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Classroom v. Courtroom: Is the Right to Education Fundamental?

Lori Anne Harper

COMMENTS

CLASSROOM v. COURTROOM
Is The Right to Education Fundamental?

Lori Anne Harper*

No one will doubt that the legislator should direct his attention above all to the education of youth; for the neglect of education does harm to the constitution.[1]

-- Aristotle

I. INTRODUCTION

Education is essential to individual development. Through education, society enables its citizens to participate fully in community activities as well as in the political processes.[2] The 1972 Montana Constitution sets forth Montana's commitment to educate its citizens:

> It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state. . . . The legislature shall provide a basic system of free quality public elementary and secondary schools.[3]

Montana's Constitution clearly requires that the state provide each

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1. ARISTOTLE, *reprinted in* 2 THE COMPLETE WORKS OF ARISTOTLE, bk. VIII, ch. 1, ¶ 1 (*cited in* Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 101 n.32 (1989) [hereinafter Hubsch]).

2. "[E]ducation is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship." Brown v. Board of Educ., 347 U.S. 483, 493 (1954). *See also* Hubsch, *supra* note 1, at 95.

3. MONT. CONST. art. X, § 1.

Montana citizen with a quality education.[4]

Article X, section 1 (the Education Clause) creates a constitutionally protected territory that the Montana Supreme Court invaded in a 1986 decision, *State ex rel. Bartmess v. Board of Trustees*.[5] In *Bartmess*, the court upheld a rule which denies both equality of educational opportunity and a quality education to a select group of high school students in Helena, by forbidding them to participate in extracurricular activities.[6] *Bartmess* gave the court the opportunity to find, within the Education Clause, a fundamental right to education. Unfortunately, the court failed to do so.[7] Instead, the court purposely limited its discussion to the status of "students' right to participate in existing extracurricular activities,"[8] even though extracurricular activities and academics are traditionally closely connected.[9] The court's reluctance to expand its discussion beyond student participation in extracurricular activities leaves two questions unsettled: (1) the status of the right to education in Montana, and (2) the meaning of "education" in the Education Clause.

This comment traces the development of Montana's education clause from its basis in the 1889 Montana Constitution to its enumeration in the 1972 Montana Constitution. The comment then discusses *Bartmess*, focusing on the Montana Supreme Court's failure to characterize the right to education as fundamental in Montana, and how that failure denied a select group of high school students in Helena both equality of educational opportunity and a quality education. Finally, the comment analyzes the effects of *Bartmess*' divergence from past precedent, and its failure to ac-

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4. "The legislature *shall* provide . . . *quality* public . . . schools." MONT. CONST. art. X, § 1(3) (emphasis added). "Because of this overriding importance of education, the committee recognizes the awesome task of providing the appropriate Constitutional provisions necessary to protect and nurture the public educational system. . . . The committee views these proposed changes as *vital to the quality and efficiency of education in Montana.*" II MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS 721 (1972) (Education and Public Lands Committee Proposal X) (emphasis added) [hereinafter TRANSCRIPTS].

5. 223 Mont. 269, 726 P.2d 801 (1986). *See infra* part III and accompanying text for a discussion of *Bartmess*.

6. *Bartmess*, 223 Mont. at 271-72, 726 P.2d at 802.

7. The *Bartmess* court stated:

> We are not ruling upon the issue of whether or not the right to education itself is a fundamental right. We are not ruling upon whether the failure to offer any extracurricular activities may result in a constitutional deprivation, nor whether extracurricular activities are in any way an indispensable component of the basic system of free quality public education.

Id. at 272, 726 P.2d at 802. *But see infra* notes 66-67 and accompanying text.

8. *Bartmess*, 223 Mont. at 275, 726 P.2d at 805.

9. *Id.* at 281-85, 726 P.2d at 808-11 (Sheehy, J., dissenting).

knowledge that extracurricular activities are fundamental to Montana's educational system.

II. BACKGROUND

A. *The 1889 Constitution*

The 1889 Montana Constitution created a duty to "establish and maintain a general, uniform and *thorough* system of public, free, common schools,"[10] a duty to provide an education to the children of Montana. This deceptively simple constitutional mandate commanded the attention of the Montana Supreme Court. For example, in *McNair v. School District No. 1*,[11] the court answered an important question: "What, then, constitutes a 'thorough' system of education in our public schools?"[12] In *McNair*, the court struck down a taxpayer's objections to the construction of a gymnasium and an athletic field, stating that "[e]ducation may be particularly directed to either mental, moral, or physical powers or faculties, *but in its broadest and best sense it embraces them all.*"[13] The *McNair* court defined education as "the totality of the qualities acquired through individual instruction and social training, which further happiness, efficiency and [the] capacity for social service."[14] The *McNair* court thus interpreted the 1889 education clause as a guarantee to the citizens of Montana that the state would provide an educational system encompassing academics as well as extracurricular activities. The court, however, did not label the right to education as fundamental.

