CONSTITUTIONAL RESPONSIBILITY TO PROVIDE A SYSTEM OF FREE PUBLIC SCHOOLS: HOW RELEVANT IS THE STATES' EXPERIENCE TO SHAPING GOVERNMENTAL OBLIGATIONS IN EMERGING DEMOCRACIES?

Denise A. Hartman*

The United States Constitution makes no mention of education. Nevertheless an educated electorate was and is an implicit prerequisite to the vitality of the democratic republic. After two centuries, the job of providing for public education has devolved upon the individual states—first as a matter of fact and later as a matter of state constitutional law. In recent decades, the courts in many of these states have interpreted these constitutional obligations as being more than hortatory and have undertaken active roles in defining and enforcing the states' responsibility to provide educational systems.

The question arises: What is the relevance of this country's experience in shaping the government's obligation to provide for a system of free public education in emerging democracies? More specifically, can this country's experience in formulating the government's role in providing a system of free public education help answer the following questions: in an emerging constitutional democracy, should the national constitution from the outset provide for a governmental responsibility to provide for a system of free public education for its citizenry? Would a constitutional obligation to provide for a free public education substantially enhance the prospects of a successful democratic government? Is a government-run system of free public education viable where the new nation is comprised of sharply defined religious groups or cultural groups? If so, how can the governmental responsibility accommodate and balance these diverse interests with the inculcation of a common national and civic interest? This article permits the reader to explore these questions against the background of the United States' experience in providing a system of free common schools.

This article will first briefly outline the evolution of public education in the United States from a national perspective. Next, it will

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* Denise A. Hartman, an Assistant Solicitor General in the Office of the New York State Attorney General, has worked on numerous cases involving the state's constitutional role in providing for a system of free public education. The views expressed in this paper are her own and do not necessarily reflect the views of that Office.

focus in on a couple of states, Massachusetts and Pennsylvania, setting forth in more detail the history of public education in those states, the constitutionalization of the government's responsibility for public education in those states, and judicial interpretations of that constitutional responsibility. Finally, this paper will attempt to draw some inferences and propose a set of principles to guide the formulation of a national role for providing a system of public education in emerging constitutional democracies.

I. AN OVERVIEW OF THE EVOLUTION OF PUBLIC EDUCATION IN THE UNITED STATES

The concept of democracy in the United States has progressed from one based on an elite or aristocratic electorate to one of universal suffrage. As prerequisites first of property ownership, then of race, and later of gender dropped by the wayside, a practical imperative emerged for the government to provide a system of public education to all its citizens. Without such a system, many question whether the democracy would have or could have survived. While the constitutional framers recognized the critical role for an educated electorate from the outset, perhaps it was their unique wisdom that allowed them to recognize that they lacked the experience and judgment to impose national responsibility for public education. After two hundred years of experimentation and evolution, the states filled the niche, leading the United States Supreme Court to declare that perhaps the most important function of the individual states is to provide for free public education.

Thus, in 1787, the United States Constitution included no reference whatsoever to the role of public education in the democracy, either as a national or as a state responsibility. Perhaps an educated electorate was presumed, with land ownership serving as a proxy for education since only male landowners bore the responsibilities of citizenry to vote and serve on juries. Thomas Jefferson, however, anticipating in 1779 the need for an education system for the success of the democratic republic, proposed a "Bill for the More General Diffusion of Knowledge" for passage by the Virginia legislature.[1] That bill proposed a system of free public schools, funded and controlled by the government, where every child would receive a basic elementary education, and the brightest would be given the opportunity to continue through the secondary and university levels. While Jefferson's bill failed, it presaged the evolution

1. THOMAS JEFFERSON AND EDUCATION IN A REPUBLIC 22-23 (Charles Flinn Arrowood ed., 1930).

of state responsibility for public education over the next century or more.

The evolution of public education proceeded at different paces in the various regions of the country. The pace at which it developed was influenced by several factors, including the rate of transition from an agrarian to a commercial and industrial society, the demographic shift toward urbanization, and the extension of suffrage to more and more groups.[2] The major complicating factor was religion. "In a society where religious freedom is allowed, but where education must be religious, a common public school system for all children is well nigh impossible."[3] As the people began to value a common public school system as much as or more than they cherished religious freedom and diversity of religious educations, they ultimately "would have to decide to exclude religion from the common schools and to nourish religion in their homes and churches."[4] While many states tried the alternative route of allowing each religious group to control its own schools and to share in access to public funds—that is, of multiple establishments—they came to realize "that the common values of a democratic society could not be achieved by such divisive practices."[5]

Against this background of influencing factors, public education evolved most rapidly in the northern states. Even in pre-revolutionary New England, Calvinistic ideology contributed to the early establishment of a governmental role in providing education. First as colonies, and later as states, the legislatures enacted laws requiring municipal subdivisions to establish grammar schools.[6] While in many states the legislatures enacted these laws as a "servant of the Church," they nevertheless reflected the colonists' recognition that widespread public education benefits the state.[7] This novel concept of governmental responsibility for public education was unprecedented in England, where education remained mostly a private matter, and in other European countries where it was largely a parochial matter.[8] By 1800, two important principles were well-established in the New

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2. *See* ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES 101-15 (1919); R. FREEMAN BUTTS & LAWRENCE A. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 141-50 (1953).

