Foreword: The 'Constitutional Moment'

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1 Introduction

In 2004, the University of Pretoria sponsored an international education law conference to celebrate the tenth anniversary of multi-racial democracy in South Africa and the fiftieth anniversary of the US Supreme Court's decision in *Brown v Board of Education*.[1] For three days, scholars from South Africa, the United States, and Europe discussed equal educational opportunities.[2] The organisers of the Conference correctly recognised that the 1994 South African election and the 1954 American court decision were watershed events for each nation. After *Brown* and the election of Mandela, each nation reaffirmed the self-evident truth – all are created equal.[3]

Yet, on closer examination, the decision that ended segregated schools in America and the voluntary transfer of power from the white minority to a leader elected by all South Africans are very different events and represent fundamentally different aspects of a constitutional democracy where the rule of law is supreme. For South Africa, that miraculous week in April of 1994 was the Democratic Moment – the time when all people, not just a small elite, exercised sovereignty over their nation's destiny.[4] For the United States, that day in May of 1954 was the Constitutional Moment – the time when the judiciary declares that the Constitution requires a fundamental transformation of governmental policy

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[1] 347 US 483 (1954).

[2] Many of the papers presented at that conference are collected in Russo, Beckmann and Jansen (eds) *Equal educational opportunities* (2005).

[3] United States Declaration of Independence.

[4] One can debate when America had its Democratic Moment. Although America was conceived in liberty and dedicated to the proposition that all are created equal (Gettysburg Address) the process of expanding and guaranteeing the franchise to all was long and arduous.

and, at least indirectly, of society.[5]

A constitutional moment involves a determination that 'the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution',[6] but it is much more than a simple act of judicial review. In most instances, a finding of unconstitutionality results in a small change – a minor amendment to a statute, the non-enforcement of a regulation, or a subtle change in how government does business. A constitutional moment, however, demands a major course correction. After a constitutional moment, nothing is ever the same.

I believe that South Africa needs a constitutional moment like *Brown*.[7] The South African Constitution – forged in a time of crisis[8] – unites a rainbow nation with eleven official languages, countless ethnic groups, and a tragic history that has seen both blacks and Boers subjected to human rights abuses.[9] The South African Constitution guarantees to everyone a basic education and, in some contexts, guarantees further training and certain language rights.[10] Yet, as the Co-Chair of the Constitutional Assembly reminds us, words on a piece of paper – no matter how inspiring – are meaningless unless those words guide and direct our public and private lives.[11]

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[5] In *Brown v Board of Education of Topeka,* 347 US 483 (1954), the American Supreme Court finally enforced the United States Constitution's explicit guarantee of racial equality (US Const amend XIV). Although there is some debate as to whether *Brown* was the definitive event in the American civil rights movement, there is no doubt it was significant. See Klarman *From Jim Crow to civil rights: The Supreme Court and the struggle for racial equality* (2004). Yet, *Brown* has another significant facet – it literally invented the field of education law. While there were certainly examples of judicial enforcement of educational rights before *Brown,* these were exceptions, not the rule. After *Brown*, judicial enforcement of educational rights became the norm. Moreover, judicial enforcement of educational rights soon spread to other contexts – including finance, gender discrimination, disability rights, and procedural due process for students. In a sense, *Brown* is responsible for the cases that, since 1982, fill over 280 volumes of the *Education Law Reporter*. It is why there are several thousand lawyers in the United States who practice education law exclusively. It is why American universities have professors of education law. It is why school administrators and teachers almost instinctively think of the legal ramifications of their actions. It is why a culture of constitutional law dominates American educational policy-making.

[6] *Federalist* 78 (Alexander Hamilton).

[7] The analogy to Brown is appropriate, yet incomplete. There are significant similarities and significant differences between the constitutional experiences of South Africa and the United States. See generally Kende *Constitutional rights in two worlds: South Africa and the United States* (2009).

[8] For a comprehensive account of those events in South Africa, see Sparks *Tomorrow is another country* (1994).

[9] For a discussion of the negotiations that led to the South African Constitution negotiations, *see* Rautenbach and Malherbe *Constitutional law* (2004) (4th ed) 17-21; Motala and Ramaphosa *Constitutional law: Analysis and cases* (2002) 1-11.

[10] South Africa Constitution s 29.

