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Educating Mississippi

James L. Robertson

EDUCATING MISSISSIPPI

The Honorable James L. Robertson[*]

In Memory of Roy D. Campbell, Jr., long-time President of the Board of Trustees, Greenville Municipal Separate School District, and who gave his all to preserve and promote public education in Mississippi.

I. READIN', RIGHTIN' AND 'RITHMETIC – GOING ON MISSISSIPPI'S THIRD CENTURY

Here follows a bit more than a once over lightly of one state's ongoing endeavors at equipping its people with the learning and understanding they reasonably need that each may enjoy – in his or her continued social existence on this increasingly complex planet – a bit richer experience than their forbears had, to the end of a public order of human dignity for all.

There is a sense in which our story begins at statehood, December 1817. And not necessarily in the schoolhouse. We have been taught by so many worthy and enlightened men and women, one and all.

In 1818, at the very first term of the Supreme Court of Mississippi, Judge Joshua Giles Clarke sufficiently understood the humanity of each being on state soil – and of the law – that he decreed freedom for slaves who had been sold down the River from southwestern Indiana.[1] Judge Clarke never had much formal schooling. Yet he found and taught a core truth that by 1857 Chief Justice Roger B. Taney of the Supreme Court of the United States could not understand.[2]

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* James L. Robertson is a graduate of Harvard Law School, a former Justice on the Supreme Court of Mississippi, author of *Heroes, Rascals and the Law; Constitutional Encounters in Mississippi History* (2019); author of *Constitutional Law*, a 500 plus page exposition of Mississippi constitutional law and practice, Chapter 19, Encyclopedia of Mississippi Law (Third Edition, 2020); and has been a citizen of Mississippi since July 30, 1940. The author expresses his appreciation for the competent and diligent assistance of James "Bud" Sheppard, Sonya Dickson, Seth Curren, Keeton Thach, Melanie Mitchell, and Mississippi College School of Law Professor Donald Campbell.

1. Harry and Others v. Decker & Hopkins, Walker (1 Miss.) 36, 1818 WL1235 (1818); *see* Robertson, *Heroes, Rascals, and the Law; Constitutional Encounters in Mississippi History*, chapter 2 (2019).

2. *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 15 L.Ed. 691, 1856 U.S. Lexis 472, 1856 WL 8721 (1857).

In 1950, Mississippi's Nobel Laureate William Faulkner taught us the insight that "the past is never dead. In fact, it's not even past."[3] Most of us have needed a schoolhouse and a good American lit teacher to get through that one.

Dr. Arthur C. Guyton graduated from University High School in Oxford in 1936, a teacher all of his life, primarily at the University of Mississippi Medical School. In 1956, Dr. Guyton published his still widely used *Textbook of Medical Physiology*.

Myres Smith McDougal was born in 1906 in rural Prentiss County. By the time he passed into history, Mac had lit and illuminated "the guiding light of a preferred future world public order of human dignity,"[4] and even introduced the polemics of Space Law to the University of Mississippi.

Ida B. Wells was a native of Holly Springs, Mississippi, an educator and journalist who was a founding member of the N.A.A.C.P. and a crusading teacher, railing against lynching, which for decades was a scourge throughout much of the state.

Eudora Welty was a Pulitzer Prize winning author, with novels such as *The Optimist's Daughter* plus many short stories, still taught in Mississippi's schools and across the country.

And the list could go on and on.

No one can function effectively within today's nuanced and complex society without far more than basic competence in reading, writing, and arithmetic. Or, for that matter, without knowing well what data processing is all about. Reading newspapers and other publications is important, but being able to understand instructions and regulations for this activity or that is more important, if not crucial. Comprehending and working with more than just simple arithmetic are necessary for everyday consumer or other business transactions, accessible tax principles, rules of the road, the delineation of landlines, and much, much more.

No informed person today doubts that knowledge is power. "Informed," that is, but at the very least, by a competent high school education. Before one casts a vote for an important public office, he or she should know and understand what it means that knowledge is power.[5]

The above persons and preliminary perspectives before us, this endeavor into education in Mississippi begins with its Historical Context. Each of the state's four constitutions has addressed the matter of education

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3. William Faulkner, *Requiem for a Nun* 80 (1927).

4. W. Michael Reisman, et al., The New Haven School: A Brief Introduction, 32 YALE J. OF INT'L L. 575, 576 (2007),

5. *See* "Knowledge is Power," in Yuval Noah Harari's popular book, *Sapiens – A Brief History of Mankind*, 259-264 (2015). Much of Harari's book would serve well as a text for an upper high school level course in world history.

and its necessity for quality of life and enriching our understanding of humanity. Free Public Schools have long been and remain the core component and cornerstone of the state's effort at fulfilling the responsibility it has accepted for the education of its people.

Yet, the struggle continues. We must remain vigilant. We still have to fight the good fight.

In 1997, the state established the Mississippi Adequate Education Program (MAEP), which, with adjustments over time, still supplies the framework for the state's program for public education. An outline of public education's financial dimensions follows, given that the practical reality of inadequate financing imperils the whole system. More particularly, several citizen-sponsored resorts to the constitutional and legal system to achieve full funding came up short. These efforts that adequate funding be provided remain important components of the history and future of public education in Mississippi. Then twenty-one school districts brought an important adequate funding suit, which in 2017, sadly and arguably erroneously, was rejected by the Supreme Court of Mississippi.

The Sixteenth Section School Lands Trust is described and explained below. This was perhaps the earliest source of funding for free public education in Mississippi. A misstep by federal land offices in 1832 impaired this program for many years. Other mismanagement has been corrected so that this program is now of considerable value for the state's public schools. Section 206 of the state constitution authorizes local school districts to make special assessments to support their educational endeavors in a program that had to be righted by litigation in 2012.

Educational stratagems of more recent vintage go well beyond the opportunities available to those Mississippi children born in the late Twentieth Century. Most of these more current concerns are presented and discussed below. These include charter schools and voucher systems.

Religion in Public Schools and related issues are presented and discussed, followed by more secular considerations of LGBTQ issues. Arguably, these should be considered together with racial desegregation beginning in 1954 with *Brown v. Board of Education*,[6] presented and discussed in the latter part of the Historical Context section, which follows below.

Finally, and arguably to come full circle, there is the comeback being made by those parents who would home school their children. This legislatively authorized practice is presented and discussed, along with relevant regulations. Our end remains a preferred future world public order of human dignity for each and all.

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6. Brown v. Bd. of Educ. of Topeka, KS, 347 U.S. 483 (1954), and 349 U.S. 294 (1955).

II. HISTORICAL CONTEXT[7]

All four Mississippi constitutions have exalted the long-term purpose and goal of a well-educated citizenry. Back in 1817, the State's original constitution-makers proclaimed that

> Religion, morality and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools and the means of education, shall forever be encouraged in this State.[8]

An identical clause appeared in the Jacksonian Democracy Constitution of 1832.[9]

The preambles to these constitutional aspirations were tempered by identical freedom of religion clauses,[10] hardly unfamiliar given the Establishment and Free Exercise clauses in the First Amendment to the U. S. Constitution, ratified on December 15, 1791. Of late, "religion" — that first word in the education clauses of the first two state constitutions — has taken a bit of a back seat among some, as people have become more secular, or at least more accustomed to the removal of religious practices and artifacts from public places, such as public schools.[11] And, as well, from public funding for sectarian entities and their activities.

In 1985, the Supreme Court of Mississippi accepted the public policy premise that the right of each child to a "minimally adequate public education" through and including high school "is one we can only label fundamental."[12] It is not without significance that, when the legislature

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7. *See* John Winkle's, *The Mississippi State Constitution* 125-135 (2d ed. 2014), which provides a brief once-over-lightly of Miss. Const. art. VIII, Education, and its history.

8. MISS. CONST. art. VI, § 16 (1817). This wording is a slightly improved version of Article 3 of the Northwest Territory Ordinance of 1787. *See* City of Corinth v. Robertson, 87 So. 464, 465 (Miss. 1921).

9. MISS. CONST. art. VII, § 14 (1832).

10. MISS. CONST. art. VI, §§ 3, 4 (1817); MISS. CONST. Art. VI, §§ 3, 4 (1832).

11. *See, e.g.*, Engle v. Vitale, 370 U.S. 421 (1962) (proscribing Christian and other religious prayer in public schools); and Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (proscribing Bible reading in public schools). Still, there are those who fight back, and cleverly so. *See, e.g.*, the Mississippi Student Religious Liberties Act of 2013. MISS. CODE §§ 37-12-1 thru -13. This new law seeks to implement the Free Exercise Clause of the First Amendment to the U. S. Constitution, to the careful avoidance of the lightning rod commands of the Establishment Clause.

12. *See* Hinds Cty. Sch. Dist. v. R. B. ex rel. D.L.B., 10 So. 3d 387, 399, 402 (¶¶ 31, 39) (Miss. 2009); Pascagoula Mun. Sch. Dist. v. T. H., 681 So. 2d 110, 114 (Miss. 1996); Clinton Mun. Sch. Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985), accepted in Uni. of Miss. Med. Ctr. v. Hughes, 765 So.2d 528, 539 (¶39) (Miss. 2000).

enacted the Mississippi Accountability and Adequate Education Program Act of 1997 [MAEP], "minimally" did not appear as a qualifier immediately before "Adequate Education."[13]

More broadly, promoting education has been a national priority almost from day one in the life of the new nation, in its gradually growing maturity and entirety. Support for public schools for many years was in substantial part provided via revenues generated by—and uses afforded by—sixteenth section lands, held by the State of Mississippi in trust, and from statehood. The U. S. Congress so provided *ab initio* in the Northwest Territory Ordinance of 1785,[14] which reserved the centerpiece sixteenth section, or 1/36th, of each township of public land, for the use and benefit of public schools.[15] Mississippi's story has been complicated by what happened regarding roughly the State's northern 23 counties—more or less from Coahoma County bordering The River on the west, to Monroe County and thence to Alabama on the east, and northerly therefrom to the Tennessee state line. In these areas, the U. S. Land Office neglected to hold back the sixteenth sections when it sold off to the public the lands "ceded" to the Jacksonian iteration of the federal government by the Chickasaw Nation via the one-sided Treaty of Pontotoc Creek in October of 1832.[16]

At statehood in December of 1817, title to and control of the new state's sixteenth sections and other school lands were donated by and otherwise derived from Georgia, whereupon—as noted—that title became vested in the State of Mississippi, in trust for the use and benefit of the respective counties.[17] Local school authorities and school children have

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13. MISSISSIPPI ACCOUNTABILITY AND ADEQUATE EDUCATION PROGRAM ACT of 1997, Miss. Laws ch. 612, § 2 (1997), codified as MISS. CODE § 37-151-1, et seq.; see particularly § 37-151-5(a).

14. *See* Northwest Territory Ordinance of 1785, 1 Laws of U. S. 565; the story of the school lands trust is told in Papasan v. Allain, 478 U.S. 265, 267-75 (1986); Papasan v. United States, 756 F.2d 1087, 1089-1091 (5th Cir. 1985); and Hill v. Thompson, 564 So.2d 1, 4-7 (Miss. 1989).

15. This story is summarized in John Winkle's, *The Mississippi State Constitution* 131-133 (2d ed. 2014); with slightly varying versions told in Papasan v. Allain, 478 U.S. 265, 270-72 (1986); Turney v. Marion Cty. Bd. of Educ., 481 So. 2d 770, 783-85 (Miss. 1985); Bd. of Educ. of Lamar Cty. v. Hudson, 588 So. 2d 683, 685-86 (Miss. 1991).

16. *See, e.g.*, Papasan v. Allain, 478 U.S. 265, 270-272, 294-295 (1986); City of Corinth v. Robertson, 87 So. 464, 465-466 (Miss. 1921).