3. BUTTS & CREMIN, *supra* note 2, at 98.

4. *Id.* at 98-99.

5. *Id.* at 99. Ultimately the Fourteenth Amendment would in any event have forced the disestablishment of religion by applying the First Amendment to the States. *See id.* at 22-29.

6. CUBBERLEY, *supra* note 2, at 17-19.

7. *Id.* at 18-20.

8. *Id.* at 18, 53.

England states: first, at the command of the state, local units of government were charged with the responsibility to run public schools. Second, responsibility for funding those schools was largely through public funds, both state and local.[9]

The middle states took a half a century longer to move from private and philanthropic support to principal governmental support. In Pennsylvania, for example, there was no dominant religious sect, though the Protestant belief in being able to read the Bible drove efforts to provide some common form of education. What emerged was a system of parochial schools, with each sect establishing its own charity and private pay schools.[10] But in the latter half of the 1700s, public support for education began to take hold, albeit under the multiple establishment paradigm. By the mid 1800s, however, interests in ensuring meaningful participation in government and in the developing non-sectarian economy led to the decline of religion's monopoly over education.[11]

Public education in the southern states did not become a reality until the latter half of the nineteenth century, largely because of their agrarian economy and the decentralization of educated landowners. Children were educated in their own homes or by private tutors. Those who could afford it attended private schools. While some churches provided charity schools, the states themselves did not regard it as their responsibility to provide widespread educational opportunities for their inhabitants. The decline of the agrarian economy after the Civil War, and the correlative shift toward industrialization and urbanization led to recognition of a greater governmental role in providing a system of free common schools.[12]

Against this factual backdrop, the states one by one amended their constitutions to impose upon themselves an obligation to provide a system of free common schools. Although six of the original thirteen states made general mention of education in their initial constitutions,[13]

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9. *Id.* at 18-19.

10. *Id.* at 20-21; BUTTS & CREMIN, *supra* note 2, at 107-08.

11. CUBBERLEY, *supra* note 2, at 58-59; BUTTS & CREMIN, *supra* note 2, at 22-29.

12. CUBBERLEY, *supra* note 2, at 21-23, 247-52; BUTTS & CREMIN, *supra* note 2, at 104-07.

13. The six original states referencing education in their first constitutions were Connecticut (1818, having remained under its colonial charter until then), Georgia (1777), Massachusetts (1780), North Carolina (1776), Pennsylvania (1776), and Rhode Island (1842, having remained under its original charter until then). But for the most part these references tended to be vague and hortatory. *See* W.E. Sparkman, *Symposium: Issues in Education Law and Policy: The Legal Foundations of Public School Finance*, 35 B.C. L. REV. 569, 572 (1994) (*see* n.9, citing CHARLES KETTLEBOROUGH, THE STATE

by mid-twentieth century, every state had adopted an education article into its constitution containing some statement about the governmental role in providing a public education. Many state constitutions merely command the state or the legislature to establish and maintain a general system of free public or common schools, as in Alabama, Alaska, California, Connecticut, Georgia, Hawaii, Kansas, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New York, Oklahoma, South Carolina, Tennessee, Utah, and Virginia.[14] Other states' education articles add the concept of comprehensiveness, requiring the establishment of an "efficient" or "thorough" and "efficient" system of free public or common schools, as in Arkansas, Delaware, Illinois, Kentucky, Maryland, New Jersey, Ohio, Pennsylvania, Texas, and West Virginia.[15] Still others seemingly insert the notion of equality or equity, calling for the establishment of a "uniform" system of free public or common schools, as do the constitutions of Arizona, Colorado, Florida, Idaho, Indiana, Minnesota, Nevada, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, Washington, Wisconsin and Wyoming.[16] Finally, several states have education articles that appear on their face to be more aspirational than mandatory, as does Iowa's, which calls for the State to "encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement"; and Massachusetts' and New Hampshire's, which exhort those States "to cherish the interests of literature and the sciences, and all seminaries and public schools."[17]

The states' pervasive involvement in providing for public education led the United States Supreme Court in its landmark decision

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CONSTITUTIONS AND THE FEDERAL CONSTITUTION AND ORGANIC LAWS OF THE TERRITORIES AND OTHER COLONIAL DEPENDENCIES OF THE UNITED STATES OF AMERICA (1918); W.F. SWINDLER, SOURCES AND DOCUMENTS OF THE UNITED STATES CONSTITUTIONS (1973)).

14. ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; CAL. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; KAN. CONST. art. VI, § 1; LA. CONST. art. VIII, § 1; MICH. CONST. art. VIII, § 2; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1; NEB. CONST. art. VII; N.Y. CONST. art. XI, § 1; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3; TENN. CONST. art. XI, § 12; UTAH CONST. art. X, § 1; VA. CONST. art. VIII, § 1.

15. ARK. CONST. art. XIV, § 1; DEL. CONST. art. X, § 1; ILL. CONST. art. X, § 1; KY. CONST. art. § 183; MD. CONST. art. VIII, § 1; N.J. CONST. art. VIII, § 4; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; W. VA. CONST. art. XII, § 1.

16. ARIZ. CONST. art. XI, § 1; COLO. CONST. art. IX, § 2; FLA. CONST. art. IX, § 1; IDAHO CONST. art. VIII, § 1; IND. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; NEV. CONST. art. XI, § 2; N.M. CONST. art. XII, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; OR. CONST. art. VIII, § 3; S.D. CONST. art. VII, § 1; WASH. CONST. art. IX, § 2; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

17. IOWA CONST. art. IX, § 3; MASS. CONST. ch. V, § 2; N.H. CONST. art. LXXXIII.

of *Brown v. Board of Education*,[18] to comment that "education is perhaps the most important function of state and local governments." There the Court elaborated:

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of 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 good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[19]

Just as the various states had concluded in the nineteenth century that separate education based on religion could not work, the Supreme Court concluded in *Brown* that separate education by race could not work either, and was in fact barred by the Equal Protection Clause of the Federal Constitution.

Despite its importance to the democracy, the Supreme Court has remained steadfast in its view that public education is not a fundamental right guaranteed by the United States Constitution. In *San Antonio Independent School District v. Rodriguez*,[20] plaintiffs challenged on Equal Protection grounds Texas' system of funding public education, claiming that it disadvantaged poor children. By arguing that education is a fundamental constitutional right, plaintiffs sought to invoke strict judicial scrutiny of Texas' funding system. The Court explained: "[T]he key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education . . . [r]ather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[21] The Court concluded, "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution."[22] Nor did the Court find any basis for finding it implicitly protected, notwithstanding the Court's recognition that the

18. 347 U.S. 483, 493 (1954).

19. *Id.* The Supreme Court on many occasions had previously recognized the critical role of education in a free society. *See* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963); People *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

20. 411 U.S. 1, 29-40 (1973).

21. *Id.* at 33.

22. *Id.* at 35.

meaningful exercise of the right to speak and vote may be bound up with educational opportunity.[23]

When the United States Supreme Court refused to step into the fray of challenges to the states' failure to provide adequate or equitable public educations, litigants turned to the state courts, arguing that the state governments were not living up to their responsibilities under the education articles of their individual state constitutions. Commentators have suggested that there were essentially three waves of litigation in the states.[24] The first wave corresponded with the *San Antonio* litigation, as litigants sought to establish that education is a fundamental right under the federal Equal Protection Clause, which was violated by the disparities in the states' education finance systems.[25] In the second wave, plaintiffs brought "equity" suits based on the equal protection clauses and the education articles of the state constitutions themselves. In these cases too, plaintiffs sought to invoke strict judicial scrutiny of disparate financing systems by claiming that education is a fundamental right.[26] Then in the third wave, plaintiffs brought "adequacy" suits, claiming that the state constitutions called for the states to provide a minimal level of education and that the states must provide greater funding to bring the worst performing districts up to the minimum educational level required by the relevant education article.[27]

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23. *Id.* at 35-37. While the Supreme Court has eschewed any constitutional role for the federal government in the provision of public education (except to ensure no violation of equal protection or other individual rights), the federal government has played an increasing role in public education on policy grounds. Beginning with the Land Ordinances of 1785 and 1787 and continuing when each new state entered the Union, Congress set aside public land in the western territories for educational purposes. CUBBERLEY, *supra* note 2, at 59-61. In 2002, Congress increased its involvement in the overall quality of public education, at least for those schools receiving federal funds, when it enacted the No Child Left Behind Act of 2001, imposing accountability requirements on the nation's schools in an effort to improve public education and to reduce racial performance gaps. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (amending the Elementary and Secondary Education Act of 1965) (codified at 20 U.S.C. § 6301 (2005)).

