

# MERCATUS ON POLICY

## Education Policymaking from the Bench: Lessons from New Jersey and Connecticut

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November 2017



**MERCATUS CENTER**  
George Mason University

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### STATE CONSTITUTIONS CAN AFFECT FISCAL

policy either by acting as fiscal restraints that limit the scope of government or by imposing fiscal pressures that expand or place demands on government.<sup>1</sup> One way to effectively design state constitutions of special relevance for the issue of public education is to legislate policy issues rather than mandating them in the constitution, thereby ensuring that policymakers have the flexibility to adapt to changing circumstances.<sup>2</sup>

Education spending constitutes over a quarter of total US state and local government spending, so it is important to understand how education policy and finances are shaped by state constitutions.<sup>3</sup> Every state constitution contains an education clause, each of which places different education spending obligations on the legislature.<sup>4</sup> State education clauses have been the object of litigation for decades, and education scholars typically divide the history of litigation into “waves,” denoting a shift in focus from whether educational opportunities for public school students are distributed equitably (“equity”) to whether educational opportunities meet a quality threshold (“adequacy”). According to one analysis, only six states have had not had a court rule on school education funding.<sup>5</sup>

### NEW JERSEY

New Jersey has been mired in litigation for nearly five decades, starting in 1970 with the filing of a complaint regarding state education funding; the case *Robinson v. Cahill* alone produced seven decisions from 1973 to 1976.<sup>6</sup> The first *Robinson* decision came down in 1973, days after the US Supreme Court had ruled in *San Antonio Independent School District v. Rodriguez* that federal equal protection claims were inapplicable to school finance; the *Robinson* decision thus “redirected and reinvigorated the litigation

campaign for school-finance reform” with a focus on state constitutional provisions.<sup>7</sup> A 1981 suit, *Abbott v. Burke*, produced 22 decisions from 1985 to 2017.<sup>8</sup>

This litigation is driven by New Jersey’s education clause, which reads, “The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”<sup>9</sup> Thus, for over four decades, the courts have been forced to wrestle with what obligations the phrase “thorough and efficient” places on the state, especially in poor school districts. These issues are difficult enough to begin with, and vague constitutional provisions like New Jersey’s add uncertainty into fiscal policymaking and give judges broad discretion, allowing them to be de facto legislators.<sup>10</sup>

Judges in the *Robinson* and *Abbott* cases have focused on both spending and policy details. In a single decision of the *Abbott* case, the New Jersey Supreme Court ruled on school construction, the length of the preschool and kindergarten days, an overhaul of schools known as “whole-school reform,” class size, and facilities for art and music.<sup>11</sup> These are vitally important issues in education policy, no doubt, but it is reasonable to ask whether judges are best positioned to be deciding among competing visions of public education. Perhaps reflecting frustration with its role, the court wrote,

Disputes inevitably will occur and judicial intervention undoubtedly will be sought in the administration of the public education that will evolve under these remedial standards. Nevertheless, because of the Commissioner’s strong proposals for educational reform and the Legislature’s clear recognition of the need for comprehensive substantive educational programs and standards, we anticipate that these reforms will be undertaken and pursued vigorously and in good faith. Given those commitments, this decision should be the last major judicial involvement in the long and tortuous history of the State’s extraordinary

effort to bring a thorough and efficient education to the children in its poorest school districts.<sup>12</sup>

This opinion was written in 1998 in the case known as *Abbott V*. Nearly 20 years later, we are now up to *Abbott XXII*. What the judges may have missed is that the underlying issues in the lawsuit are based on conflicts over competing visions of public education’s design and funding. These conflicts will not disappear, and in fact they will evolve over time as the people within the legislative and executive branches change. New Jersey courts’ deep involvement in education policy through the *Abbott* case set the stage for decades of litigation, with judges either managing or crafting education policy.

It is tempting to use the New Jersey saga as an illustration of the perils of *vague* clauses in state constitutions. However, the issue is sometimes not the clarity or even the strength of the clauses, but rather, the mere *presence* of the policy issue in the constitution. As one observer notes, New Jersey has been viewed as having a relatively weak constitutional protection for education, and “in fact, there almost seems to be an inverse correlation—the weak and relatively weak provisions have led to more expansive interpretations than the relatively strong and strong provisions.”<sup>13</sup> By mandating that state governments fund education, state constitutions open the door to judge-made policy.

## CONNECTICUT

Connecticut provides another example. Its constitution’s education clause reads, “There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.”<sup>14</sup> In September of 2016, based on this provision, a superior court judge issued a 250-page ruling which makes clear his intent to remake education policy:

In Connecticut’s constitution, the state promises to give children a fair opportunity for an elementary and secondary school education. This doesn’t

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mean the courts can tell the General Assembly how much to spend on schools. But the language can't mean that the state can leave learning to chance. It has to mean that the state must do thoughtful, visible things to give them that opportunity. To put it as a legal proposition, beyond a bare minimum, it is for the General Assembly to decide how much to spend on schools, but the state must at least deploy in its schools resources and standards that are rationally, substantially, and verifiably connected to teaching children. It isn't a lot to ask, but asking it raises doubts about many of our state's key education policies.<sup>15</sup>

The decision went on to discuss funding, the perils of online education, the meaning of a course "credit," state education standards, and teacher evaluation systems, among other topics.