17. *See* MISS. CODE § 29-3-1, re local school board control of trust lands; *see also, e.g.*, Jones v. Madison Cty., 18 So. 87, 91 (Miss. 1895) (legal title vested in State of Mississippi); Street v. City of Columbus, 23 So. 773, 774 (Miss. 1898) (same); Robertson v. Monroe Cty., 79 So. 184, 185 (Miss. 1918) ("the State is therefore a trustee"); Yazoo & M. V. R. Co. v. Sunflower Cty., 87 So. 417 (Miss. 1921) (same); Armstrong v. Jones, 170 So. 637, 640 (Miss. 1936); Bridgforth v. Middleton, 186 So. 837, 838 (Miss. 1939); Pilgrim v. Neshoba Cty., 40 So. 2d 598 (Miss. 1949) (lands here

been the beneficiaries of the school lands trust but have never been its fee simple title owners. This system and its title relationships remain, though knowledgeable citizens recognize that far greater financial resources are needed if we are to have only adequate public schools, Prekindergarten (PK) through Twelfth (12th) grade.

In the course of postbellum Reconstruction, another new constitution—Mississippi's third—made extensive provisions for "a uniform system of public schools."[18] With assorted twists and turns because of perceived white supremacy and related racial considerations, and—to a lesser extent—of religious considerations, there is a sense in which this postbellum system of freely accessible pre-college public schools exists to this day.

In the early days of statehood, the school year lasted only four months.[19] The reasons for this practice ranged from—on the one hand, the expense of operating public schools for longer periods of time each year to—on the other hand, the fact that the rural lifestyle of most Mississippians made it necessary that older school-age children be available for farm labor, both at planting in the spring of each year and at harvest in the fall.[20] In 1912, communities with a population of at least 5000 people became eligible to extend their school years to seven months.[21] The minimum public school year today is one hundred eighty (180) days in which the school personnel and students must be in attendance for not less than sixty-three percent (63%) of the instructional day.[22]

Sadly, once Reconstruction had passed in the late 1870s, racial

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involved conveyed in trust to the State of Mississippi); Hill v. Thompson, 564 So. 2d 1, 5-6 (Miss. 1989); Morrow v. Vinson, 666 So. 2d 802, 805 (Miss. 1995); Miss. Gaming Comm'n v. Bd. of Educ., of Harrison Cty., 691 So. 2d 452, 461 (Miss. 1997); Clark v. Stephen D. Lee Foundation, 887 So. 2d 798, 803 (¶15) (Miss. 2004); *see also*, Simmons v. Holmes, 49 Miss. 134, 144-45, 1873 WL 4145 (1873).

18. MISS. CONST. art. VIII, § 1 (1869); *see* Chrisman v. Mayor of Town of Brookhaven, 12 So. 458, 459-60 (Miss. 1893).

19. "At least one school must be maintained in each school district for four months in the year." Otken v. Lamkin, 56 Miss. 758, 763, 1879 WL 4019 (1879); Bufkin v. Mitchell, 63 So. 458, 460, 461 (Miss. 1913); Miller v. State ex rel. Russell, 94 So. 706, 708-09 (Miss. 1923); and Tunica Cty. v. Town of Tunica, 227 So. 3d 1007, 1024, 1034 (¶¶ 39, 72) (Miss. 2017).

20. Under the 1890 constitution as originally enacted, "agricultural improvement" was one of the original goals of the free public schools. *See, e.g.*, Morris v. Vandiver, 145 So. 228, 229, 230-32 (Miss. 1933) (agricultural high school); State Teachers' College v. Morris, 144 So. 374, 376 (Miss. 1932); Bufkin v. Mitchell, 63 So. 458, 460, 462 (Miss. 1913).

21. Miss. Laws ch. 255 (1912); *see* Bufkin v. Mitchell, 63 So. 458, 459 (Miss. 1913).

22. MISS. CODE §§ 37-13-63, -151-5(j).

segregation in public schools became a cruel fact of life in Mississippi,[23] and in the American South in general. In 1960, and with white state leaders fearful and determined to resist the probable effects of *Brown v. Board of Education* (1954, 1955),[24] the mandatory public school attendance component of Section 201 was deleted from the state constitution.[25] This, of course, was at a time when, as a practical matter, not many African American citizens were able to register and vote. It was not until 1987 that the constitutional mandate for compulsory[26] free public schools was restored.[27]

In the aftermath of *Alexander v. Holmes County Bd. of Education* (1969),[28] the legislature quickly passed a statute outlawing racial segregation in "any group, area, school, institution or other politic subdivision of the State."[29] Little prescience was required to sense the purpose and meaning of the next sentence of that new statute, viz., "There shall be no governmentally enforced segregation by race, color or national origin and there shall be no governmentally enforced integration by reason of race, color or national origin."[30] Section 37-15-35 is still on the books, though the latter clause is arguably a dead letter.

Of more practical consequence, and much more so than in the wake of the *Brown* decisions, this state's public schools became complemented by ever-growing and increasing iterations of private, parochial, and more

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23. *See* MISS. CONST. art. VIII, § 207, repealed December 1978; Miss Laws, ch. 587 (Senate Concurrent Resolution No. 557); *see also* references in Chrisman v. Town of Brookhaven, 70 Miss. 477, 12 So. 458, 459-60 (1893) and Wyatt v. Harrison-Stone-Jackson Agric. High Sch., 177 Miss. 13, 170 So. 526, 528 (1936).

24. Brown v. Bd. of Educ. of Topeka*, KS*, 347 U.S. 483 (1954), and 349 U.S. 294 (1955). *Alexander* had followed Green v. Cty. School Bd. of New Kent Cty., 391 U.S. 430 (1968).

25. *See* Miss. Laws, ch. 547 (1960), formally inserted into the state constitution on Nov. 23, 1960.

26. Many state laws advisedly use the phrase "compulsory-school-age child." *See, e.g.*, MISS. CODE, §§ 37-13-91(2) (f); -(3), -(4), -(5), -(6), -(7); Lauderdale Cty. Sch. Bd. v. Brown, 106 So.3d 807, 810, 811 (¶¶ 11, 12, 18) (Miss. 2013); L. W. v. McComb Separate Mun. Sch. Dist., 754 So.2d 1136, 1142 (¶ 25) (Miss. 1999); In Interest of T. H., III, 681 So. 2d 110, 116 (Miss. 1996); In Interest of R. G., 632 So. 2d 953, 955 (Miss. 1994).

27. *See* Miss. Laws, ch. 671 (1987) (House Concurrent Resolution No. 9), formally inserted into the state constitution on Dec. 4, 1987.

28. Alexander v. Holmes Cty. Bd. of Educ., 396 U.S. 19 (1969). Prof. Dennis J. Mitchell has told a more complete version of the *Alexander* saga in *A New History of Mississippi* 469-470 (2014).

29. Miss. Laws, ch. 374 (1970), codified as MISS. CODE §37-15-35 (first sentence).

30. Miss. Laws, ch. 374 (1970), codified as MISS. CODE §37-15-35 (second sentence).

recently other public Prekindergarten (PK) through Twelfth (12th) grade levels of educational alternatives. The total enrollment for PK-12th grade in Mississippi is 442,627.[31] While approximately 51,000 Mississippi children attend private schools of one variety or another[32], and 25,376 children are homeschooling.[33] Relatively few African American students have ever attended these sectarian non-public schools. Consistent with the racial makeups of their communities, PK-12 schooling—in its various conglomerated iterations in the state today—has become almost as segregated *de facto* as it was *de jure* in the days before *Brown* and its *Alexander* mandate.

Charter schools are an alternative of recent interest.[34] No doubt some public charter schools have improved the educational experience of some school children. Ostensibly intended to help underprivileged and special needs children, however, it is doubtful one could find—in Mississippi or much of anywhere else—a student moving to a charter school that has a larger minority population than the conventional public school that child would otherwise attend. The number of students attending charter schools and their percentage among school age children in the state remain relatively minuscule.[35] Chronic lack of financial and quality human resources has kept many Mississippi public schools mired in mediocrity.

The story of the *Ayers* case is important in the history of education here. Regarding traditional racial practices in public college and university classrooms, the 1992 *Ayers* ruling by the U. S. Supreme Court demanded that the State dismantle the sources of such long practiced racial segregation.[36] With this constitutional precedent in place, the question has become, whether—in the half century since *Alexander*—the sources of racially discriminatory practices in PK-12 public schools have been

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31. *State Data Report*, MISSISSIPPI DEPARTMENT OF EDUCATION (March 9, 2021 8:55 AM), https://newreports.mdek12.org.

32. *Top Mississippi Private Schools*, PRIVATE SCHOOL REVIEW (March 9, 2021 9:00 AM), https://www.privateschoolreview.com/mississippi#:~:text=For%20the%2020 21%20school%20year(view%20national%20tuition%20averages).

33. Brett Kittredge, *Number of Homeschoolers in Mississippi Rises*, MISSISSIPPI CENTER FOR PUBLIC POLICY (March 9, 2021 9:10 AM), https://mspolicy.org/ number-of-homeschoolers-in-mississippirises/#:~:text=According%20to%20unofficial %20data%20collected,is%20homeschooled%20by%20September%2015.

34. *See* Mississippi Charter Schools Act. MISS. CODE, §§ 37-28-1 thru 37-28-61; *see also*, MISS. CODE § 37-151-5(v).

35. For the year 2019-20, some 2189 students were enrolled in Mississippi charter schools, some .0046% of all school age children in the state with a substantial mathematical increase over years past.

36. United States v. Ayers, 505 U.S. 717 (1992) and Ayers v. Thompson, 358 F.3d 356 (5th Cir. 2004) (finally and practicably dismantling the sources of substantial racial discrimination in all of the State's institutions of higher learning).

dismantled. After all, in *Ayers* the State, with discerning and sensible leadership, finally accepted the inevitable—and settled.

Fast forward a generation. A prime exemplar of the sort of state's data dilemma in the immediate future is whether other than traditional educational stratagems—primarily private schools and homeschooling[37]—will become an increasingly effective means[38] by which the state continues falling short of achieving, in reality, *Alexander's* long term, full integration mandate. This becomes a serious question of state constitutional law, given the command of the second clause of Article III, § 7, *viz*., "nor shall any law be passed in derogation of the paramount allegiance of the citizens of this State to the government of the United States."[39]

Mississippi's "duty of paramount allegiance" extends to all issues and contexts where "the citizens of this State" are subject to and bound by the federal Supremacy Clause.[40] Suffice it to say that the jury is still out on whether—again only for an increasingly prominent exemplar—the Charter School Act[41] may in time become a release valve that allows the state to evade its duties under *Alexander*. Its lessons thought learned and accepted under *Ayers*, applied in the state's free public schools. Put otherwise, because the point is so essential, every school law that the state may enact is subject to mandatory scrutiny for whether it has or preserves "substantial discriminatory effects."[42] The question going forward is whether Mississippi's leadership will insist that—when it comes to the historic constitutional goal of an educated and enlightened citizenry—the state will once again try, as the saying goes, "to cut off its nose to spite its face." Or will it look back to and take heart from that "[not so] brief [1982-1997] shining [fairly brightly] moment[s]" that [were] known initially as "the

37. A not insignificant number of Mississippi parents have a go at home schooling their children. *See* MISS. CODE § 37-13-91(3)(c), *see also*, Mississippi Home School Guidelines, 7 Miss. Admin. Code Pt., R. 30.7. Contact Mississippi Home Educators Assn., www.mhea.net.

38. In 2017, approximately 8.1% of all school age children were being siphoned off into private schools, and this percentage is reasonably expected to increase gradually for the foreseeable future.

39. MISS. CONST. art. III, § 7; *see* the author's "Of the Paramount Allegiance of the Citizens of this State," CABA Newsletter/Articles, Posted May 2013; http://caba.ms/articles/features/paramount-allegiance.html.

40. U. S. CONST. art. VI, § 2.

41. A voucher school program is at times cussed and discussed, and, if ever enacted on any substantial level, may present a significant federal or state constitutional test.

42. MISS. CONST. art. III, § 7. See discussions herein of the *Alexander* and *Ayres* cases.

Education Reform Act of 1982,"[43] to the end of a public order of human dignity for one and all.

III. FREE PUBLIC SCHOOLS

At the advent of the third decade of the Twenty-first Century, Mississippi has found itself living under a constitutional mandate that

> The Legislature *shall*, by general law, provide for the establishment, maintenance and support of free public schools[44] upon such conditions and limitations as the Legislature *may* prescribe.[45]

Section 201 says the legislature *shall* make three provisions regarding the State's "free public schools." The legislature *shall* establish free public schools. Then it *shall* maintain these free public schools. Finally, the legislature *shall* support these free public schools. As fate, fear and the constitutional draftsmen would have it, the teeth have largely been pulled from these Section 201 mandates by the closing and facially discretionary *may* clause.