24. William E. Thro, *Judicial Analysis of the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994).

25. *See, e.g.*, Serrano v. Preist, 557 P.2d 929 (Cal. 1976); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Washakie County Sch. Dist. v. Hershler, 606 P.2d 310 (Wyo. 1980).

26. *See, e.g.*, Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (en banc); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Seattle Sch. Dist. v. State, 585 P.2d 71 (Wash. 1978) (en banc).

27. *See, e.g.*, Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Helena Elementary Sch. Dist. No. 1 v. Montana, 769 P.2d 684 (Mont. 1989); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); DeRolph v. Ohio, 677 N.E.2d 733 (Ohio 1997); Edgewood Indep.

The state courts have divided on the issue whether the plaintiffs can assert a justiciable cause of action under their education articles. In New Jersey, Kentucky and Ohio, for example, the courts entered these tempestuous waters in an attempt to force the States to live up to what the courts believe are judicially enforceable constitutional obligations to provide adequate and/or equitable systems of public education.[28] In contrast, the courts in Wisconsin, Illinois, and Rhode Island withheld passing judgment on the states' financing systems based on separation of powers principles that are integral to our constitutional democracy.[29] The courts' views of judicial activism or restraint, of the importance of the role of education in our society, and of the degree of dysfunction in the education system may predict the outcomes of such litigation as much as the language or historical bases of the education articles themselves.[30]

II. PUBLIC EDUCATION IN MASSACHUSETTS

The American experience with public education cannot be discussed without recounting the history of public education in Massachusetts. A governmental role in providing a universal system of public education was established in that colony within decades after the settlers' arrival on Plymouth Rock. The Puritan/Calvinist settlers of the Massachusetts Bay Colony enjoyed a virtual monopoly on church and state. Their central religious tenet that each individual should be able to read and understand the Bible and other religious literature motivated a governmental role in ensuring that the youth of that colony were sufficiently educated to meet their religious obligations. Moreover, the Massachusetts colonialists believed from the outset that an educated populace was vital to good government and the social welfare.

As early as 1642, at the instance of the Puritan Church, the colonial government enacted legislation that required parents to teach their children "to read and understand the principles of religion and the

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Sch. Dist. v. Kirby, 777 S.W.2d 291 (Tex. 1989); Campbell County Sch. Dist. v. Wyoming, 907 P.2d 1238 (Wyo. 1995).

28. *Robinson*, 303 A.2d 273; *Rose*, 790 S.W.2d 186; *DeRolph*, 677 N.E.2d 733.

29. Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995).

30. *See* William S. Koski, *The Politics of Judicial Decision-Making in Education Policy Reform Education,* 55 HASTINGS L.J. 1077 (2004); Michael Heise, *The Courts, Educational Policy, and Unintended Consequences,* 11 CORNELL L. REV. 633 (2002); Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101 (2000).

capital laws of the country."[31] Town officials were directed to ascertain whether parents were attending to their instructional duties and to impose fines for failure to comply. It has been observed that this was the first time in the English speaking world that a government ordered that all children should be taught to read.[32] Education, however, remained the primary responsibility of the home and family, as it had been in England.

Only five years later, however, in 1647, the colonial legislature, again as the servant of the Church, enacted a law requiring every town having fifty or more households to appoint a teacher of reading and writing and to pay for his wages.[33] Every town having 100 or more households was required, under penalty of fines, to provide a Latin grammar school to prepare youths for the university. The express purpose of this law was not only to ensure that the youth be literate, but also to inculcate them with a moral education for the good of the state.[34] Implicitly, the towns were to levy taxes to fund their educational efforts. Over the next century, the colonial government continued its vigilance over the towns' responsibilities to establish schools, enacting further laws expressly empowering them to assess taxes on their inhabitants for the maintenance and support of schools,[35] and going so far as to require officials to "bind out" into "good families" children whose parents were delinquent in their responsibilities.[36]

By 1780, a system of public schools was so firmly entrenched that the delegates to the 1779-1780 Constitutional Convention included an education article in the Commonwealth's Constitution. Drafted by John Adams, the provision read:

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31. Province Law of 1642, *reprinted in* The Acts and Resolves, Public and Private, of the Province of Massachusetts Bay: to which are prefixed the charters of the province. Published under Chapter 87 of the Resolves of the General Court of the Commonwealth for the Year 1867, at 6 (1869-1922) [hereinafter 1867 Mass. Acts] (a primary source collection of Massachusetts legal history).