### ANALYSIS

Connecticut and New Jersey are just two of the states with education policies being managed by the judicial system—often for years. For instance, the Kansas Supreme Court in October 2017 handed down the latest ruling in *Gannon v. State*, a case that has been ongoing since 2010.<sup>16</sup> Education litigation driven by state constitutional clauses has created situations where policy and spending decisions are now subject to the approval or direction (or both) of the court system.

The academic literature is mixed as to whether it was court-ordered spending increases, redistribution, or both that improved education outcomes, especially for poor students.<sup>17</sup> There is much more agreement that money, if not deployed properly, is unlikely to

have a meaningful effect on outcomes. For instance, three scholars who wrote a much-debated paper about education reform—and found positive effects of spending increases imposed by court decisions on future earnings of students—note, "Importantly, we find that how the money is spent may be important. As such, to be most effective it is likely that spending increases should be coupled with systems that help ensure spending is allocated toward the most productive inputs."<sup>18</sup>

By forcing courts to adjudicate disputes about education, we either place them in the position of constraining their rulings to a focus on inputs (spending), which at best is necessary but not sufficient for improving education,<sup>19</sup> and at worst has no effect; or place them in the position of acting as a policymaker in an attempt to reform the educational system, like the judge in Connecticut or perhaps a future judge who decides to mandate the creation of "systems that help ensure spending is allocated toward the most productive inputs." In the former case, judges take on something akin to the power of the purse—the province of legislatures. In the latter case, they become policymakers—the province of the legislative and executive branches. It is reasonable to ask, should the courts be placed in either role?

### LESSONS FOR STATE CONSTITUTIONAL DESIGN

The lessons of education litigation are instructive for constitutional design more generally. Specifically, once a policy area is addressed in the state constitution, the associated fiscal pressure imposed on state governments is constrained only by the creativity of judges. Given that several states have provisions related to public health and the environment, it is

conceivable that if political winds shift, we could observe judges become increasingly involved in these areas as well, in terms of mandating certain types of policies or spending.

Of course, education, public health, and the environment are important policy issues over which there should be vigorous debate. But the education decisions in New Jersey and Connecticut raise an important question: are the courts the proper venue for such debates? The more fiscal pressures placed in state constitutions, the greater the power courts will have to direct the size of budgets, prioritize certain categories of spending over others, and determine which policies must be implemented to meet constitutional obligations. This should be kept in mind as modifications to state constitutions are proposed in the future.

## NOTES

1. Some examples and/or concepts in this paper were first presented in David M. Primo, "State Constitutions and Fiscal Policy" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, August 2016).
2. Primo, "State Constitutions and Fiscal Policy."
3. Primo, "State Constitutions and Fiscal Policy."
4. Primo, "State Constitutions and Fiscal Policy."
5. Education Law Center, *School Funding Litigation*, January 6, 2017.
6. Douglas S. Reed, "People v. the Court: School Finance Reform and the New Jersey Supreme Court," *Cornell Journal of Law and Public Policy* 4, no. 1 (1994), art. 9.
7. Russell S. Harrison and G. Alan Tarr, "School Finance and Inequality in New Jersey," in *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns* (Westport, CT: Greenwood Press, 1996), 178.
8. A history provided by the original plaintiffs' attorneys can be found here: Education Law Center, "The History of Abbott v. Burke," accessed October 13, 2017, <http://www.edlawcenter.org/cases/abbott-v-burke/abbott-history.html>.
9. N.J. Const. art. 7, § 4.
10. Primo, "State Constitutions and Fiscal Policy," 20–21.
11. *Abbott v. Burke*, 153 N.J. 480 (1998).
12. *Abbott v. Burke*.
13. Paul L. Tractenberg, "Education," in *State Constitutions for the Twenty-First Century*, vol. 3, *The Agenda of State Constitutional Reform*, ed. G. Alan Tarr and Robert F. Williams (Albany, NY: State University of New York Press, 2006), quoted at 264.
14. Ct. Const. art. 8, § 1.
15. Connecticut Coalition for Justice in Education Funding, v. Rell, Docket No. X07 HHD CV 145037565 S (September 7, 2016).
16. *Gannon v. State*, 2017 Kan. 113,267.
17. See Primo, "State Constitutions and Fiscal Policy," for a discussion of this literature. For a book-length treatment, see Eric A. Hanushek, ed., *Courting Failure: How School Finance Lawsuits Exploit Judges' Good Intentions and Harm Our Children* (Stanford, CA: Hoover Institution Press, 2006).
18. C. Kirabo Jackson, Rucker C. Johnson, and Claudia Persico, "The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms," *Quarterly Journal of Economics* 131, no. 1 (2016), 214.
19. Jackson, Johnson, and Persico argue that it is a necessary condition.

### About the Authors

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