The legislature has been told it *may* modify its three-step mandate with "conditions" and "limitations" thereon, "as the legislature may prescribe." The core reality here is that—textually and linguistically—Section 201 falls short of creating self-executing state responsibilities and student rights on a firm mandate. Given this, Mississippi's constitutional jurisprudence—even without discretionary implementation—stops short of

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43. *See also* the restoration of authority to compel school attendance, Miss. Laws, ch. 671 (1987) (House Concurrent Resolution No. 9), formally inserted into the state constitution on Dec. 4, 1987, the Mississippi Compulsory School Attendance Law, MISS. CODE, § 37-13-91, and, as well, the Mississippi Accountability and Adequate Education Program Act of 1997, MISS. CODE, ch. 151. See the provisions for a director of the Office of Compulsory School Attendance and the duties thereof, MISS. CODE, § 37-13-83.

44. In State Teachers College v. Morris, 144 So. 374 (Miss. 1932), Chief Justice Sydney M. Smith, for the majority, and Justice George H. Ethridge in dissent, engage in a useful debate regarding the meaning of "free public school." This article proceeds on the premise that Chief Justice Smith's opinion is controlling. See also Justice Ann Lamar's controlling opinion in Pascagoula Sch. Dist. v. Tucker, 91 So.3d 598, 605 (¶15) (Miss. 2012) vs. Chief Justice William L. Waller, Jr., 91 So.3d at 608 (¶26), in dissent; and Justice John B. Holden's controlling opinion in Miller v. State ex rel. Russell, 94 So. 706, 708-709 (Miss. 1923), and Chief Justice Smith's opinion in dissent, 90 So. at 713.

45. MISS. CONST, art. VIII, § 201 (1890, as amended; see Miss. Laws, 1987, ch. 671, effective Dec. 4, 1987) (italics provided).

finding the goal of Section 201 more translatable into practical reality.[46] And so the question has become whether—and to what extent and with what effects—the Mississippi Accountability and Adequate Education Program Act of 1997, and as amended [MAEP],[47] implements Section 201 and does the work that, standing alone, Section 201 cannot do.

The 1970s saw a noble effort toward augmenting—constitutionally and practicably—one means of approaching adequate funding for Mississippi's public schools. By 1980, that effort had led to the Supreme Court of Mississippi's exposition in *Fondren v. State Tax Commission*,[48] after extensive litigation financed and otherwise supported privately by a broad cross-section of public school patrons.[49] The *Fondren* court held that the then-current text of Miss. Const. Art. IV, § 112 [in those days, a sort of state taxation equal protection clause], coupled with enforcing *ad valorem* tax statutes already on the books, required that all property be carried by the assessor in each county at its full and true fair market value. Prior to 1980, most real properties and improvements were carried on local tax rolls at small and erratically varying fractions of their true value. All that was needed to be done post-*Fondren*—to maintain local property tax bills at a politically tolerable level—was for the respective county supervisors to make a mathematically appropriate reduction in the millage rate. Common political sense left little doubt but that, in any county where the supervisors did not make the appropriate millage rate reduction, the next elections would result in new holders of the offices of the erring supervisors.

But it wasn't long before the legislative powers that be stepped in and—quite effectively—used (or was it "responded to") scare tactics to get the voters to gut *Fondren* at its core, albeit this took a constitutional amendment to complete the mischief. This amendment enshrined unreasonably low assessment ratios in the formula for establishing the true fair market value of assessable properties and was approved in 1986.[50]

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46. Regarding the practice of making constitutional clauses self-executing, *see, e.g.*, Oktibbeha Cty. Bd. of Educ. v. Town of Sturgis, 531 So. 2d 585, 588 (Miss. 1988).

47. MISS. CODE, ch. 151. The MAEP Act of 1997 effectively eviscerated an earlier Attorney General Opinion, Thompson No. 58 (January 29, 1991). MISS. CODE § 37-151-6, which became law in 2007, put the nail in the coffin.

48. Fondren v. State Tax Comm'n, 387 So.2d 712 (Miss. 1980).

49. Quite a combination of state business, labor and education leaders had hired counsel who brought and prosecuted this suit. *See* Fondren, 387 So. 2d at 713, for the names of counsel in the case.

50. *See* 1986 amendment to MISS. CONST., art. IV, § 112, House Concurrent Resolution No. 41, Miss. Laws, 1986, ch. 522, submitted to the electorate and ratified on June 3, 1986; see Proclamation of Secretary of State, June 19, 1986. *See also*, John Winkle, *The Mississippi State Constitution* 85-87 (2d ed. 2014). Burrell v. Mississippi State Tax Comm'n, discussed on Prof. Winkle's page 86, was overruled in Commonwealth Brands, Inc. v. Morgan, 110 So. 3d 752, 762-63 (¶27) (Miss. 2013).

From a political perspective, these assessment ratios only proved what anyone with elementary skills in arithmetic could see. Reducing the millage rates would have done the trick, and from the next board of supervisors meeting after *Fondren* was finally decided. All interest groups would have been winners, particularly the once and future compulsory attendance school-age children.

One fly in the ointment remained, *viz.*, the established political preference and practice that commercial and industrial property owners pay taxes at a higher rate than the owners of real properties classed as agricultural and residential, the latter of whom also had homestead exemption deductions. With the 1986 amendments, a golden opportunity to make provision for badly needed additional funding for public schools was lost. And so the state has remained, for some thirty-plus years after the fact, the people having forgotten that core lesson of citizenship—taxes are the price we pay for civilization, a price sensible and responsible citizens tend to believe is well worth paying.

IV. MAEP OF LATE

In 1997, under the authority of constitutional § 201, the legislature established the Mississippi Adequate Education Program (MAEP).[51] Exercising its constitutional discretion, the legislature has defined an "adequate education program" as one with:

> funding levels necessary for the programs of such school district to meet at least a successful Level III ["C"] rating of the accreditation system as established by the State Board of Education using current statistically relevant state assessment data.[52]

Simply put, MAEP at its core says to each public school district, "If you establish and maintain a school district that is successful when measured by the standards of the State Accreditation System, then the State will provide sufficient funds for your students to succeed."[53] Of course, there is a chicken-and-the-egg dimension here. Still, on March 24, 2006, the legislature, including the governor—in solemn and constitutionally

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51. *See* MISS. CODE § 37-151-6, authority for which lies in MISS. CONST., art. VIII, § 201.

52. MISS. CODE § 37-151-5(a).

53. By law, each local school district is required annually to supply twenty-seven per cent (27%) of basic adequate education program cost for its schools. Miss. Code § 37-151-7(2)(a).

authorized process—made a great leap forward,[54] *viz*., "Effective with the fiscal year 2007, the Legislature shall fully fund the Mississippi Adequate Education Program."[55] No discretionary "may" qualifier afforded the State room to wiggle out from under this public promise. On the contrary, the State holds a judicial sledgehammer with which to make the locals divvy up their twenty-seven percent share.

As noted, and as time and fate would have it, alternative, largely non-public educational opportunities have emerged. In point of fact, public support for MAEP has declined. October of 2017 provided a watershed moment. The mandate of § 37-151-6 notwithstanding, the Supreme Court of Mississippi declined the plea of twenty-one school districts that this short, one sentence political promise be enforced as it has been so simply written,[56] so that in demonstrable fact the MAEP would be fully funded to at least a "C" level quality.[57] With less jurisprudential perception and spine than were needed at the moment, the *Clarksdale MSD* case's majority of justices held that the funding level for MAEP was discretionary "[b]ecause Section 37-151-6 does not obligate the Governor to sign a bill fully funding MAEP."[58] A few years earlier, another valiant effort to add more teeth to § 201 via a constitutional initiative had failed legally and politically.[59]

V. STATE ADMINISTRATION OF PUBLIC EDUCATION[60]

A State Board of Education (SBE) has been created and given a few general charges. The board must "formulate policies according to law for implementation by the State Department of Education (SDE)."[61] The constitution directs the state board that it "shall manage and invest school

54. But see the problematic ruling in Clarksdale Mun. Sch. Dist. v. State of Mississippi, 233 So. 3d 299 (Miss. 2017), the flaws in which are explained hereinbelow.

55. MISS. CODE § 37-151-6. Again, this is without derogation of each local school district's mandate to supply annually twenty-seven per cent (27%) of basic adequate education program cost for that district. MISS. CODE § 37-151-7(2)(a).

56. The legislature has enjoined that, in all exercises of statutory construction and application, "All words and phrases contained in the statutes are used according to their common and ordinary acceptation and meaning; but technical words and phrases according to their technical meaning." MISS. CODE § 1-3-65. There are no technical words in Section 37-151-6.

57. Clarksdale Mun. Sch. Dist. v. State of Mississippi, 233 So. 3d 299 (Miss. 2017).

58. Clarksdale Mun. Sch. Dist. v. State of Mississippi, 233 So. 3d 299, 305, 306, 307 (¶¶18-31) (Miss. 2017); *see also*, Oktibbeha Cty. Bd. of Educ. v. Town of Sturgis, 531 So. 2d 585, 588 (Miss. 1988).

59. Legislature of Mississippi v. Shipman, 170 So.3d 1211 (Miss. 2015).

60. *See* MISS. CONST., art. VIII, §§ 202, 203.

61. *Id*.

funds according to law."[62] Other than these, the constitution says only that the board shall "perform such other duties as prescribed by law."[63] "[A]ccording to law" twice set out, and "as prescribed by law"[64] in the more general constitutional authorization, refer to such laws as have been enacted by the legislature with at least the acquiescence of the governor.[65] In due course, the legislature has prescribed a variety of duties for the board.[66]

A State Superintendent of Education is charged to direct "a central management capacity" within the SDE; of course, at the end of the day, the "law"[67] here referred to is included within the governor's constitutional command that he or she "shall see that the laws are faithfully executed."[68] Past these, both "law" and "funds" within § 203 also include those received from federal, state, charitable, and other sources. "Law" includes the judgments of courts of competent jurisdiction—state and federal---and the constitution, common law, and other principles upon which those judgments rest. Religion and LGBTQ are among the several dimensions of our collective active existence and recent history that afford contexts for problematic educational administrative activity.

The nine state board members serve staggered nine-year terms.[69] They receive their appointments from three sources. Five seats on the state board are filled by the governor, though not all simultaneously. At least one such gubernatorial appointee must come from each of the three state supreme court districts—northern, central, and southern.[70]

One gubernatorial appointee must be actively engaged full-time as a school administrator, and another must be a full-time schoolteacher. Presumably, these occupational appointees must hold positions with public schools in Mississippi. As well, "full-time basis" excludes county or district school board members with other employments, though nothing is said whether a person other than a county or district superintendent may have this post. The lieutenant governor makes two at-large appointments to the SBE. The speaker of the house of representatives also makes two at-large appointments.[71] Terms are staggered so that there can be no time

62. *Id.*
63. *Id.*
64. *Id.*
65. MISS. CONST., art. IV, § 72
66. MISS. CODE § 37-1-3.
67. MISS. CONST. art. VIII, § 203(2).
68. MISS. CONST. art. V, § 123.
69. MISS. CONST. art. VIII, § 203(2); MISS. CODE § 37-1-1.
70. These districts are subject to reconfiguration following the 2020 Census, if that is necessary to make their populations approximately the same.
71. The criteria for appointment to the State Board are found in MISS. CONST. art. VIII, § 203(2).

when more than four state board members owe their appointments to the same governor.

Then there is the meat in the coconut. "The State Board of Education shall adopt and maintain a curriculum and course of study to be used in the public school districts that is designed to prepare the state's children and youth to be productive, informed, creative citizens, workers, and leaders . . . ."[72] This awkwardly worded curriculum aspiration—not likely to get high marks from a competent English grammar teacher—may be understood as turning out productive citizens, productive workers, and productive leaders, informed citizens, informed workers and informed leaders, and creative citizens, creative workers, and creative leaders.