32. CUBBERLY, *supra* note 2, at 17.

33. Province Law of 1647, *reprinted in* 1867 Mass. Acts 203.

34. The Preamble to the Province Law of 1647 read:

> It being one chief project of Sathan to keep men from knowledge of the Scripture, as in former times, keeping them in unknown Tongues, so in these later times, by perswading from the use of Tongues, that so at least the true sense and meaning of the Original might be clouded and corrupted with false glosses of Deceivers; to the end that Learning may not be buried in the Graves of our fore Fathers, in Church and Common-wealth, the Lord, assisting our endeavors. . . . *Id.*

35. Province Laws of 1692-1693, ch. 28, § 6, *reprinted in* 1867 Mass. Acts 66.

36. Province Laws of 1703-1704, ch. 14, § 1, *reprinted in* 1867 Mass. Acts 538; Province Laws of 1735-1736, ch. 4, § 5, *reprinted in* 1867 Mass. Acts 757.

> Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among different orders of people, it shall be the duty of the legislatures and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature ad sciences and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in towns. . . .[37]

Soon after the provision's ratification, the Massachusetts General Court, its legislative body, enacted its first comprehensive school law, declaring that "the Constitution of this Commonwealth hath declared it to be the duty of the General Court to provide for the education of youth; and whereas a general dissemination of knowledge and virtue is necessary to the prosperity of every State, and the very existence of a Commonwealth."[38] Afterwards, the state government exercised increasing responsibility over the Commonwealth's system of public education, providing increasing amounts of state aid to towns for that purpose, creating a state board of education, provided for teacher training, specifying the subjects to be taught and establishing proficiency standards, and overseeing the proliferation of high schools. Horace Mann, appointed Massachusetts' first state superintendent of public education in 1837, became one of the nation's best known crusaders for improvements in public education. He is credited with transforming "in the minds of the American people the conception that education should be universal, nonsectarian, and free, and that its aim should be social efficiency, civic virtue, and character, rather than mere learning or advancement of sectarian ends."[39] In his Twelfth Annual Report of the Board of Education, Mann promoted the inculcation of "patriotic values" and instruction regarding the "great documents," or as he put it, "that those articles . . . of republicanism, which are accepted by all, believed in by all, and which form the common basis of our political faith, shall be taught to all."[40]

Notwithstanding the state's extensive efforts to expand and enhance educational opportunities in the nineteenth and twentieth

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37. MASS. CONST. pt. II, ch. 5, § 2.

38. MASS. GEN. LAWS ch. 19, pmbl. (1789).

39. CUBBERLEY, *supra* note 2, at 226.

40. HORACE MANN, TWELFTH ANNUAL REPORT TO THE STATE BOARD OF EDUCATION 89 (1848).

centuries, the Massachusetts public schools, particularly in urban areas, have come to be regarded by many as unacceptably substandard. In the late 1970s, parents of public school students brought suit against Massachusetts officials claiming that the Commonwealth was failing it its constitutional duty to provide them with an opportunity for a public education. In its landmark decision, *McDuffy v. Secretary of Education*,[41] the Massachusetts Supreme Judicial Court agreed that students in many districts were receiving substandard educations due to excessive class sizes, inadequate teaching in basic subjects including reading, writing, science, social studies, mathematics and computers, lack of curriculum development, neglected libraries, unsafe building conditions, and an inability to attract and retain high quality teachers. Given this "bleak portrait of plaintiffs' schools and those they typify," the Court concluded that the Commonwealth had failed to fulfill its constitutional obligations.[42]

Adopting the broad guidelines formulated by the Kentucky Supreme Court in that state's education litigation, the Massachusetts Court articulated the basic requirements of an education prescribed by the Massachusetts Constitution:

> An educated child must posses "at least the seven following capabilities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental process to enable students to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[43]

41. 415 Mass. 545, 615 N.E. 2d 516 (1993).

42. *Id.* at 553-54.

43. *Id.* at 554 (quoting Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989)).

The Court observed that these guidelines accorded with the views expressed by Horace Mann a century and a half earlier when he wrote that:

> [U]nder our republican government, it seems clear that the minimum of this education can never be less than such as is sufficient to qualify each citizen for the civil and social duties he will be called to discharge, such an education as teaches the individual the great laws of bodily health; as qualifies for the fulfillment of parental duties; as is indispensable for the civil functions of a witness or a juror; as is necessary for the voter in municipal and in national affairs; and finally, as is requisite for the faithful and conscientious discharge of all these duties which devolve upon the inheritor of a portion of the sovereignty of this great republic.[44]

Notwithstanding the historical underpinnings for these guidelines, the Massachusetts Court did not regard the basic requirements of an education to be static; instead writing, "the content of the duty to educate . . . necessarily will evolve . . . with the society."[45]

The Court remanded the *McDuffy* case to the lower court to enter judgment declaring that the Constitution imposes an enforceable duty on the Commonwealth to ensure that there are sufficient funds to provide an education to all children in the Commonwealth, and that the Commonwealth is not fulfilling that duty.[46]

Just recently, in *Hancock v. Commissioner of Education*,[47] the Massachusetts Supreme Judicial Court addressed a new challenge claiming that the Commonwealth had not remedied the constitutional deficiencies identified in *McDuffy*. The single judge who was assigned to review the evidence had found substantial improvements in the state's system of public education since 1993, but concluded that significant failings persisted in certain focus districts that warranted

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44. *Id.* at 555 (quoting THE MASSACHUSETTS SYSTEM OF COMMON SCHOOLS: TENTH ANNUAL REPORT OF THE MASSACHUSETTS BOARD OF EDUCATION 17 (1849)).