[11] Wessels 'Constitutional values: The launching pad for human rights interpretation and a value driven society' Keynote Address to the Interuniversity Centre for Education Law and Policy's *Conference on interpreting the South African Constitution in educational contexts* Sandton, Gauteng South Africa 1 (2012-07-01).

The gap between constitutional rhetoric and reality is immense.[12] Just as the Supreme Court of Kentucky invalidated all educational statutes in 1989,[13] I think there is a plausible argument that the Constitutional Court should declare that the entire educational system is broken and order the People's representatives to try again.[14]

Yet, regardless of whether South Africa's constitutional moment involves a wholesale invalidation of the education scheme or simply a demand for dramatic change, it will involve the enforcement of the South African Constitution in educational contexts. Before the Constitutional Court can enforce the Constitution in educational contexts, the Constitutional Court must first determine what the Constitution means in educational contexts. Determining the meaning of the Constitution in educational contexts is a complex process that ultimately will involve academics, attorneys, and foreign scholars.

In late July 2012, the Interuniversity Centre for Education Law and Policy brought together professors of education policy, constitutional advocates, and American scholars for a two-day conference on *Interpreting the South African Constitution in Educational Contexts*.[15] The Conference represented the opening discussion in what will be a long debate over the meaning of educational rights and duties as well as the judicial role in their enforcement. The articles in this special issue of *SA Public Law* represent some of the best of the papers presented at the Conference. My co-editor, Rika Joubert, and I hope that this special issue will continue the conversations begun in Sandton and, ultimately, will lead to the Constitutional Moment.[16]

Within this special issue are several provocative articles. Rika Joubert, a professor of education law at the University of Pretoria reminds us that every provision of the Constitution limits the power of government. When the Constitution guarantees a right to education, it limits the government's discretion

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[12]Recent events illustrate the point. The National and Provincial authorities in Limpopo failed to provide textbooks for more than six months. De Vos 'On the real immorality in our society' *Constitutionally Speaking* (2012-05-21) available at http://constitutionallyspeaking.co.za/on-the-real-immorality-of-our-society (2012-06-01). The failure of the government to provide textbooks renders the education right essentially meaningless. It was only when Judge Kollapen of North Gauteng High Court ordered the government to deliver the textbooks and to provide a remedial plan for year ten learners that the constitutional right was vindicated. *Ibid*.

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

[14]To be sure, the South African Government has made tremendous progress toward educational equality in the years since the demise of apartheid. Many South Africans, of all races, are receiving world-class instruction. However, progress, no matter how commendable, does not necessarily mean that the government has met its constitutional obligations.

[15]Constitutional analysis actually involves two activities – constitutional interpretation and constitutional construction. See Balkin *Living organalism* (2012) (Kindle ed) 32-35. Constitutional interpretation is the process of determining the meaning of each provision. If constitutional interpretation is inadequate, then courts must employ constitutional construction and develop a precise legal rule.

[16]Wessels (n 11) 5-6.

– Parliament must act so that the educational right is vindicated. Johan van der Vyver, a former Dean of the University of Pretoria's Law Faculty and currently a scholar at Emory University, offers some thoughts on how the South African Constitution protects education. Suzaan van der Merwe, a legal scholar with the Federation of Governing Bodies of South African schools, offers some insights into the meaning of basic education in the constitutional text. Ann Skelton, one of the leading Constitutional Court litigators, speculates on how far the South African judiciary will go in enforcing the constitutional text. TK Daniel, a professor at Ohio State University and one of America's experts on race and education, details the consequences of the United States Supreme Court's refusal to recognise in a national constitutional right to an education. His piece serves as a cautionary tale for the South African judiciary. Scott Bauries, a law professor at the University of Kentucky and one of the leading theorists on positive rights in the state constitutions, compares the South African constitutional provisions with those found in the American state constitutions. He offers both hope and a warning for those who would seek to use the courts to change South African education.

The emphasis then shifts to specific problems. Trynie Boezaart, Departmental Head of Private Law at the University of Pretoria, and chairperson of the Board of the Interuniversity Centre for Education Law and Policy, examines the meaning of the Constitution's education provision for children with profound disabilities. Johan Beckmann, an education law professor at the University of Pretoria, discusses the meaning of the Constitution with respect to pre-school children. Susan Coetzee, an associate professor at the University of South Africa, details the unique rights of those learners who become pregnant before they graduate. Finally, Francois Venter, the Dean of the Law Faculty at the University of the North West, describes why the government's policy of neutrality toward religion in the classroom is not neutral and violates the Constitution.