VI. FUNDING MAEP

We have seen that—as an outgrowth of the fifteen-year [1982-97] "shining moment"—the political partnership that consists of the house of representatives, the senate, and the governor has exercised its constitutional authority and prescribed a formula for computing the state's annual allocation of funds for operating the MAEP.[73] This funding formula has been designed to assure that every student is afforded an opportunity for at least a "Successful" ["C"] level education regardless of where s/he lives.[74] The State Board has recognized that to meet this goal, the system must: (a) provide equity by recognizing differences in local resources, and (b) provide a level of resources necessary that adequate educational opportunities will be available for each school-age child.

The MAEP statutory funding formula is of some complexity, and some of its minutiae are beyond the scope of this elaboration.[75] Summarily, funding for each district is a function of average daily attendance and basic student cost. The cost of educating each such student[76] multiplied by average daily student attendance.[77] As noted, twenty-seven percent (27%) of this annual allocation comes from the local school district level. Then there are add-ons, inflation factors, trust funds, and other complications laid out in the roughly eleven pages of statutory text that make up § 37-151-7.[78]

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72. MISS. CODE § 37-1-3(2)(a).

73. MISS. CODE § 37-151-7.

74. MISS. CODE § 37-151-7.

75. A Class I ("A+" grade) math student is likely needed here.

76. MISS. CODE § 37-151-7(1)(b).

77. MISS. CODE § 37-151-7(1)(a).

78. Recognizing that many in need of understanding matters such as those presented in this chapter were not math majors in college, the Mississippi State Department of Education, Office of School Financial Services, has published and made readily accessible power point presentations, *viz*., "MISSISSIPPI ADEQUATE

VII. THE UNFORTUNATE *CLARKSDALE MSD* DECISION

On careful study and reflection, it appears that *Clarksdale MSD* may have been incorrectly decided. Any such suggestion is swimming upstream against the same forces as was *Fondren*, noted above, and in the noble effort that led to *Shipman*, sadly put to rest in 2015. Recent history suggests the same political resistance forces remain "out there," probably stronger and more self-centered than in the days following *Fondren* and, as well, in the State's failure to follow through with its solemn and unequivocal political promise made in 2007 for fully funding MAEP[79] and, more recently, by rejecting *Shipman* and its accompanying constitutional initiative.

Foremost, a significant percentage of white public school patrons want their children to attend largely white schools. These good people do not believe they have the financial means at once to (a) pay private school tuition, etc., (b) pay taxes sufficient to support public schools at the MAEP level, and (c) maintain their preferred lifestyle. Moreover, most parents of school age children—and with a viable alternative—do not find "C" quality public schools acceptable. Still, the imperatives of state educational history make it important that the jurisprudential problems with the *Clarksdale MSD* decision be set out, explained and understood. These problems include flaws in statutory analysis, in constitutional analysis, and in general adjudicative jurisprudence. Also important is understanding the familiar jurisprudential premise that a matter[80] should be decided on non-constitutional grounds, where that is practicable.[81] To some, this premise

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EDUCATION PROGRAM (MAEP), An Overview Of How The Formula Is Calculated," and "MISSISSIPPI ADEQUATE EDUCATION PROGRAM (MAEP), An Overview Of How The Base Student Cost (BSC) Is Calculated."

79. *See* MISS. CODE § 37-151-6 and its mandate for fully funding MAEP, coupled with the governor's oath and obligation that he or she "shall see that the laws are faithfully executed." MISS. CONST. art. V, § 123. The controlling opinion in *Clarksdale MSD* is too timid when it comes to the governor's mandatory duty. *See Clarksdale MSD*, 233 So. 3d at 305 (¶22). After all, the court must presume that the governor will discharge his constitutional duty under Art. V., § 123. *See* Trotter v. Frank P. Gates & Co., 139 So. 843, 845 (Miss. 1932). Indeed, all state officers are presumed to perform their official duties, absent clear evidence to the contrary. *See, e.g*., State ex rel. Moore v. Molpus, 578 So. 2d 624, 643 (Miss. 1991); Harris v. Harrison Cty. Bd. of Supervisors, 366 So. 2d 651, 655-656 (Miss. 1979); Raper v. State, 317 So. 2d 709, 712 (Miss. 1975) (presumption applies "to all Federal, state, county and municipal officers of high or low rank"); Slay v. Lowery, 119 So. 819, 820 (Miss. 1928).

80. As well, keep in mind that "matter" is the common (if not exclusive) constitutional word of choice for labeling that which is the object of the adjudicative process. *See, e.g*., MISS. CONST. art. VI, §§ 146, 156, 159, 161.

81. *See, e.g*., In Matter of Adoption of D.D.H., 268 So.3d 449, 456-457 (¶¶ 31-33) (Miss. 2018) (duty to deny a request to decide a constitutional question that is unnecessary to the resolution of the litigation); Johnson v. Mem'l Hosp. at Gulfport, 732

has been of biblical proportions,[82] though at times it merely confuses the familiar with the necessary[83]

To begin with and perhaps foremost, *Clarksdale MSD* is about the legislative facts[84] and circumstances relating to—and the meaning of, and application and enforcement of—a statute. That statute has been denominated Miss. Code. § 37-151-6. More narrowly, the controlling opinion says that, to decide the case, "this Court must first look at the language of the statute at issue."[85] Fine,[86] as § 37-151-6 on its face, and in its form and substance as well, is sufficient unto the day. No one suggests there has ever been anything unconstitutional about § 37-151-6.

The text of the statute is set out in the next paragraph of the *Clarksdale MSD* opinion.[87] With little doubt, good English grammar teachers will tell you that the simple wording and phrasing found in § 37-151-6 means that each year, beginning with the fiscal/school year 2007, the State should have fully funded MAEP, and, implicitly, continued to do likewise in each succeeding year unless—and until—the statute is substantially amended.

What really is—in the words of the *Clarksdale MSD* Court—"particularly illuminating"[88] is that the governor signed the version of § 37-151-6[89] that the court was charged with construing, applying and ordering

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So. 2d 864, 866 (¶ 9) (Miss. 1998) (same); Miss. Pub. Serv. Comm'n v. MP&L, 593 So. 2d 997, 1003 (Miss. 1991) (same); Hendricks v. State, 79 Miss. 368 (Miss. 1901) ("courts should never decide constitutional questions except when necessary to the disposition of a cause).

82. *See* Miss. Power Co. v. Miss. Pub. Serv. Comm'n, 168 So. 3d 905, 910 (¶7) (Miss. 2015); Broadhead v. Monaghan, 117 So. 2d 881, 888 (Miss. 1960). For an impressive statement of this premise, *see* Chief Justice Rehnquist's opinion in Jean v. Nelson, 472 U.S. 846, 848, 854 (1985).

83. It would be helpful to have a copy of the *Clarksdale MSD* opinion in hand while reviewing and considering the above analysis.

84. The term "legislative facts" is used in the sense found in the Advisory Committee Note to Miss. R. Evid. 201, and in cases such as Samuels v. Mladineo, 608 So. 2d 1170, 1183-1186 (Miss. 1992); and McPhail v. State, 180 So. 387, 388-389 (Miss. 1938).

85. *Clarksdale MSD*, 233 So. 3d at 299, 305 (¶20).

86. Of course, the notion of seeking "legislative intent"—the actual thoughts in the minds of legislators—is impracticable and approaching nonsense. The question always involves assessing what the collective legislature said and what the governor did not veto, not what one, or more, or even the majority of the collective legislature of two separate houses actually and in fact—and at that moment in legislative time---*intended*, nor what the governor had in mind when he engaged in the legislative act of signing the bill, or at least the omission of not vetoing the bill.

87. *Clarksdale MSD*, 233 So. 3d at 305 (¶21).

88. *See* text in *Clarksdale MSD*, 233 So. 3d at 305 (¶21).

89. *See* Miss. Laws 2006, ch. 473, § 2, eff. from and after passage (approved March 24, 2006).

enforced, with the text that the court correctly assumed was controlling. Unless amended, that statutory text controls as written—[and should have been held to control in *Clarksdale MSD*]—all future actions otherwise subject to § 37-151-6. The most that can be said of the governor's role is that, any thought of a veto *vel non* has been and remains legally premature.[90] The court never—with judicial propriety—reaches the proposition set out in *Clarksdale MSD's* ¶22 until there has been—in actual political fact—a veto of a MAEP fiscal year funding bill. Nothing in *Clarksdale MSD* suggests there ever has been any such veto.

As a matter of elementary legal reasoning and understanding, any thought of the governor's signature *vel non* in *Clarksdale MSD*—as that matter stood on October 19, 2017, the day of decision—is a non-justiciable issue. That matter fails the "ripeness" requisite for justiciability. In terminology more familiar to some, there is no case or controversy. Under state law, no one could satisfy the ground rules for a declaratory judgment action[91] as to whether the governor would—or would not—sign or veto a particular MAEP fiscal year funding bill.

The conclusory ¶22 in *Clarksdale MSD* fails for the reasons noted above, particularly given that the governor timely otherwise properly signed the bill which begins "Effective with the fiscal year 2007, the Legislature shall . . . ." No subsequent legal text ameliorates this mandatory "shall".[92] One might safely "bet the farm" that every competent English grammar teacher in a Mississippi public school would give the Supreme Court an "A," if it so construed and applied this mandatory "shall." No constitutional premise precludes the state from obligating itself as it has done in §37-151-6. This statutory text has enough specificity and simplicity that—as written and enacted, including being timely signed by the governor—it should have carried the day.

The state has no honorable way around the fact that it has a public and politically moral obligation—and on reasonable, practicable, and fiscally responsible terms—of making up the funds not provided over the years since 2007 when the §37-151-6 promise was first broken, albeit, to be sure, many students who were entitled to the benefits of those funds have

90. The reference here is to ripeness, that door opening, earliest stage in the jurisprudential process of justiciability, and its practice. This premise is explained in § 1:25 Ripeness, Subject Matter Jurisdiction chapter, in *Mississippi Civil Procedure*, Vol. 1 (Jackson, et al., eds. 2019).

91. *See* Miss. R. Civ. P. 57.

92. *See, e.g.*, Moore v. State, 287 So. 3d 905, 918 (¶51) (Miss. 2019) ("the word "shall" when used in a statute, is mandatory"); In Interest of E.K., a Minor, 249 So. 3d 377, 383 (¶21) (Miss. 2018) (same); *High v. Kuhn*, 240 So.3d 1198, 1201 fn. 5 (¶15) (Miss. 2017) (same); Pitalo v. GPCH-GP, Inc., 933 So. 2d 927, 929 (¶5) (Miss. 2006) (same); In Interest of D. D. B., A Minor, 816 So. 2d 380, 382 (¶7) (Miss. 2002) (same).

completed most---if not all---of their public education in the absence of those funds, and others who would have benefited have some—if not all—of their public school experience remaining ahead of them.

VIII. THE FLAWED END-RUN ATTEMPT BY *CLARKSDALE MSD'S* CONCURRING JUSTICES

No doubt because they saw the flaws in the majority opinion in *Clarksdale MSD*, Justices Maxwell and Coleman filed concurring opinions, arguing another way out, *viz*., that Article I's constitutional "separation of powers" provisions control. With respect, each was wrong, and remains so. Initially, each overlooked the constitutional and practical reality that "there is no natural law of separation of powers. Rather, the powers of government are separate only insofar as the Constitution makes them separate."[93] Equally as fundamental, the state clings to a regime of constitutional "checks and balances."[94] History teaches that you can't have it both ways. There can be no meaningful "checks and balances" without there also being encroachments by officials in one department upon and thwarting the ostensible prerogatives of at least one of the other two. This is why there is no absolute separation of powers in state constitutional law, never has been, never will be, though some have mistakenly—and no doubt in good faith—argued to the contrary.[95]

More directly, the core reason why Justices Maxwell and Coleman were mistaken in *Clarksdale MSD* is simple*, viz*., all gubernatorial powers that could possibly have been brought to bear were and are "legislative" in their nature and practical effect, and in the sense contemplated by a reasonable reading of Article I. What these two justices overlooked was that the constitution's "signing sub-clause"[96] and "veto sub-clause"[97] grant the governor powers that are legislative in every real and practical and constitutional sense.