45. *Id.*

46. *See McDuffy*, 615 N.E.2d at 555-56. In Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088 (Mass. 1995), the Massachusetts Supreme Judicial Court clarified that, while it held in *McDuffy* that the Commonwealth has a general obligation under the Constitution to educate its children, it declined to hold (in *Doe*) that a student has a fundamental right to an education which, under American principles of constitutional law, triggers strict scrutiny whenever an individual claims that the state is depriving him of that right. 653 N.E.2d at 1095.

47. Hancock v. Comm'r. of Educ., 822 N.E.2d 1134 (Mass. 2005).

court intervention. The Supreme Judicial Court disagreed. Notwithstanding the problems that remained in certain areas, the Court recognized that the Commonwealth had undertaken major reforms and shown a new financial commitment to public education. Thus the Court declined to hold that the Commonwealth was not meeting its constitutional obligations at that time. Notably, the opening paragraphs of the Chief Justice's concurring opinion in *Hancock* encapsulate the value and purpose that the Commonwealth has accorded public education for over three and a half centuries:

> For its effective functioning, democracy requires an educated citizenry. In Massachusetts the democratic imperative to educate finds strong voice in the "education clause" of the Massachusetts Constitution . . . an enforceable duty on the magistrates and Legislatures of the Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live. This reflects the conviction of the people of Massachusetts that, because education is fundamentally related to the very existence of government, the Commonwealth has a constitutional duty to prepare all of its children to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts.[48]

III. PUBLIC EDUCATION IN PENNSYLVANIA

Pennsylvania's early experience with public education was markedly different, but ultimately governmental responsibility for providing public education in that mid-Atlantic state evolved into one comparable to that assumed by the Commonwealth of Massachusetts from its earliest days. Given Pennsylvania's diverse groups of settlers, it took some time for the practical benefits of common schools to overcome the individual group interests in controlling their cultures and the religious training of their youth.

As early as 1682, William Penn expressed in his Frame of Government his vision that the State government should promote public schools, writing that the Governor and Provincial Council "shall erect and order all public schools."[49] But the demography of Pennsylvania was not conducive to Penn's vision. Founded upon the principle of religious freedom, the people who settled in Pennsylvania were a

48. *Id.* at 1137 (internal quotations, citations and footnotes omitted).

49. BUTTS & CREMIN, *supra* note 2, at 87-88.

heterogeneous group of various Protestant sects, wary of the possibility that reposing the responsibility for educating the colony's youth might give the more powerful or populous religious groups the opportunity to propagate their own religious beliefs in the public schools. Nevertheless, there was a commonly held value that all should be able to read the Bible. What evolved was a system of state-supported chartered schools run by the various religious denominations and other private corporations. The colony enacted legislation in 1712 and 1713 providing that all religious denominations of Protestants would be permitted lawfully to buy land for the erection and support of public schools. Thus when Benjamin Franklin proposed his "public school," the practice was to obtain a charter from the government granting the privilege of establishing a private school to a corporation, religious or private, managed and supervised by a board of trustees. Such schools were public only in the sense that they were chartered by the state and may have received some state funding.

The Commonwealth itself retained the obligation to provide for education only for the poor and destitute and to establish a university. Pennsylvania's Constitution of 1776 provided:

> A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct at low prices: And all useful learning shall be duly encouraged and promoted in one or more universities.[50]

Fourteen years later, Pennsylvania's education article was amended to clarify that the governmental obligation to provide for a free education extended only to the poor:

> The legislature shall, as soon as conveniently may be, provide, by law, for the establishment of schools throughout the State, in such manner that the poor may be taught gratis.[51]

To fulfill its constitutional responsibility, the Pennsylvania legislature passed laws in 1802, 1804 and 1809 providing for "pauper schools."[52] This legislation did not actually establish any state-owned

50. PA. CONST. of 1776, ch. 2, § 44.

51. PA. CONST. of 1790, art. VII, § 1.

52. Act of Mar. 1, 1802, ch. 34, 1802 Pa. Laws 76; Act of Mar. 19, 1804, ch. 65, 1804

or operated schools, only that the government would set aside an education poor-fund and pay tuition for poor children to attend privately owned charity schools. But in order for children to attend such schools, their parents were required to declare themselves paupers. The 1802 legislation, for example, directed overseers of the poor to notify indigent parents that if they would declare themselves to be paupers, their children could go to either a private or pay school for free. These laws were commonly detested and became regarded as clearly ineffective.