Although the articles in this special issue tend to focus on a particular problem or circumstances, this foreword takes a more general approach. In the pages that follow, I explore the broad principles that, in my opinion, should govern any analysis of the South African Constitution in educational contexts.[17] This foreword has three parts. Part I explains why judicial review is important in both America and South Africa. In my view, the Constitution represents the ultimate expression of the People and, thus, trumps the actions of the People's representatives. Part II discusses what I regard as the appropriate method of interpreting the Constitution. If judges are to respect, rather than subvert, the democratic process, judges must utilise the original public meaning of the constitutional text. Finally, because interpretation often is inadequate to resolve

[17]A comprehensive analysis of the South African Constitution in educational contexts is well beyond the scope of this introductory essay. Such an undertaking would require a detailed discussion and comparison of both South African and American constitutional theories as well as a careful attempt to apply South Africa's fundamental law in a variety of situations.

the constitutional issue, Part III details my thoughts on how the Court should develop constitutional constructions. Since education is vital to the achievement of equality, freedom, and dignity, I believe educational rights and duties must prevail over other constitutional rights and duties.

2 The need for judicial review

Judicial review – the idea that the judiciary may review the actions of the government and invalidate those actions that are contrary to the Constitution – is inherently controversial in both America and South Africa. In America, President Obama suggested that it was 'undemocratic' for the Court to invalidate his signature legislative achievement. Various progressives suggested that the Court's legitimacy would suffer if it did not uphold all aspects of the Affordable Care Act.[18] On the right, former Speaker Gingrich, a candidate for the Republican presidential nomination, declared that the Supreme Court's interpretation of the Constitution is not binding on the President or the Congress.

Similar tensions exist in South Africa. The recent 'discussion paper' on the judiciary[19] suggests 'the government is at best uneasy with the notion of an independent Constitutional Court that acts as a vigorous but necessary check on the other branches of government'.[20] Instead, the government appears to 'prefer a court that works *with* government to achieve a common goal – rather than a court that vigorously and in an 'activist' manner checks the powers of the other two branches of government and embarrasses the legislature and especially the executive by sometimes declaring some of their actions unconstitutional and invalid'.[21] Since 'South Africa essentially remains a one-party state in which the ANC has severely criticised the Court and does not brook dissent',[22] 'the rule of law and judicial independence could be at risk'.[23]

Yet, despite the controversial nature of judicial review, it is an essential component of the constitutional system in both nations. To explain, a democratic constitution is the ultimate expression of the people's will. As one of the drafters of the South African Constitution explained:

> The values contained in a Constitution are the result of a country's history. It also gives an indication of the type of community that the People of the country wish to achieve. South Africa wants to move away from a closed, repressive, racially-

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[18]See Editorial 'Targeting John Roberts' *Wall Street Journal* (2012-05-22) A15.
[19]Department of Justice and Constitutional Development *Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state* (2012).
[20]De Vos 'Mixed signals on the review of our courts' *Constitutionally Speaking* (2012) available at http://constitutionallyspeaking.co.za/mixed-signals-on-the-review-of-our-courts (2012-06-01).
[21]*Ibid*.
[22]Kende (n 7) 299.
[23]*Id* 300.

> based oligarchy toward an open democratic society anchored in the values of human dignity, equality, and freedom.[24]

Put another way, a democratic constitution defines what a nation is and what the nation hopes to become.

Although the people entrust their elected leaders 'to pursue the ends of the [People], rather than their own ends, and they will do so with an eye toward the effects of adopted policies',[25] it is inevitable that the representatives will betray that trust. 'If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary'.[26] A constitution assumes that a government made up of imperfect men and women will betray the people's trust.[27] It is the role of the judiciary to prevent this betrayal. The judiciary must compare the actions of the people's leaders, as expressed in the statutes and executive actions, with the will of the people, as expressed in the Constitution.[28] As the Constitutional Court observed, 'Our task is to give meaning to the Constitution and, where possible, to do so in ways that are consistent with the underlying purposes and not detrimental to effective government'.[29] As a South African constitutional framer declared, 'Parliamentary laws and actions programmes have to be in harmony with the constitutional values and rights. If this is not the case, then the Constitutional Court may declare it as unconstitutional'.[30] Indeed, it was a desire to avoid constitutional accountability that prompted the exclusion of judicial review in the 1961 Apartheid Constitution.[31]