The idea that the governor's action in signing or vetoing a bill is a legislative act is hardly novel in Mississippi, or anywhere else in the United

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93. Dye v. State ex rel. Hale, 507 So. 2d 332, 346 (Miss. 1987) states and explains this premise, which has been followed in Myers v. City of McComb, 943 So. 2d 1, 6 (¶20) (Miss. 2006); *see also*, Jordan v. Smith, 669 So. 2d 752, 756 (Miss. 1996).

94. *See, e.g*., In Re Fiscal Year 2010 Judicial Branch Appropriations, 27 So. 3d 394, 395 [1] (Miss. 2010); Myers v. City of McComb, 943 So.2d 1, 7 (¶21) (Miss. 2006); *Fordice v. Bryan*, 651 So. 2d 998, 1002, 1003 (Miss. 1995)

95. *See* Gunn v. Hughes, 210 So. 3d 969, 973-974 (¶¶ 16, 17) (Miss. 2017); *see also*, Alexander v. State By and Through Allain*,* 441 So. 2d 1329, 1336 (Miss. 1983), ("the idealistic concept of absolute separation of powers").

96. MISS. CONST. art. IV, §§ 72, 73.

97. MISS. CONST. art. IV, §§ 72, 73.

States. Indeed, one of this state's great legal scholars, Justice Josiah A. P. Campbell, explained the point a long time ago, *viz*.,

> Grant that the governor in signing a bill thereby evidencing his approval, does perform a legislative act. It is as a governor that he acts legislatively, as prescribed by the constitution. [98]

Nationally known state constitutional scholar, the late Judge Thomas M. Cooley, in his famous treatise, reported that "in the approval of laws, the governor is a component part of the legislature."[99]

It is the nature and function of a governmental power that determines its Article I category. The "signing sub-clause" and "veto sub-clause" are polar opposites in exercise and effect. These clauses contemplate, authorize and direct the exercise of "legislative powers," and only legislative powers. Either a signing or a veto is the performance of a political power that is legislative in constitutional nature and in its political and practical reality. Because their effects are forward looking—focusing on what the law will be going forward—these either/or alternative activities are just as much the exercise of legislative powers as are the actions of members of the house and senate in passing such a bill in the first place.

It is a simple mistake to assume that everything a governor does is the exercise of an executive power. Not so at all. The key to understanding this comes when one has in mind how many public officials in this and no doubt other states are constitutionally given—and actively exercise—differing powers that fall within two—and occasionally even all three—of the powers identified and discussed in Article I of the Mississippi Constitution. Most familiar of all are the justices of the Supreme Court of Mississippi when they make what we still call common law[100] or in some instances equitable remedies.[101]

Put another way, a bill such as the one that became § 37-151-6, or one that may have failed, was subject the same procedural process. At its core, to become law a bill has to receive a majority vote of one (or more) from the house of representatives, from the senate, and from the governor.

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98. State ex rel. Attorney General v. Bd. of Supervisors of Coahoma Cty., 64 Miss. 358, 364, 1 So. 501, 502-503 (1887) (emphasis added).

99. Hardee v. Gibbs, 50 Miss. 802, 809 [••4], 1874 WL 6529 (Miss. 1874), quoting *Cooley on Constitutional Limitations* at 155 (1878).

100. *See, e.g*., Parker v. Benoist, 160 So. 3d 198 (Miss. 2015), which made new state law in the field of donative transfers of property. More globally, see "The Coming of the Common Law in Mississippi" in my *Heroes, Rascals and the Law; Constitutional Encounters in Mississippi History* 301-370 (2019).

101. Tideway Oil Programs, Inc v. Serio, 431 So. 2d 454, 460-67 (Miss. 1983).

And in a proper and timely sequence. At each of these three stages, a single vote majority sufficed. In the 122-member house of representatives,[102] 62 affirmative votes will carry the day, or fewer if the issue were one where by rule the majority of those present and voting would suffice. Similarly, in the 52-member senate, 27 affirmative votes will ordinarily suffice, subject to the same caveat.[103] In the case of the governor, of course, a 1-0 vote is all it takes.[104]

Just as the lieutenant governor is given both legislative and executive powers,[105] so also is the governor given executive and legislative powers. These legislative gubernatorial powers and practices include making recommendations to the legislature regarding bills that should be passed, amended or rejected.[106] And they include acting in accordance with the "signing sub-clause" and/or the "veto sub-clause" of the constitution, authority for calling special legislative sessions, and no doubt more.

For present purposes, one gubernatorial power is front and center. It is that found in Article V, labeled "Executive." "The Governor shall see that the laws are faithfully executed."[107] Nothing in the constitution or any other law or known political authority exempts §37-151-6 from the category "the laws" with respect to which the governor–on his oath–has the job of "faithful . . . execut[ion]."

IX. A PROPER *CLARKSDALE MSD* ADJUDICATION

The above points aside, there are two more discrete and independent errors or omissions in the *Clarksdale MSD* opinions. For one, consider the justices' failure to construe and apply and enforce the term "adequate" in Mississippi Adequate Education Program.[108] With little doubt, a team of expert witnesses, well qualified within Miss. R. Evid. 702, could be

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102. *See Mississippi Official & Statistical Register* (Blue Book) 2016-2020, at pages 119-120 (2017).

103. *See Mississippi Official & Statistical Register* (Blue Book) 2016-2020, at pages 98-99 (2017).

104. *See Mississippi Official & Statistical Register* (Blue Book) 2016-2020, at page 77 (2017).

105. Dye v. State ex rel. Hale, 507 So. 2d 332 (Miss. 1987).

106. *See* MISS. CONST., art. V, § 122.

107. MISS. CONST. art. V, § 123; *see* Clark v. Bryant, 253 So. 3d 297, 303 (¶32) (Miss. 2018) ("The Governor (as head of the executive branch) must faithfully execute all laws passed by the Legislature.")

108. MISS. CODE § 37-151-5(a) defines "Adequate program," or "adequate education program" or "Mississippi Adequate Education Program (MAEP)". Obviously, this definition — funding level necessary "to meet at least a successful Level III rating" according to the SBE's accreditation system — should be given substantial consideration by any such Miss. R. Evid. 702 qualified experts.

assembled to establish the proposition of adjudicative (if not also legislative) fact[109] whether the level of MAEP funding since 2007 has been "adequate." And the consequential fact whether the quality of education afforded Mississippi's students could fairly be labeled "adequate."

To be sure, the term "adequate" is highly general. But "adequate" is no more general or difficult of construction and application than are "reasonable," "unusual," "excessive," "liberty," "freedom," "negligent" and numerous other terms set forth in the laws that judges and other authorized public officials are — every day — expected to construe and apply, and in a great variety of settings. At the least, "adequate" acquires flesh from the state's declared imperative of educating its youths "to be(come) productive, informed, creative citizens, workers and leaders."[110] An outcome determinative adjudication of "adequacy"[111] *vel non* would have the added benefit of honoring the practice of deciding matters on non-constitutional grounds, where that is feasible.

Second, there is the equity imperative. Historically, the most important policy statement here is attributed to Horace Mann, father of the "Common Schools" movement in the Northeast back in the Nineteenth Century.

> Education then, beyond all other devices of human origin, is a great equalizer of the conditions of men (and women)— the balance wheel of the social machinery.[112]

You start with the legislative facts that Mississippi has long been at or near the bottom, among impoverished states in the Union, and has among

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109. Justice Virgil Griffith's findings regarding activities along the "Gold Coast" justifying the governor's decision to order a raid are a familiar example of legislative facts found by one of the state's most respected jurists. State v. McPhail, 180 So. 387, 388-389 (Miss. 1938); MHSAA v. Hattiesburg High Sch., 178 So. 3d 1208, 1216 (¶31) (Miss. 2015); Cook v. Bd. of Supervisors of Lowndes Cty., 571 So. 2d 932, 935 (Miss. 1990); also, Miss. R. Evid., Advisory Committee Note to Rule 201.

110. MISS. CODE ANN. § 37-1-3(2)(a).

111. The legislature has defined "adequate program" or "adequate education program" for purposes of the MAEP Act as the funds needed "for the programs of such school district to meet at least a successful Level III ("C") rating of the accreditation system as established by the State Board of Education using current statistically relevant state assessment data." MISS. CODE § 37-151-5(a). Presumably, this definition will be persuasive, in the absence of a finding otherwise supported by substantial evidence which satisfies criteria of Miss. R. Evid. 702.

112. Horace Mann, 1848, as cited in Education and Social Inequity, (n.d.); also www.brainyquote.com/Horace Mann Quotes; see also, Roslin Growe & Paula S. Montgomery, "Educational Equity in America: Is Education the Great Equalizer?," *The Professional Educator,* Vol. XXV*,* 23 (Spring 2003).

its citizens a larger percentage of non-Caucasians than any other state. As well, the state's citizens have been less able to pay the tax man what he says is his due than the people of most any other state. Add the fact that Mississippi has also long been at or near the bottom rung when it comes to the level of educational achievement by its citizenry.

Legally, one opening question is whether the State's due process clause[113] might reasonably be construed to confer an equity or equal protection right? Cannot the same be said of the Open Courts Clause which, when you look at the text in historical context, is a contemporary expression of Magna Carta.[114] Then there is the Unenumerated Rights Clause,[115] which may be the best bet. Building upon the state's constitutional educational imperative dating back to 1817, followed with the enhanced imperative, given the state's lack of quality of life which with high probability may be attributed to poor educational attainments, and the case should be there, beyond reasonable dispute, thus rendering non-optional "fully fund[ing] the Mississippi Adequate Education Program" to a level higher than Level III.

Turning to the facts [adjudicative and/or legislative], it doesn't take much knowledge of the demographics of Mississippi to understand that there are substantial differences between and among the affected persons within the twenty-one school districts that were plaintiffs in *Clarksdale MSD*. These differences range from the Prentiss County School District in Northeast Mississippi, where the minority population was so low that back in the 1970s the district was never brought under a federal court desegregation order, on the one hand, to the many Delta area districts with increasingly heavy minority populations. Absent from the *Clarksdale MSD* suit were the state's more affluent school districts, e.g., DeSoto County near Memphis, any of the school districts in Jackson County[116] with an industrial base and near Mobile, Harrison County [Biloxi and Gulfport], Lee County [Tupelo], Lafayette County [Oxford and University of Mississippi], Oktibbeha County [Starkville and Mississippi State University]. Hattiesburg School District was a plaintiff, but that district does not include the affluent parts of the Forrest/Lamar County area, and the University of Southern Mississippi is not on the tax rolls.

Then there are great and disparate funding inequities, from county to county among Mississippi's eighty-two, and from school district to

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113. MISS. CONST. art. III, § 14.

114. MISS. CONST. art. III, § 24; see also the last three paragraphs of Justice Virgil Griffith's opinion in *State v. McPhail*, 180 So. 387, 391 (Miss. 1938).

115. MISS. CONST. art. III, § 32.

116. *See* Pascagoula Sch. Dist. v. Tucker, 91 So. 3d 598 (Miss. 2012), discussed below.

school district.[117]

Able counsel with a bevy of qualified and articulate educational management professionals should be able to take it from there, so long, that is, as the simple promise of Section 37-151-6 remains on the books, an aspirational imperative, if nothing else. A new generation supporting a *Shipman*-like constitutional amendment is bound to come. The lesson from *Fondren* through the "shining" years from 1982 through 1997, and then the *Shipman* advocates, is nothing less. As in 1817 and 1832, "schools and the means of education, shall forever be encouraged in this State."

X. REVENUES FROM SIXTEENTH SECTION LANDS—THE "RAINY DAY" FUND AND MORE

We have seen above how MAEP reflects a deal made in 2007 between the state and its public school districts. Each district agreed to make all reasonable efforts to turn out students who are able to satisfy the MSBE accountability scale of "Successful" ["C"]. The state agreed to provide the funds needed to enable and facilitate such educational achievements, no matter where within each respective district the students live. One big fly in the ointment remains. The legislature has hardly ever fully funded MAEP, its express commitment made in plain English in § 37-151-6 to the contrary notwithstanding.