The Philadelphia Society for the Establishment and Support of Charity Schools, and later joined by The Society for the Promotion of a Rational System of Education, urged far-reaching reforms to educate Pennsylvania's youth more effectively. Philadelphia, then several other counties, sought and obtained leave from the State legislature to be exempt from the pauper school laws and to organize their own schools, but still relatively few attended these schools.

The battle for more inclusive free public schools gained momentum, and in 1824, the legislature enacted an optional free school law permitting the organization of public schools where a child could attend at public expense for up to three years.[53] But that law was repealed in 1826 and the old pauper school law was reinstated. Another press for free public schools was made in 1834, spearheaded by The Pennsylvania Society for the Promotion of Public Schools. These efforts led to the enactment of the Free School Act of 1834, which created a school district for each and every ward, township, and borough in the state and gave it the option of organizing free public schools or continuing under the old pauper schools laws.[54]

In the district elections held that year, 502 of the 987 districts that were created voted to accept the new law. The districts along the northern border, most influenced by New England attitudes, and western districts were more likely to vote for the new system. The predominantly German counties in the east-central portion of the state opposed the new law, partly because the new law established English schools, partly because they feared the effect of public schools on the established parochial schools, and partly because they objected to the increased taxation that would be required to fund these schools.[55] These groups fought hard for repeal of the free school law, but ultimately an

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Pa. Laws 298; Act of Apr. 4, 1809, ch. 114, 1809 Pa. Laws 193.

53. Act of Mar. 29, 1824, ch. 88, 1824 Pa. Laws 137.

54. Act of Feb. 9, 1834, no. 24, 1834 Pa. Laws 22.

55. CUBBERLEY, *supra* note 2, at 143-44.

even stronger free school law was passed by pro-public education forces, providing for state aid to the school districts choosing to establish free public schools, authorization for local taxation, and a mechanism for state supervision over the public schools. By 1836, seventy-five percent of the districts had opted in; by 1847, eighty-eight percent had done so.[56] In 1848 and 1849, the Pennsylvania legislature enacted laws for a state-wide system of free public education.[57]

Soon after, the policy preference for governmental establishment of a system of free public schools came under attack in the state courts. In *Commonwealth v. Hartman*,[58] several elected district officials from an eastern county made provision only for educating only the poor in their township, as had been done under the old pauper school laws. When a petition for their removal was filed for failing to comply with the 1848 and 1849 laws, they defended on the ground that the 1848 and 1849 laws were unconstitutional in that they were at variance from the education article that required only that the legislature provide for the establishment of schools "in such a manner that the poor could be taught gratis." The Pennsylvania Supreme Court rejected that argument, holding the education article sets a minimum limitation on the legislative power, but does not define the legislature's maximum power, writing, "it enjoins them to do this much, but does not forbid them to do more."[59] This landmark case established the power of the state to establish a system of free common schools without express constitutional direction.

Pennsylvania's power to maintain a system of free public schools became a mandatory constitutional duty with the ratification of an 1873 amendment to the Pennsylvania Constitution. Similar to other states' education articles adopted around that time, Pennsylvania's new provision read:

> The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.[60]

A century later brought a new constitutional challenge under the

56. *Id.* at 145.

57. Act of Apr. 11, 1848, no. 366, 1848 Pa. Laws 536; Act of Apr. 7, 1849, no. 316, 1849 Pa. Laws 441.

58. 17 Pa. 118 (1851).

59. *Id.*

60. PA. CONST. art. III, § 14.

state's education article, but this time plaintiffs claimed that the Commonwealth was not doing enough to comply with its mandate. In *Danson v. Casey*,[61] school officials and parents of students attending the City of Philadelphia's schools brought suit against state officials claiming that the state's funding system violated the state's education article. Unlike the other school districts in Pennsylvania, the Philadelphia school district had no independent authority to levy taxes directly upon its residents. Instead, the board was required annually to submit an operating budget to the city's mayor and council and to request authorization to levy taxes to balance the proposed budget for that year. The city council was statutorily empowered to authorize the school board to levy such taxes. In addition, the state itself provided state-wide education aid per student based on a formula that reflected the real estate and personal income tax base of the district. Plaintiffs claimed that this system failed to provide enough funds to educate Philadelphia's students.