3 Interpreting the South African Constitution

Although judicial review is essential to the constitutional system, it is potentially dangerous to the values of democracy. Because the judiciary has the power to overturn the actions of the People's elected leaders, there is a real chance that judges will become 'a bevy of Platonic Guardians',[32] who 'substitute their predictive judgments for those of elected legislatures and expert agencies'.[33] As Justice Sachs observed, the judiciary must 'be sensitive to considerations of

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[24] Wessels (n 11) 2. See also Chaskalson 'Human dignity as a foundational value of our constitutional order' (2000) 16 *SAJHR* 199.
[25] Bauries 'The education duty' *Wake Forest LR* (forthcoming 2013).
[26] *The Federalist* no 51 (James Madison).
[27] The Constitutional Court's refusal to accept the first proposed Constitution illustrates this principle. *See In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC).
[28] *The Federalist* No 78 (Alexander Hamilton).
[29] *State v Makwanyane* 1995 3 SA 391 (CC) para 108.
[30] Wessels (n 11) 3.
[31] 1961 South African Constitution s 59(a).
[32] *Griswold v Connecticut* 381 US 479, 513 (1965) (Black J dissenting).
[33] *Lingle v Chevron* 544 US 528, 544 (2005).

institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity'.[34] Thus, the challenge for judges is to interpret the Constitution to ensure that elected officials do not transgress the people's fundamental law while at the same time respecting the policy choices made by those elected officials.

Much ink has been – and will be – spilled in both America and South Africa trying to develop a theory of constitutional interpretation that accomplishes this objective.[35] Yet, I believe the answer is clear. In my view, the only interpretative method that holds elected officials accountable to the Constitution while also allowing elected officials to exercise policy discretion is original meaning originalism.[36]

Under original meaning originalism, 'the words of the Constitution should be interpreted according to the meaning they had at the time they were enacted'.[37] Original meaning originalism is separate and distinct from original intent originalism.[38] 'Whereas original intent originalism seeks the intentions or will of the lawmakers or ratifiers, original meaning originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment'.[39] As a participant in South Africa's constitution making process observed, 'the responsibility of imparting content and bringing into force the constitutional values is too important to leave to [the legal profession]. This is the reason why the Constitution is written in layman's terms …'.[40] While knowing what the authors of a particular constitutional provision intended can be helpful in ascertaining the original meaning of the provision,[41] 'it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated'.[42] Thus, the original meaning of the words, not the original intent, is the touchstone.

Moreover, in my understanding of original meaning originalism, 'fidelity to original meaning does not require fidelity to original expected application'.[43] 'What judges must be faithful to is the enacted law, not the expectations of the parties

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[34] *Prince v President of the Law Society of the Cape of Good Hope* 2002 1 SACR 431 (CC).
[35] In the American context, see, eg, Breyer *Active liberty* (2005); Dworkin *Law's empire* (1986); Ely *Democracy and distrust* (1979).
[36] Original meaning originalism may be the most popular constitutional theory in the legal academy. Somin 'Originalism and political ignorance' *Minnesota LR* (forthcoming 2012) (available on Social Science Research Network).
[37] Barnett *Restoring the lost Constitution: The presumption of liberty* (2005) 88.
[38] *Id* 88-92.
[39] *Id* 91 (internal quotation marks omitted).
[40] Wessels (n 11) 3.
[41] Calabresi and Rickert 'Originalism and sex discrimination' *Tex LR* (forthcoming 2012).
[42] Scalia 'Common-law courts in a civil-law system: The role of United States federal courts in interpreting the Constitution and laws' in Gutmann (ed) *A matter of interpretation: Federal courts and the law* (1997) 1, 17.
[43] Balkin 'Framework originalism and the living Constitution' (2009) 103 *NW LR* 549, 552.