Over and above MAEP, the Sixteenth Section School Lands Trust has continued as a significant source of funding for the public schools.[118] The important variable here has been that the benefits a particular district draws from the trust are as variable as the factors that make up the fair market value of this tract of real property, or that. Because land values have varied widely, School Land Trust benefits available to the school districts have also varied widely.

An obligatory return to the proverbial page of history.[119] For years, and for largely local political reasons, these school trust lands were leased for at best nominal rentals. The 99-year leases for token rentals following the Civil War became infamous, an infamy of constitutional proportions. It has now been well settled that rentals or other considerations substantially below approximate fair market value are prohibited by the No Donation Clause[120] of the Constitution.

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117. Herein of one of the practical inequity problems produced by Pascagoula Sch. Dist. v. Tucker, 91 So. 3d 598 (Miss. 2012), discussed below.

118. *See* MISS. CODE § 29-3-1, re local control of school lands trust.

119. *See* John Winkle, *The Mississippi State Constitution*, 130-133 (2d ed. 2014).

120. MISS. CONST. art. IV, § 95; see particularly Hill v. Thompson, 564 So. 2d 1, 9-12, (Miss. 1989); Clark v. Stephen D. Lee Found., 887 So. 2d 798, 803 (¶16) (Miss.

One paragraph on this page of history tells a story that began in the late 1980s. The Supreme Court of Mississippi faced the question whether—within the context of Section 211 of the Constitution and regarding Sixteenth Section Lands—oil & gas leases that the state had granted could extend longer than twenty-five years, though the particular well at issue was still producing more than fifty years after discovery, with no end in sight. In a rather wooden analysis, the court held such mineral leases void after twenty-five years.[121] Likely as a result of two strong dissenting opinions,[122] the people amended Section 211 the very next year, providing that "the Legislature may provide, by general law, for leases on liquid, solid or gaseous minerals with terms coextensive with the operations to produce such minerals."[123] Of course, the primary natural asset of many acres of trust lands has been valuable growing timber. Other such lands have been cleared and have fair market rental values according to the crops that they may yield, not to mention variables ranging from the dynamics of commodities markets to the vagaries of the weatherman. Few foresaw the spring of 2019 floods that ravaged the normally productive Mississippi Delta farmlands. For these and other reasons, the fair market value of sixteenth sections and "lieu lands" have varied widely, beginning with that core criteria of value—location, location and location.

The Chickasaw Cession of 1832 further complicates the story. Putting numbers—values and annual income—on the lands that should have gone into the School Lands Trust, but didn't, is even more problematic. The story—told above—of that historic foible centers on the litigation led to the U. S. Supreme Court in 1986.[124] Establishing the school districts of those twenty-three counties in a position of equity with the rest of the state may never be fully accomplished.

All of this—and much more—is precedent to the benefits enjoyed by Mississippi's public school districts in recent years. One school district may find that it needs a few new school buses. The rainy day fund is there. A high school may need to expand its library resources. Or a new football stadium or other sports venue. The Sixteenth Section money in the bank is

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2004); Bd. of Educ. of Lamar Cty. v. Hudson, 585 So. 2d 683, 687 (Miss. 1991). A driving practical force behind the scenes in Oktibbeha Cty. Bd. of Educ. v. Town of Sturgis, 531 So. 2d 585 (Miss. 1988), was that a decision otherwise would have had the effect of approving a more contemporary 99-year lease for an outrageously low rental.

121. Chevron U. S. A., Inc. v. State, 578 So. 2d 644 (Miss. 1991). *See* discussion in John Winkle, *The Mississippi State Constitution* 130-131 (2d ed. 2014).

122. Chevron U. S. A., Inc. v. State, 578 So. 2d 644, 650-658, 658-666 (Miss. 1991).

123. MISS. CONST. art. VIII, § 211(b) (1890, as amended Nov. 3, 1992); *see* Miss. Laws, 1992, ch. 591 (Senate Concurrent Resolution No. 552).

124. *See* Papasan v. Allain, 478 U.S. 265 (1986).

there. A third school may need several new teachers at different levels and in different fields of study. Or facilities and equipment for its concert or marching band. Chances are that the school lands trust funds are sufficient unto the day.[125] Building improvements, furniture and equipment, special interest programs, support for extra-curricular activities, and dozens of other not necessarily recurring financial needs are filled from School Lands Trust funds that are readily available.

XI. SUPPLEMENTAL LOCAL ASSESSMENTS

As explained above, the constitution provides first and foremost that funding for public education in Mississippi is handled on a statewide basis.[126] Recognizing, however, that people residing in some counties or separate school districts may place a higher value on public education—than a merely "adequate education"—above and beyond the political values found among the often niggardly legislators in Jackson, the constitution makers have given us section 206, which provides, in relevant part, that "Any county or separate school district may levy an additional tax, as prescribed by general law, to maintain *its* schools."[127]

It has been the great good fortune of the Pascagoula School District (PSD)[128] that an oil refinery and gas terminal have been constructed within its boundaries, and that these properties produce substantial *ad valorem* tax revenues. In 2011, however, the legislature enacted that the revenue from such assessable property should be distributed among all public school districts in the entire county, not just the district in which such facilities are located. This new law meant that the Ocean Springs School District, the Moss Point School District, and Jackson County School District, would share these *ad valorem* revenues, though the physical facilities so assessed and taxed lay wholly within the PSD's political boundaries.

In 2012, the Supreme Court of Mississippi held that the applicable words and phrases of Section 206 mean what they simply say. Every school district is empowered to assess and levy an *additional* tax upon assets within that district to "maintain its schools." Applying elementary school

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125. *See* MISS. CODE ANN. § 29-3-1 (2020), *viz*., "Sixteenth section school lands, or lands granted in lieu thereof, constitute property held in trust for the benefit of the public schools and must be treated as such."

126. MISS. CONST. art. VIII, § 206, providing for the "state common-school fund."

127. *Id.* (emphasis added). While the title of a constitutional section ordinarily provides no substantive content, the second phrase in the title of Section 206 may be noteworthy, *viz.,* "State common-school fund; additional tax levy by district."

128. The district is now known as the Pascagoula-Gautier School District (PGSD).

linguistics and grammar, the PSD was held entitled—at its discretion—to "maintain its schools" by assessing and levying upon the valuable revenue producing oil refinery and gas terminal which physically lay entirely within the PSD's geographical and political confines.[129] One might safely "bet the farm" that every competent English grammar teacher in the Jackson County public schools would give the Supreme Court an "A."

XII. CHARTER SCHOOLS[130]

The Mississippi Charter Schools Act[131] has been introduced. Charter schools are public schools that are a "part of the state's public education system."[132] A charter school may only operate in a school district which the State Board of Education has designated as an "A," "B," or "C" school, these in accordance with the applicable accreditation system, if approved by the local district school board.[133] For the 2019-2020 school year, Mississippi Charter School Authorizer Board (MCSAB) oversaw six public charter schools, five in the Jackson area and one in Clarksdale.[134] Another public charter school, Leflore Legacy Academy in Greenwood, opened in the fall of 2020, for sixth through ninth grade students only.

In "D" and "F" rated public school districts, an applicant may be approved with no local board action by the SBE, the agency created to approve the establishment of any charter school in the state.[135] In "D" or "F" districts, a prospective charter school operator must first file an application with the SBE. The application process begins in January of each year and concludes in the following September, when the SBE makes final decisions on the applications.[136] The application process is conducted in three phases. During the process, the SBE examines and considers many criteria, including the applicant's proposed academic program, discipline policies, organizational structure, pupil transportation, food services, and must be accompanied by a proposed budget and financial plan.[137] If the applicant has satisfied all of the criteria and has shown an ability to operate

129. Pascagoula Sch. Dist. v. Tucker, 91 So. 3d 598, 599, 602, 604-607 (¶¶ 1, 7, 14, 15, 19, 22) (Miss. 2012).

130. Araujo v. Bryant, 283 So. 3d 73 (Miss. 2019) (charter schools funding upheld).

131. MISS. CODE ANN. § 37-28-1, et seq (2016).

132. MISS. CODE ANN. § 37-28-3(2) (2016).

133. MISS. CODE ANN. § 37-28-7(2)(c) (2016).

134. Clarksdale Collegiate Charter School received an extensive, quite lengthy and largely favorable front page feature review in *The (Jackson) Clarion Ledger*, Sept. 19, 2019.

135. *See, generally*, MISS. CODE §§ 37-28-7, -9 and -19 (2016).

136. *See* www.charterschoolboard.ms.gov/Pages/RFP.aspx.

137. MISS. CODE ANN. § 37-28-15 (Rev. 2019).

a school successfully, the SBE may then approve the application. On the other hand, the SBE may deny an application, though it must set forth the reasons for doing so.[138] Once an application has been approved, the SBE and the applicant then negotiate a charter setting forth the terms and conditions of the operation of the school.[139] The charter is a contract between the SBE and the school, which sets forth terms and conditions for the operation of the school for a period of five years, subject to renewal at the end of the initial five-year term.[140]

Any student residing within the geographic boundaries of a school district in which the charter school is located may attend that school.[141] In addition, any student may attend the charter school, if he or she resides in a school district rated "C," "D," or "F," either at the time the school was approved by the Board, or at the time the student enrolls.[142] A charter school may not limit admission "based on ethnicity, national origin, religion, gender, income level, disabling condition, proficiency in the English language, or academic or athletic ability."[143]

The charter may limit students based on certain ages or grade levels and may organize based on a specific theme, concept or focus, such as students with disabilities, same gender, students with disciplinary problems or students at risk of academic failure.[144] Also, [t]he underserved students of a charter school's enrollment collectively must reflect that students of all ages attending schools in the district in which the school is located, defined for the purposes of this chapter as being at least eighty per cent (80%) of that population.[145] The charter school must enroll all students who wish to attend unless the number exceeds the school's capacity,[146] in which event the school must select students by lottery.[147] Once established, the charter school must give enrollment preference to students enrolled in the school in the previous year and to siblings of students enrolled.[148] A charter school may give enrollment preference to students of the applicant, board members and employees as long as those students do not make up more than ten per cent (10%) of the total student population.[149]

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138. MISS. CODE ANN. § 37-28-19 (Rev. 2019).
139. MISS. CODE ANN. § 37-28-21 (Rev. 2019).
140. MISS. CODE ANN. §§ 37-28-21, -33 (Rev. 2019).
141. MISS. CODE ANN. § 37-28-23 (Rev. 2019).
142. MISS. CODE ANN. § 37-28-1(b) (Rev. 2019).
143. MISS. CODE ANN. § 37-28-3 (2013).
144. MISS. CODE ANN. § 37-28-23.
145. MISS. CODE ANN. § 37-28-5.
146. MISS. CODE ANN. § 37-28-6.
147. MISS. CODE ANN. § 37-28-7.
148. MISS. CODE ANN. § 37-28-23(8).
149. MISS. CODE ANN. § 37-28-23(8).

Funding for charter schools follows the student; that is, the charter school receives a per student allocation of funds from the district in which it resides and the SDE.[150] The Supreme Court of Mississippi has upheld the legitimacy of this funding mechanism.[151] Charter schools may also receive certain types of private funding such as grants, gifts and donations.[152]

XIII. VOUCHER SYSTEM

Government-issued vouchers are an alternative strategy for public education which is practiced in a number of states. One important feature of this educational funding format is that the student and/or his or her parents have choices as to what schools they wish to attend. Another argument for a voucher system is that it creates competition among schools, which arguably results in higher quality educational opportunities being available for school age students.

In recent years, Mississippi has offered a single and carefully tailored voucher school program. The Nate Rogers Scholarship for Students with Disabilities/Mississippi Speech Language Therapy Scholarship has been available in K-6 grades for children suffering the disability commonly known as dyslexia. There are separate programs for children attending public and private schools.[153]

Mississippi has not had enough history with school vouchers that credible, experience- based conclusions may be drawn. A good place to start for persons wishing to pursue the subject is the "14 Pros and Cons of School Vouchers," published by Vittana.org.[154]

XIV. RELIGION IN PUBLIC SCHOOLS AND RELATED ISSUES

Of course, as long as there are teachers who give examinations, there will be prayers said in public schools, or so the saying goes. Yet there have been and remain serious constitutional and other concerns about blatantly Christian prayers, invocations, Bible readings, and other religious observances that once were commonplace in Mississippi's public schools, e.g., devotionals held over the P. A. system at the beginning of each school

150. MISS. CODE ANN. § 37-28-55 (2016).

151. *Araujo*, 283 So.3d at 73.