The Pennsylvania Supreme Court rejected the claim. The Court found no allegation that the children of Philadelphia were being denied a minimally adequate education. To the extent that plaintiffs alleged that there were insufficient funds to provide a normal education, the Court held the question to be non-justiciable because there is no manageable standard by which the courts could adjudge the specific components of a "thorough and efficient education."[62] Moreover, the Court noted, one purpose of the education article was to enable successive legislatures to adopt changing programs to keep abreast of the educational advances and societal needs, and to prevent binding the hands of future legislatures and school boards by defining once and for all what is constitutionally required for a "thorough and efficient education."[63] This same concern, the Court believed, counseled against the judiciary doing so.

Next the Court rejected the argument that the education article of the Pennsylvania Constitution requires some sort of uniformity of education practices across the state. Looking back at the history of the 1873 amendment, the Court found that the framers specifically rejected that notion and instead "endorsed the concept of local control to meet diverse local needs and took notice of the right of local communities to utilize local tax revenues to expand educational programs subsidized by

61. 399 A.2d 360 (Pa. 1979).
62. *Id.* at 366.
63. *Id.*

the state."[64]

Finally, the Court held that, as long as the legislative scheme for financing education bears a reasonable relation to the constitutional objective of providing for the maintenance and support of a thorough and efficient system of public schools, the legislature had fulfilled its constitutional duty. In this case, the Court found no basis to conclude that the scheme, as adopted, "clearly," "palpably," or "plainly" violated the Constitution.[65]

Twenty years later, Philadelphia school officials and parents, perhaps encouraged by the numerous state court decisions finding other states not in compliance with their constitutional mandate to provide a system of free public education, once again challenged Pennsylvania's system for financing public education, in the case of *Merrero v. Commonwealth*.[66] Once again, however, the Supreme Court declined to interject the judicial branch into a realm that the Court viewed as exclusively the province of the political branches of government.[67]

IV. IMPLICATIONS FOR EMERGING DEMOCRACIES

What principles can be gleaned from these experiences that may aid in shaping the government's obligations to provide a system of free public education in emerging democracies? The relevance of the American experience may well be too attenuated to provide much guidance, in light of cultural differences, socioeconomic circumstances, the size and demography of the newly formed nation, pre-existing educational institutions, and the overall structure of the emerging government itself. To the extent that there is relevance, some of the principles to be garnered from the American experience with public education are as follows:

1. In the United States' experience, the country was too large and diverse to define a constitutional role for the national government in providing a system of public education. The unit of the state proved a much more workable level for administering this function. And as the nation grew to define itself as a nation instead of a collection of independent states, concepts relating to national citizenry found their way into the states' school systems. (Query: Is the decentralization of governmental responsibility for providing public education necessary to

64. *Id.* at 367.
65. *Id.*
66. 739 A.2d 110 (Pa. 1999).
67. *Id.* at 112-14.

preserve freedom of thought and speech?)

2. Although overall responsibility for public education proved workable at the state level, responsibility for day-to-day administration of the public schools is best placed at a local level—at the level of the "school district," which may or may not correspond to the municipal boundaries of villages, towns, cities, or counties. At this level, citizens who have the greatest stake in the school system can have meaningful input in the schools and tailor the education provided in those schools to their own interests, so long as the schools meet minimum standards established by the states. Local school districts have the authority to levy taxes to pay for their share of public education expenses.

3. Funding for the public education is a joint state and local responsibility, with the states being ultimately responsible inasmuch as local school districts are creatures of the states whose authority and obligations are defined by the state.

4. The attempt to maintain religiously segregated public schools, with public funds going to all religious groups, proved unworkable. The collective conclusion that national and/or state interests were more important than having religious education in schools and the recognition that religious education could be accommodated at home and church, led to secular public school systems. Religiously segregated public schools in any event would have been unconstitutional under the First Amendment, which forbids the governmental establishment of religion, when that provision ultimately became applicable to the states upon ratification of the Fourteenth Amendment in 1868.

5. The attempt to maintain racially segregated schools also proved unworkable and unconstitutional under the Equal Protection Clause because separate schools inherently could not provide equal educational opportunities.

6. Including in the constitution an education article or provision defining governmental responsibility for providing a system of public education may or may not be found enforceable by the judicial branch of government.

It may not be possible or desirable to define at the outset a constitutional responsibility for the government of an emerging democracy to provide a system of public education. It may be that the government's role must evolve through experience before the parameters relevant to a particular society become apparent. Thus the first question is whether it is desirable to jump-start the process by defining the government's responsibility for public education at the inception of the democratic nation. If the answer to that question is yes,

then the principles gleaned above in combination with information about how public education systems work in other democracies can inform how that responsibility is defined. Clearly, a more global perspective is necessary, but the experience of this Nation, and in particular its states, may help inform the decision-making process when formulating the constitutions of fledgling democracies.