who wrote the law'.[44] For example, America's adoption of the Equal Protection Clause[45] in 1868 prohibited racially segregated schools[46] and miscegenation laws[47] even though the authors of the Equal Protection probably never intended these results.[48] In short, 'it is not necessary that [constitutional drafters] understand what they have done when they enact [a constitutional provision] than it is necessary that individuals understand all aspects of what they have done when they sign a contract'.[49]

4 Developing constitutional constructions

Constitutional interpretation involves ascertaining the original meaning of words, but there are times when interpretation of the constitutional provisions does not resolve the issue. The original meaning of the text may be clear, but the question of whether the legislature has acted in accordance with the text is ambiguous.[50] 'When interpretation has provided all the guidance it can but more guidance is needed, constitutional interpretation must be supplemented by constitutional construction – within the bounds established by original meaning'.[51] In other words, if the plain language of the constitutional provisions does not provide a definitive answer, then the Constitutional Court must build upon the framework established by the constitutional text.[52]

The development of constitutional constructions involves many considerations, but this foreword focuses on three in particular – the interplay of constitutional provisions, the idea that parliament has a fiduciary duty, and the law of other nations.

First, the Constitutional Court must consider the interplay of constitutional values. Section 39 commands the courts to 'promote the values that underlie an open and democratic society based on human dignity, equality, and freedom'[53] and to 'promote the spirit, purport, and objects of the Bill of Rights'.[54] There is a

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[44]Calabresi and Fine 'Two cheers for Professor Balking's originalism' (2009) 103 *NW LR* 663, 669.
[45]US Const amend XIV, § 1.
[46]*Brown v Board of Education of Topeka* (n 5).
[47]*Loving v Virginia*, 388 US 1 (1967).
[48]Calabresi and Fine (n 41) 669-72. See also Calabresi and Rickert (n 44).
[49]Calabresi and Fine (n 41) 671.
[50]To be sure, there is a subtle – but crucial – distinction between determining the scope of a constitutional right and declaring that the right is not really worth enforcing. As the American Supreme Court noted, '[a] constitutional guarantee subject to future judges' assessment of its usefulness is no guarantee at all'. See *Heller* 554 US 634. Constitutional rights have the scope that the people who adopted the constitution intended – regardless of whether the rights are inconvenient for the current political leadership. *Id* 634-35.
[51]Barnett (n 37) 120.
[52]See Balkin *Living originalism* (n 15) 240.
[53]South African Constitution s 39(1)(a).
[54]*Id* s 39(3).

presumption against the government and in favour of the people. Section 36 makes it clear that the rights contained in the Bill of Rights are not absolute.[55] The rights of an individual or a group are diminished when it is necessary to preserve other constitutional values. Taken together, the provisions require the judiciary to limit the rights of some individuals in order to promote human dignity, equality, and freedom.[56]

Because 'it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education',[57] education is an essential component of human dignity, freedom, and equality. Indeed, given 'the importance of education in maintaining our basic institutions'[58] and given that providing 'public schools ranks at the very apex of the function of a State',[59] the judiciary arguably should subordinate other rights to educational rights. For example, if teachers were to go on strike and undermine the ability of learners to pass the matriculation examination, a court might decide to limit the labour relations' rights of teachers[60] as a means of ensuring the educational rights of the learners.[61] Conversely, the judiciary might hold that the educational rights of learners are subordinate to the labour relations' rights of their instructors. Indeed, one can argue that every provision of the Bill of Rights limits or enhances the education provision.

Second, the Constitutional Court should consider the idea that parliament has a fiduciary duty. Bauries demonstrates that constitutions are entrustments and that legislatures are fiduciaries, particularly where there is an affirmative obligation to pursue certain policy goals.[62] In other words, parliament has an 'education duty' and citizens may enforce this duty by convincing the Constitutional Court that parliament 'has acted insufficiently, either by not legislating at all (and thereby arguably violating a duty of obedience to the legislative command), or by legislating insufficiently well (and thereby violating the duty of due care)'.[63] In evaluating this fiduciary duty, the Constitutional Court must inquire, 'whether the state action achieves or is reasonably related to achieve the "constitutionally prescribed end"'.[64] If parliament cannot meet this 'rational direction' test, then the Constitutional Court orders the elected leaders to try again and to consider all relevant information and policy implications.