More than thirty years later in *Moran v. School District No. 7*,[15] a United States District Court judge acknowledged the importance the Montana Supreme Court had given to extracurricular activities in *McNair*: "[The] Montana Supreme Court has recognized the importance of extracurricular activities as an *integral part* of the total education process."[16] In *Moran*, a married high school senior challenged a statute which prevented married high school students from participating in extracurricular activities. The federal district court, applying the 1889 Montana Constitution, granted a preliminary injunction to Moran, holding that "the right to attend school includes the right to participate in extracurricular

10. MONT. CONST. of 1889, art. XI, § 1 (emphasis added).
11. 87 Mont. 423, 288 P. 188 (1930).
12. *Id.* at 428, 288 P. at 190.
13. *Id.* (emphasis added).
14. *Id.* (citation omitted).
15. 350 F. Supp. 1180 (1972).
16. *Id.* at 1184 (emphasis added).

activities."[17] In doing so, the *Moran* court employed an interpretation of *McNair* that the Montana Supreme Court has refused to utilize since it decided *McNair*.[18]

B. The 1972 Constitution

The 1972 Montana Constitution, although not as encompassing as its 1889 counterpart,[19] expresses the intent that Montana's educational system must encompass a broad range of activities inside and outside the classroom. The drafters recognized the critical importance of education to every Montana citizen, and therefore required that education be accessible to all. "Learning is gradually being recognized as a process which extends from the early months till the late years of life. A long range goal of the state should be to foster and support this learning process for *all* citizens to the maximum level possible in any given era."[20] The Education Clause of the 1972 Montana Constitution thus reflects Montana's commitment to the individual development of its citizens.

The 1972 Constitutional Convention Transcripts set forth the delegates' plan to fulfill the purpose of Montana's educational system, namely, to provide the tools necessary for the citizens of Montana to lead productive and satisfying lives.[21] The transcripts identify three broad concepts as essential to a healthy educational system: (1) quality, (2) equality[22] and (3) flexibility.[23]

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17. *Id.*

18. In Granger v. Cascade County School District, 159 Mont. 516, 499 P.2d 780 (1972), the Montana Supreme Court, interpreting the 1889 Montana Constitution, seemed to weaken the strong definition of a "thorough system of public, free, common schools" adopted in *McNair*, stating: "As long as the individual student is not deprived of equal access to educational courses and activities reasonably related to recognized academic and educational goals of the particular school system, the constitutional mandate is not violated." *Id.* at 526, 499 P.2d at 785. Justice Sheehy, in his dissenting opinion in *Bartmess*, however, interpreted *Granger* as an affirmation of *McNair*.

> [In *Granger*] this Court reaffirmed its statement that education may be directed to mental, moral and physical powers, and provided this test: "Is a given course or activity reasonably related to a recognized academic and educational goal of a particular school system? If it is, it constitutes part of the free, public school system commanded by Article XI, Section 1 [of the 1889 Montana Constitution] . . . ."

Bartmess, 223 Mont. at 283-84, 726 P.2d at 810 (Sheehy, J., dissenting) (quoting *Granger*, 159 Mont. at 527, 499 P.2d at 786).

19. The 1889 Montana Constitution contained express language that required the legislature "to establish and maintain a *general, uniform and thorough system of public, free, common schools*." MONT. CONST. of 1889, art. XI, § 1 (emphasis added).

20. II TRANSCRIPTS, *supra* note 4, at 722 (emphasis added).

21. *Id.* at 721-22.

22. Although *equality* is not specifically listed as a fundamental consideration of the delegates, the transcripts contain other language which implies that *equality* of educational opportunity is also of utmost importance to the delegates: "*every child* should have *approx-*

1. Quality

A quality education is the basis of a good citizenry and a strong government.[24] The Montana Supreme Court defined a "quality education" in *McNair*, by emphasizing the importance of non-academic activities.