152. *See* MISS. CODE ANN. § 37-28-59.

153. *See* Mississippi Voucher Programs (March 2017), http://ees.force.com/mbdata/mbprofallBSrt?Rep=VMS.

154. Louise Gaille, *14 Pros and Cons of School Vouchers*, VITTANA.ORG PERSONAL FINANCE BLOG (Mar. 8, 2021, 10:10 PM), https://vittana.org/14-pros-and-cons-of-school-vouchers.

day, or before the kickoff in high school football games, among other occasions. The latter was held impermissible in the year 2000?[155]

The statutory backdrop on the books today dates back to 1997. References to religion or "the use of religious literature, history, art, music and other things having a religious significance" are permitted, so long as they do not "aid any religious sect or sectarian purpose."[156] Public schools are instructed to display in all classrooms enlarged posters stating "IN GOD WE TRUST," as this is the "motto of the United States of America."[157]

Legal principles emanating from the Establishment Clause have been brought to bear in Mississippi schoolhouses, along with other federal authorities.[158] For example, legislation prohibiting the teaching of the Darwinian theory of evolution has been held impermissible and unenforceable under Establishment Clause.[159] Any effort to teach or present so-called "creationism" should suffer a similar fate, and for the same reasons. Past that, the plot thickens, time to trot out the familiar insight that, in the law "a page of history is worth a volume of logic."[160] The rise of the secular society and the increasing variety of religions and faiths beyond mainstream Christianity—and their passionate prejudices and practices – have complicated matters since the simple exhortations of the state's first two constitutions.

The most prominent matter regarding religion in public schools has been *Ingebretsen v. Jackson Public School Dist.,*[161] dating back to the mid-1990s. A number of students, parents and public interest organizations

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155. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); M. B., a minor through Bedi v. Rankin Cty. Sch. Dist., 2015 WL 5023115 (S.D. Miss. 2015). *See also*, Bd. of Trustees of Jackson Pub. Sch. Dist. v. Knox, 638 So. 2d 1278 (Miss. 1994) and 688 So. 2d 778 (Miss. 1997) (student read prayers).

156. 1997 Miss. Laws Ch. 599, codified as MISS. CODE ANN. §37-13-163(1).

157. 1970 Miss. Laws Ch. 374, codified as MISS. CODE ANN. §37-15-35. It is hard to see how such an iteration survives under the Establishment Clause, or under its counterpart in the Mississippi Constitution. See Constitutional Law, Ch. 19, §19:55, "Freedom of Religion," Encyclopedia of Mississippi Law (Third Edition), Vol. 3, April 2020.

158. *Buford*, at * 9-11. *See* Lemon v. Kurtzman, Superintendent, 403 U.S. 602 (1971).

159. Smith v. State, 242 So. 2d 692, 693, 696-98 (Miss. 1970). A legislative effort to bar the teaching of Darwinism succeeded on paper only. See Mitchel, *A New History of Mississippi* 475 (2014). For a contemporary summary of issues surrounding Darwinian evolution and so-called "intelligent design" theory, see Yuval Noah Harari, *Sapiens: A Brief History of Mankind* 397-399 (2018).

160. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.)

161. David Ingebretsen, Et Al. v. Jackson Public School Dist., 88 F.2d 274 (5th Cir. 1996), affirming Ingebretsen v. Jackson PSD, 864 F.Supp. 1473 (S.D. Miss. 1994).

brought an action challenging a state statute[162] which authorized public school students to initiate non-sectarian, non-proselytizing prayers at various compulsory and noncompulsory school events. The U. S. Court of Appeals for the Fifth Circuit held that

> The School Prayer Statute fails all three prongs of the *Lemon* test[[163]] because its purpose is to advance prayer in public schools, its effect is to advance religion in the schools and it excessively entangles the government with religion.[164]

Shortly after *Ingebretsen*, a north Mississippi federal court considered a matter involving a variety of religious practices in the Pontotoc County. In 1996, *Herdahl v. Pontotoc County School Dist.*[165] adjudged the viability of the school district's efforts to evade a number of U. S. Supreme Court cases relating to religious practices in public schools. The fact driven *Herdahl* opinion considered intercom prayers,[166] pre-official school day activities–a brief voluntary activity was permitted,[167] classroom prayer–"[n]othing herein interferes in any way with each student's right to individually pray at the lunch table in the cafeteria, or to individually pray silently at any other time,"[168] and Bible class, not permitted at all.[169] *Lemon* correctly controlled the court's constitutional analysis.[170]

Circa 2013-2014, religion-related activities in Northwest Rankin High School (NWRHS) in central Mississippi gave rise to the decision in

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162. 1994 Miss. Laws ch. 609, § 1(2), codified as MISS. CODE ANN. §§ 37-13-4 & 37-13-4.1 (rev. 1990).

163. The state courts of Mississippi have applied the U. S. Supreme Court *Lemon* construction of the Establishment Clause. *See* Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1224-25 (¶¶ 28-31) (Miss. 2005); Fountain v. State ex rel MSDH, 608 So. 2d 705, 708 (Miss. 1992).

164. *Ingebretsen*, 88 F.2d at 279. As with all important cases cited in this chapter, the opinion of the court should be read and studied in its entirety. This is particularly so here, as there was a strong dissent filed on application for rehearing *en banc*, with two Mississippi circuit judges joining the dissent. See *Ingebretsen*, 88 F.2d at 281-88.

165. Herdahl v. Pontotoc Cty. Sch. Dist., 933 F.Supp. 582 (Miss. 1996); prior thereto, *see* Herdahl v. Pontotoc Cty. Sch. Dist., 887 F.Supp. 902 (N.D. Miss. 1995).

166. *Herdahl*, 933 F.Supp. at 586-89.

167. *Id*. at 589-91.

168. *Id.* at 591.

169. *Id.* at 591-93.

170. *Id.* at 593-98. U. S. District Judge Neal Biggers also cited and relied on *Lee v. Weisman*, 505 U.S. 577 (1992), a pre-*Lemon* decision. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). The *Ingebretsen* case was noted in its U. S. District Court iteration. *See Herdahl*, 933 F.Supp. at 585, 588, 591, 593, 598.

M. B., a minor, which produced points of interest.[171] On July 17, 2013, the school district had adopted a facially neutral and apparently permissible Religion in Public Schools Policy. In April of 2014, the NWRHS held a ceremony in the school assembly, honoring students who had scored well on the ACT test. The school invited a pastor to deliver a prayer at this school-sponsored event. Early in the ceremony, the pastor instructed the students to bow their heads as he delivered his conventionally Christian opening prayer.[172] Such ceremonies had been regularly held in the past, and "the 2014 event proceeded in its traditional fashion."[173] Relying on the Establishment Clause and the *Lemon* case, the U. S. District Court explained

> [T]he invocation at the April 17, 2014 ACT Ceremony blatantly violated these [previously stated] mandates. The preacher-led prayer at this event was an affront to M.B. and any of the other student who may not have shared the same beliefs espoused by the reverend. In fact, even those who are of the Christian faith (which may have included M.B.) could have taken exception. Regardless of the faith shared by a fraction or even a majority of its pupils, schools owe a duty to all students to refrain from conduct which gives the appearance of advocating a particular religion. In fairness to and protection of all, they must remain neutral. This same duty is owed to parents who submit their children to the protection of educators. . . .[174]

But the 2014 ACT Ceremony was not all. In October of 2014, the principal of the Northwest Rankin Elementary School "instructed all fifth-grade teachers to walk their students through a hallway where members of a Christian association, Gideons International, were distributing Bibles." All of this was coordinated with the Gideons. Citing *Lemon*, the U. S. District Court held that "Assisting with the distribution of Bibles to students at school, during school hours, is inherently coercive," and was prohibited.[175] Though predicated solely on the First Amendment, the

171. There are other procedural twists and turns in this case that are of little or no interest.

172. *M.B., a minor*, at **5-6.

173. *M.B., a minor*, at *6.

174. *M.B., a minor*, at *6.

175. *M.B., a minor*, at *10. This federal constitutional ruling calls into serious question the final clause of Miss. Const. Art. III, § 18, which provides that the state constitution does not "exclude the Holy Bible from use in any public school in this state." *M.B., a minor*, and cases going back to *Abingdon v. Schempp*, for all practical

principles applied and enforced in *M. B.* are consistent with settled constructions and applications of Section 18 of the Mississippi Constitution.[176]

Buford v. Coahoma Agricultural High School[177] arose in a different factual context. The complaining party was a school principal who had been discharged for flagrantly violating the school's religious neutrality policy, *viz*., the principal led programs involving scriptural readings from the Bible.[178] Constitutional freedom of religion, conventional variety, was upheld.

The *M.B., a minor* and *Buford* cases are worthy of reflection in light of the Mississippi Student Religious Liberties Act, effective July 1, 2013.[179] For one thing, the act has been crafted from the perspective of the student. Its tenor is to put any student activity on a par with non-religious activities that may be permitted in the school. The act is likely to be tested in the courts, where it seems destined to expose for scrutiny the perennial dilemma in the First Amendment, *viz*., the Free Exercise Clause leaves people free to engage in all sorts of activities and practices that the Establishment Clause would never permit the state to require or enforce.

There may be religion and free exercise-based absences from school that should be recognized or honored. The legislature has enacted that

> An absence may be excused if the religion to which the compulsory-school-age child or the parents adheres, requires or suggests the observance of a religious event. The approval of the absence is within the discretion of the superintendent of the school district, or his designee, but approval should be granted unless the religion's observance is of such a duration

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purposes overrule Justice Julian Alexander's eloquent opinion in *Chance v. Mississippi State Textbook Rating and Purchasing Board*, 190 Miss. 453, 200 So. 706 (1941), and, as well, U. S. Circuit Judge J. P. Coleman's opinion in *Norwood v. Harrison*, 340 F.Supp. 1003 (N.D. Miss. 1972), much of which takes Justice Alexander's opinion and quotes it verbatim, *Norwood*, 340 F.Supp. at 1008-1009, quoting *Chance*, 200 So. at 709-710, 713. See also John Winkle, *The Mississippi State Constitution*, 43-44 (2d ed. 2014) and Justice Anderson's dissent in *Chance*, 200 So. at 714.

176. *See* MISS. CONST. art. III, § 18, which, if anything, is stronger than the Establishment Clause of the First Amendment. First, "[n]o religious test as a qualification for office shall be required." Second, "no preference shall be given by law to any religious sect or mode of worship." *See also*, John Winkle, *The Mississippi State Constitution*, 43-44 (2d ed. 2014).

177. Buford v. Coahoma Agricultural High Sch., 2014 WL 4692753 (N. D. Miss. 2014).

178. *Buford*, at ** 3-5.

179. 2013 Miss. Laws ch. 334 (S.B. No. 2633); MISS. CODE ANN. §§ 37-12-1 thru -13.

as to interfere with the education of the child.[180]

School administration, funding and use of textbooks are other contexts in which religious freedom issues have arisen and been adjudicated. Miss. Const., art. VIII, § 208, provides that

> No religious or other sect or sects shall ever control any part of the school or other educational funds of this state, nor shall any funds be appropriated toward the support of any sectarian school. . . .

The constitution thus has long forbidden the use of public funds for the support and operation of schools that have a religious or sectarian affiliation.[181]

XV. LGBTQ ISSUES IN PUBLIC SCHOOLS

In recent years, the rights and practices of gay and lesbian students have drawn attention in Mississippi. In 2010, Itawamba Agricultural High School in northeast Mississippi faced just such an issue. The school board canceled the senior prom which had been scheduled for early April, rather than let down barriers against the lesbian lifestyle. Constance McMillen, an openly lesbian female student since the eighth grade, asked permission that she be allowed to wear a tuxedo and bring her girl friend to the prom as her date to the senior prom. School officials balked. Constance sued them in federal court.