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[55] *Id* s 36.
[56] See *id* s 7 (obligation of the State to promote the values of the Constitution).
[57] *Brown* 347 US 493.
[58] *Plyler v Doe* 457 US 202, 221 (1982) (holding that an American State could not deny educational services to illegal immigrants).
[59] *Wisconsin v Yoder* 406 US 205, 213 (1972).
[60] South African Constitution s 23.
[61] *Id* s 26.
[62] Bauries (n 25).
[63] *Ibid*.
[64] *McCreary v Washington* 269 P 2d 227, 248 (Wash 2012) (quoting Hershkoff 'Positive rights and state constitutions: The limits of federal rationality review' (1999) 112 *Harvard LR* 1131, 1137).

Third, the Constitutional Court should consider foreign law when interpreting the Constitution in educational contexts. Although there is a significant debate as to whether foreign law has any relevance to American constitutional analysis, the people of South Africa have declared that constitutional analysis must include international law and may include foreign law.[65] Thus, the South African Constitutional Court may rely on American, Australian, Canadian, or European law interpreting individual rights or ensuring equalities.[66]

One area of foreign law that offers enormous potential for South African constitutional constructions is the experience of the American States with school finance litigation. In school finance litigation, the plaintiffs claim that the state legislature has violated the State Constitution by failing to provide enough money for the public schools.[67] Historically, litigants have relied on two different constitutional theories. In 'equity suits', the plaintiffs assert that all children are entitled to have the same amount of money spent on their education and/or that children are entitled to equal educational opportunities. Specifically, the plaintiffs contend the legislature violates the State Constitution's Equality Guarantee because education is a fundamental right, wealth is a suspect class, or the system is irrational.[68] In 'adequacy suits', the plaintiffs, relying on the State Constitutions' Education Clauses,[69] argue that the finance system is unconstitutional because some schools lack the money to meet minimum standards of quality.[70] In other words, all children are entitled to an education of at least a certain quality, and that more money is necessary to bring the worst school districts up to the minimum level mandated by the State Constitution.[71]

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[65]South African Constitution s 39(1).

[66]See Kende (n 7) ix-x (discussing the South African Constitutional Court's citation of and reliance on decisions from other nations).

[67]For an analysis of American School Finance Litigation in a readily accessible South African publication, see generally Thro 'The judicial enforcement of educational finance reform: American lessons for South Africa' in Van Rooyen (ed) *Financial management in South African public education* (2012) 225.

[68]Most State Constitutions do not contain an explicit equal protection clause, but instead rely on other equality guarantee provisions, some of which the judiciary has interpreted as having the same effect as the federal Equal Protection clause. See Williams 'Equality guarantees in state constitutional law' (1985) 63 *Texas LR* 1195, 1196.

[69]Every State has a state constitutional provision dealing with the establishment of a public school system. See Thro 'School finance litigation as facial challenges' (2011) 272 *Education Law Reporter* 687, 695-696.

[70]See Underwood and Sparkman 'School finance litigation: A new wave of reform' (1991)14 *Harvard JL and Pub Pol'y* 517, 536-37; Buchanan and Verstegen 'School finance litigation in Montana' (1991) 66 *Education Law Reporter* 19, 32; Thompson 'School finance and the courts: A reanalysis of progress' (1990) 59 *Education Law Reporter* 945, 960-66; Thro 'The third wave: The impact of the Montana, Kentucky, and Texas decisions on the future of public school finance reform litigation' (1990) 19 *JL and Educ* 219, 238-39.

[71]For an extensive examination of the judicial analysis in the early adequacy cases, see Thro 'Judicial analysis during the third wave of school finance litigation: The Massachusetts decision as a model' (1994) 35 *BC LR* 597.

5 Conclusion

Education is inextricably linked to the South African constitutional narrative. Educational issues prompted the Great Trek and Boer independence, solidified Afrikaner nationalism in the early years of the 20th century, and sparked the Soweto uprisings in 1976. As South Africans negotiated a constitution for a multi-racial nation, the wording of the Education Clause in the South African Constitution was one of the most controversial issues.

If South Africa's Constitution is to survive, the advocates must convince the Constitutional Court to enforce educational rights and duties. Yet, as a former Cabinet Minister said, 'the responsibility of imparting content and bringing into force the constitutional values is too important to leave it to these people only'.[72] All of us – educators, lawyers, and, yes, Americans – have a role to play in bringing about the Constitutional Moment.

[72]Wessels (n 11) 3.