> [I]t is clear that the solemn mandate of the Constitution is not discharged by the mere training of the mind; mentality without physical well-being does not make for good citizenship—the good citizen, the man or woman who is of the greatest value to the state, is the one whose *every faculty* is developed and alert.[25]

Similarly, the constitutional convention delegates defined a "quality" educational system as "not simply a minimum educational system, but one which meets contemporary needs and produce[s] capable, well-informed citizens."[26] As both definitions demonstrate, an individual needs a complete education that will *at least* develop the skills necessary to survive in the outside world. Although reading, writing and arithmetic provide a basic education, they do not provide a complete education.[27]

2. Equality

Montana's education clause explicitly guarantees "equality of educational opportunity" to all students in Montana.[28] The 1972 Constitutional Convention delegates acknowledged the importance of equality when they stated: "Society has accepted the duty to support a quality educational system, and courts have stressed that it must be made available on approximately equal terms."[29] The notion that the state of Montana should treat individuals equally under the Montana Constitution is a familiar constitutional concept enumerated in article II, section 4 (the Equal Pro-

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imately the same opportunity to receive an adequate basic education." *Id.* at 724 (emphasis added).

23. The transcripts enumerate *quality and flexibility* as "fundamental to the committee's considerations." *Id.* at 721-22.

24. Hubsch, *supra* note 1, at 96.

25. *McNair*, 87 Mont. 423, 428, 288 P. 188, 190 (1930) (emphasis added). Although *McNair* was decided prior to the adoption of the 1972 Constitution, the Montana Supreme Court continues to cite it in its decisions. For example, the Montana Supreme Court stated in *Bartmess*: "The priority given to academic over non-academic work . . . *does not contradict this Court's statement in McNair that physical and moral education are also important.*" *Bartmess*, 223 Mont. 269, 276, 726 P.2d 801, 805 (1986) (emphasis added).

26. II TRANSCRIPTS, *supra* note 4, at 724.

27. *See infra* section IV(B).

28. MONT. CONST. art. X, § 1(1).

29. II TRANSCRIPTS, *supra* note 4, at 722.

tection Clause).[30] This clause provides for "equal protection of the laws."[31] In 1908, while construing the fourteenth amendment of the United States Constitution, the Montana Supreme Court defined "equal protection of the laws" as

> equal security under [the laws] to everyone, under similar terms, in . . . life, . . . liberty, . . . property, and in the pursuit of happiness, and exemption from any greater burdens and charges than . . . [those which] are equally imposed upon all others under like circumstances. . . . [I]f a particular statute distributes its burdens unequally upon those who occupy the same relation to its subject, if it punishes one citizen for doing that which another may do with impunity, if it abridges the liberty of one without imposing a like restriction upon another, it does not furnish the "equal protection of the laws."[32]

In order to guarantee equal protection of the laws, Montana must therefore ensure that educational opportunities are offered to *all* of its citizens.[33]

3. *Flexibility*

The constitutional convention delegates recognized the fundamental need for flexibility in order to accommodate the changing needs of Montana's educational system.[34] Although it is not clear

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30. MONT. CONST. art. II, § 4.

31. *See* Butte Community Union v. Lewis, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986) ("The equal protection clause [MONT. CONST. art. II, § 4] guarantees that similar individuals will be dealt with in a similar manner by government."); *In re* C.H., 210 Mont. 184, 197-98, 683 P.2d 931, 938 (1984) ("Art. II, Sec. 4 of the 1972 Montana Constitution [guarantees] equal protection of the laws to all persons.").

32. State v. Holland, 37 Mont. 393, 406, 96 P. 719, 722-23 (1908) (quoting 8 CYCLOPEDIA OF LAW & PROCEDURE § 1059). Although written in 1908, the court has reiterated this principle from *Holland* in cases decided after the ratification of the 1972 Montana Constitution. *See e.g.*, TIPCO Corp. v. City of Billings, 197 Mont. 339, 346, 642 P.2d 1074, 1078 (1982); Billings Assoc. Plumbing Heating & Cooling Contractors v. State Bd. of Plumbers, 184 Mont. 249, 253, 602 P.2d 597, 600 (1979); Montana Land Title Ass'n v. First Am. Title, 167 Mont. 471, 474, 539 P.2d 711, 712-13 (1975).

33. The Montana Supreme Court recently interpreted the phrase "equality of educational opportunity" in Helena Elementary School Dist. No. 1 v. State, 236 Mont. 44, 769 P.2d 684 (1989).

> [The framers] stated that equality of educational opportunity "is guaranteed" to each person of the state. As we review our Constitution, we do not find any other instance in which the Constitution "guarantees" a particular right. We conclude that the plain meaning of [the Education Clause] . . . is that each person *is guaranteed* equality of educational opportunity. The plain meaning of that [subsection] is clear and unambiguous.

