the twentieth century focus on individual rights, and the litigation-oriented, court-centered methodology that has been used to develop that focus.⁵⁸ The way law students have been educated (the case method) probably had a profound effect on the resort to the courts for enforcement. Ahistorical, abstract, and unduly sanguine applications of constitutional doctrine and analysis may also cause distortions attributable to the way we educate practitioners and public decision-makers.⁵⁹ There are other ways of knowing and explicating Constitutional meaning, and the question is how will our future legal education prepare lawyers, judges, legislators, and citizens to engage in that explication process.

⁵³ *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (recognizing First Amendment rights to engage in nondisruptive speech).

⁵⁴ *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (holding that school library cannot exercise total discretion to censor books if their decision is motivated by a desire to remove access to ideas with which they disagree).

⁵⁵ *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) and *Widmar v. Vincent*, 454 U.S. 263 (1981) (finding that high schools and universities respectively cannot prohibit a voluntary student organization prayer group from using school facilities to meet on an equal access basis) (Equal Access Act interpreted in the *Mergens* situation).

⁵⁶ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that school officials can exercise editorial control over expression in school-sponsored activities like a school paper when their actions are reasonably related to a pedagogical concern).

⁵⁷ See *supra* note 16 (cases only).

⁵⁸ *E.g.*, MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991); Sherry, *supra* note 1, at 133-45 (noting the rights-oriented liberalism of 20th century spurring republican and neorepublican theories, and evaluating strengths and weaknesses in each focus, and citing many contemporary thinkers); and 146-47 (highlighting critiques of the “peculiarly American” exaggerated focus on rights).

⁵⁹ See, *e.g.*, Curtis, *supra* note 17; Finkelman, *supra* note 17; Gottlieb, *supra* note 17; Tushnet, *supra* note 17.

IV. CONCLUSION

Education has profoundly influenced the way we view and interpret the fundamental tenets of our constitutional system and the rights and responsibilities at its core. The Constitution has had an equally critical impact on whom and how we educate, in both content and form. As we address the policy issues of the twenty-first century, our educational strategies and reforms will be adopted and judged against a template of constitutional legitimacy, rooted in twentieth century precedents, and our Constitution will grow and develop within the framework that its practitioners have been educated to use. Undoubtedly, the principles we develop and apply to evaluate the constitutionality of actions within the educational context will continue to have striking effects on what the Constitution means in all aspects of our lives. It will behoove us to do things well. The thoughtful input of scholars such as those we have assembled here should help us do just that.