Citing established federal precedents, Judge Glen Davidson treated Constance's lifestyle and her then present proposal as forms of protected speech, albeit of the non-verbal variety. The "expression of one's identity and affiliation to unique social groups may constitute speech as envisioned by the First Amendment."[182] The court never mentioned the free speech clause of the state constitution. This is of interest because, if anything, the state's free speech clause is stronger and more protective of the individual than is the First Amendment.[183] The Mississippi Constitution declares that "freedom of speech . . . shall be held sacred . . . ."[184] Nonetheless, Judge Davidson invoked and quoted cases from a variety of other jurisdictions

180. MISS. CODE. ANN. § 37-13-91(4)(g).

181. State Teachers' College v. Morris, 165 Miss. 758, 144 So. 374, 377 (1932); See also Winkle, *Mississippi State Constitution* 129 (2d ed. 2014).

182. McMillen v. Itawamba Cty. Sch. Dist., 702 F.Supp. 2d 699, 703 (N.D. Miss. 2010).

183. *See* Gulf Pub. Co., Inc., v. Lee, 434 So. 2d 687, 696 (Miss. 1983).

184. MISS. CONST. art. III, § 13.

and held that the school district "ha[d] violated . . . [Constance's] First Amendment rights by denying . . . [her] request to bring her girlfriend as her date to the prom."[185] The school district may have been spared a large damages award by a group of school parents, who privately organized a senior prom to which "all IAHS students, including the plaintiff, are welcome and encouraged to attend."[186]

A similar issue arose the next year in a more southern part of the state. A female lesbian student at Wesson Attendance Center sought to sit for her senior yearbook portrait wearing male attire, a tuxedo. The court's opinion----denying her motion to dismiss—referred the matter to mandatory mediation.[187] A few years later, Judge Carlton Reeves cited *McMullen* and *Sturgis* en route to authorizing a same-sex marriage in Mississippi.[188]

Many who object to, or are offended by, LGBTQ lifestyles ground their views in religion. This has brought to bear the state's freedom of religion clause which, in relevant part, reads,

> [T]he free enjoyment of all religious sentiments . . . shall be held sacred. The rights hereby secured shall not be construed to justify acts of licentiousness injurious to morals or dangerous to the peace and safety of the State, or to exclude the Holy Bible from use in any public school of the state.[189]

This constitutional text can be applied in differing ways in differing contexts by different people.

Some (if not most) take the origin of the two sexes back to Genesis. The biblical view of man and woman may well be a "religious sentiment" that people may freely practice. On the other hand, the right to pursue different LGBTQ lifestyles may be seen as respect for human dignity which falls well within the "religious sentiments" of others. Some may find sanction for such respect for human dignity[190] in the New Testament, which

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185. *McMillen*, 702 F.Supp.2d at 704. Extra-judicial statements on the rights of gays and lesbians have been construed as constitutionally protected political speech. Mississippi Commission on Judicial Performance v. Wilkerson, 876 So. 2d 1006 (Miss. 1990).

186. *McMillen*, 702 F.Supp.2d at 706.

187. Sturgis v. Copiah Cty. Sch. Dist., 2011 WL 4351355 (S.D. Miss. 2011).

188. Campaign for Southern Equality v. Bryant, 64 F.Supp.3d 906, 936 (S.D. Miss. 2014).

189. MISS. CONST. art. III, § 18.

190. The late Prof. Myres S. McDougal of Prentiss County, Mississippi and the Yale Law School, arguably Mississippi's greatest Twentieth Century scholar, centered

may lead to one use of the Christian Holy Bible which should not be off limits in the public schools.[191] Past these, reasonable people may disagree on just what are "acts of licentiousness" and, assuming that first bridge is crossed, upon whether those "acts" are "injurious to morals or dangerous to the peace and safety of the State." Members of the Itawamba County School Board, and, as well, people in the community who opposed allowing Constance to attend the senior prom with her girlfriend quite likely are among those who view the lesbian lifestyle as involving "acts of licentiousness" that are "injurious to morals or dangerous to the peace and safety of the State." In the end, Section 18 appears to give sanction to that wisest view of human interactions that never made its literal way into the Holy Bible or other religious texts – Live and Let Live!

XVI. HOME SCHOOLING

Mississippi has a compulsory school attendance law,[192] as noted above. Parents are responsible for seeing to it that all children between the ages of six and 17 attend school regularly.[193] Parents who do not see to it that their school age children attend school, as required by law, are subject to criminal sanctions.[194] The experience-based premise for this compulsory school attendance law takes us back to 1817 and statehood. This state's founders thought "knowledge . . . necessary to good government, the preservation of liberty and the happiness of mankind."[195] And so we have schools.

In its wisdom and experience, and within its constitutional authority, the state has learned and legislated that there are multiple means of acquiring "knowledge." Many of these have been examined above. Last, but not least, for present purposes, the state has authorized "legitimate home

much of his career promoting human dignity as a secular value. See my brief depiction, "A Public Order of Human Dignity for All," published in March 2020, https://caba.ms/articles/features/public-order-of-human-dignity-for-all, an abbreviated version of which appears below.

191. *See* M. B., a minor through Bedi v. Rankin County School Dist., 2015 WL 5023115 (S.D. Miss. 2015) discussed above.

192. *See* Mississippi Compulsory School Attendance Law, MISS. CODE § 37-13-91 (2014), et seq.; *see particularly* §37-13-91(3)(c). *See also*, a problematic decision regarding the county compulsory school attendance officers. In re R. G., 632 So. 2d 953 (Miss. 1994).

193. MISS. CODE ANN. §§ 37-13-91(2)(f), -(3).

194. MISS. CODE ANN. §§ 37-13-61, -63.

195. MISS. CONST. of 1817 art. VI, § 16.

instruction program[s]."[196] And so we have home school laws.[197] A parent, guardian or custodian of a child to be home schooled must procure a certificate of enrollment issued by the SDE by September 15 of each year.[198] Without surprise, a home school program may not be "operated or instituted for the purpose of avoiding or circumventing the compulsory attendance law."[199]

Parents build home school curriculums for PreK-12 in Mississippi. Suffice it to say that these curricula vary from parent to parent, from child to child. The better means of presenting the history and likely future of such "home instruction programs" would be presenting a broad variety of individual parent-built curricula, their implementation and their results. This would enlarge greatly an exposition which may be arguably too long anyway. Make no mistake about it; home schooling is as legitimate as it is important as it is valuable towards the ends of family autonomy and dignity and "the happiness of mankind" which have always been enhanced greatly by "education," albeit among many families and for many years home instruction was the only means of education available.

XVII. CORNERSTONES OF HUMAN DIGNITY PROPERLY TAUGHT

At the outset, we named several great teachers who had been born and bred in Mississippi. One of those is Myres Smith McDougal, who hailed from rural Prentiss County in the northeastern corner of this state. Years ago, Prof. McDougal and a colleague, Harold D. Lasswell, studied, understood, articulated and elaborated eight value-institution cornerstones of human dignity that each person on this planet might reasonably aspire to. About half of these are particularly worthy of statement and elaboration in connection with a proper education of the maturing children of this state.

Prof. McDougal envisioned a public order of human dignity that should be taught to all. As a further anchor, Mac—ever the teacher—"characterize[d] the social process as human beings interacting with one another and with resources."[200] Relevant here and also to be taught in all schools is the simple social practice of **respect**.[201]

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196. MISS. CODE ANN. §§ 37-13-91(2)(i), -(3)(c), -(9).

197. Time for Learning, Inc., (last visited, February 3, 2021), available at https://www.time4learning.com/homeschooling/mississippi/laws-requirements.html.

198. MISS. CODE ANN. § 37-13-91(3).

199. *Id.*

200. Myres S. McDougal and Harold D. Lasswell, *Jurisprudence in Policy Oriented Perspective*, 19 FLA. L. REV. 468, 506 (1966-1967); Robertson, "A Public Order of Human Dignity for All," Capital Area Bar Assn., (posted March 2020), https;//caba.ms/articles/features/public-order-of-human=dignity-for-all.

201. *Id.*

People value their active participation within and among their gender, race, nationality, geography, language, religion and other classes and castes. Interest groupings, such as business associations, economic councils, classmates, clubs and other more natural classes and castes are exemplars of the practices or institutional cornerstones that enable human and mutual respect. A touch or two of humility would enrich the practice and experience of respect and self-respect in most any context.

Then there is the cornerstone of **well-being**.[202] Well-being includes "health, safety and comfort arrangements." It is valued because it makes so much more possible within a person's time in this humanity, this existence. Protection of life, liberty and property three prominent and invaluable exemplars. Hospitals, medical clinics, health-plexes, retirement homes and other like facilities and services are practical and institutional cornerstones that enable well-being and longevity, as are criminal justice, including law enforcement, police, public safety and fire protection enablers of well-being and thus human dignity.

Then there is the cornerstone of **affection**,[203] *viz*., "family, friendship, circles, loyalty." Family speaks for itself, along with how much of a family, its humanity and longevity one is privileged and fated to enjoy. One values friendship both received and given, experiences circles of colleagues, acquaintances and passers-by, and each of us cherishes loyalty given and experienced. Practical and institutional cornerstones make each more tangible, enriching each, that reciprocal affections may enhance the capacity for connection as progenitor of "a public order of human dignity on the widest possible scale."

Then there is the cornerstone of **rectitude**,[204] *viz*., "churches and related articulators and appliers of standards of responsible conduct." Most people have a fair sense of "right and wrong" and even shades of gray, and how these inform and nourish the other cornerstones of human dignity. As a public order of human dignity on the widest possible scale is our goal, little more need be said here.

Then there is the cornerstone of **enlightenment**,[205] "mass media, research."

Education is quickly added here, as a value and a prime exemplar of the practice of that dimension of human existence that Mac and his colleague labeled enlightenment.

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202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*

XVIII. EPILOGUE

One of the more interesting activities within the world of education---over the last half century, at least---has been the search for substantial alternatives beyond traditional PK-12 public schools. Background realities have included goals set forth in Mississippi's early constitutions, on the aspirational end, and more recent compulsory school attendance laws, on the coercive end. The centerpiece cry increasingly heard has been "Choice!" Less overt but nonetheless real is "Fear."

And so, we wrap this exposition up with the complementary comments of several of our country's more thoughtful citizens of generations past, words as powerful and meaningful in today's context as when first uttered.

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas---that the best test of truth is the power of the thought to get itself accepted in the competition of the marketplace."[206]

But, as noted above, there is also "fear" in the marketplace, as much as many might wish it otherwise. And so it is time for reflecting upon Franklin Roosevelt's wise advice to our country in the early days of the Great Depression, that "the only thing we have to fear is---fear itself!"[207] Before *Brown* and since *Alexander*, our greatest and most prevalent fear has been racial desegregation in public education, though African-Americans make up only 38 percent of the state's population. The practical problem is that for so long so many have insisted on such a super-majority of white classmates for *their* children, with white flight the consequence of these parents not getting their way. Of course, this one is coupled with the fact that public school teacher salaries remain unfortunately, if not criminally, low. People fear taxes necessary that MAEP be fully funded in the selfish sense that no one likes paying taxes very much.

Fear is at the cornerstone of the religious issues discussed above. This seems odd, as the fearful ones are our less tolerant – some might with merit say, less than Christian -- Christians, whose religion remains by far the most predominant in the state. Objections to LGBTQ students in our schools are also grounded in fear. Again, why not Live and Let Live?

And in the context of what seems our second greatest fear---immigration---again, the battle scarred and thrice near fatally wounded Oliver Wendell Holmes, Jr., regarding a female pacifist's application for

206. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

207. President Franklin D. Roosevelt, Inaugural Address (1933).

citizenship, reflected

> And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make this country what it is, . . . , and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount.[208]

Perhaps we should add these thoughts from Emma Lazurus, so associated with our country's Statue of Liberty.

> Give me your tired, your poor, your huddled masses longing to breathe free. The wretched refuse of your teeming shore. Send these, the homeless, your tempest-tost to me. I will lift my lamp beside the golden door.[209]

And teach all of these wise words to our children and their grandchildren.

Respectfully, history teaches that the foregoing insights are valuable in understanding our state's efforts at educating its people---and particularly its children---from 1817, through the recent past, and for the foreseeable future.

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208. United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

209. Emma Lazarus, *The New Colossus* (1883; 1903).