Id. at 53, 769 P.2d at 689. For another discussion of the "equality of educational opportunity" clause, see *Bartmess*, 223 Mont. at 279, 726 P.2d at 807 (Morrison, J., concurring).

34. II TRANSCRIPTS, *supra* note 4, at 721.

from the constitutional convention transcripts, perhaps the delegates intended to use the local boards of trustees as vehicles to implement their goal of flexibility.

Local control of individual school districts by boards of trustees, as a complement to statewide regulation, helps state agencies meet the needs of students in small communities as well as in larger cities.[35] Local control of individual school districts is authorized by article X, section 8, of the 1972 Montana Constitution (the Local Control Clause).[36] Pursuant to this article, the Montana Legislature adopted statutes authorizing individual boards of trustees to supervise and control particular school districts by promulgating rules that govern student instruction, student behavior, and provide sanctions for violations.[37]

When interpreting this clause, the Montana Supreme Court has recognized the need for flexibility in Montana's educational system by supporting the discretion exercised by individual boards of trustees.[38] In *Kelsey v. School District No. 25*,[39] the court stated:

> A wide discretion is necessarily reposed in the trustees who compose the board. They are elected by popular vote, and, presumably, are chosen by reason of their standing in the community, [their] sound judgment, and their interest in the educational development of the young generation which is soon to take the place of the old.[40]

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35. Yanzick v. School Dist. No. 23, 196 Mont. 375, 389-90, 641 P.2d 431, 440 (1982). The legislature has indicated its desire to place local control of schools in the local school districts. . . . [T]his Court quoted the proceedings of the 1972 Montana Constitutional Convention in which the matter of local control was discussed by delegates who stated: "[T]his body does want *local control to remain with the local school districts* . . . . [W]e should give constitutional recognition and status to the local boards to . . . [preserve] . . . *local autonomy*."

Id. (emphasis in original).

36. The Local Control Clause provides: "The supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law."

37. *See* generally, Title 20 of the MONT. CODE ANN. (1989). Montana statutes "empower school trustees to govern students within a school district, establish and maintain instructional services, adopt standards for pupil behavior, and provide sanctions for violations of those standards." Respondent's Reply Brief at 17, *Bartmess*, 223 Mont. 269, 726 P.2d 801 (1986) (No. 85-540) (citing MONT. CODE ANN. §§ 20-3-324, 20-5-201 (1989)). The code further provides "that the Montana Board of Public Education must set minimum standards for accreditation and instruction but local school districts may provide other instruction when approved by the local board of trustees." *Id.* (citing MONT. CODE ANN. §§ 20-7-101, 20-7-111 (1989)).

38. *Yanzick*, 196 Mont. 375, 641 P.2d 431 (1982); School Dist. No. 12 v. Hughes, 170 Mont. 267, 552 P.2d 328 (1976).

39. 84 Mont. 453, 276 P. 26 (1929).

40. *Id.* at 458, 276 P. at 26.

Although decided prior to the 1972 Montana Constitution, the Montana Supreme Court has since reiterated the *Kelsey* rationale by quoting it approvingly in *Yanzick v. School District No. 23.*[41]

Unfortunately the concepts of flexibility and equality may conflict if individual boards of trustees are allowed to implement rules more stringent than statewide requirements. Disparity between individual school districts may arise,[42] creating the basis for a claim that the school board's enactment violates the Equal Protection Clause of the Montana Constitution.[43] *Bartmess* provides an example of such a claim.

III. *State ex rel. Bartmess v. Board of Trustees*

A. *The Facts*

Lewis and Clark County citizens and "parents of students enrolled at the two Helena high schools" brought this action for declaratory and injunctive relief against the Board of Trustees of School District No. 1 and High School District No. 1.[44] The plaintiffs objected to a rule adopted by the Trustees. The *2.0 rule* requires that a student, hoping to participate in extracurricular activities, including athletics, academic clubs, student government, music, drama and speech, maintain a "C" or 2.0 grade point average for a nine-week period prior to participation.[45]

In contrast to Helena's 2.0 rule, no other Montana "AA" high school against which the two Helena high schools competed in extracurricular activities, maintained such a rigorous standard.[46] These other high schools followed the "D" or 1.0 grade point average rule promulgated by the Montana High School Association (MHSA), a private organization.[47] Additionally, the two Helena high schools failed to remain consistent. Specifically, the two schools required only a 1.0 grade point average to graduate from

41. 196 Mont. 375, 390, 641 P.2d 431, 440 (1982) (quoting *Kelsey*, 84 Mont. at 458, 276 P. at 26).

42. *See e.g., Helena Elementary School Dist.*, 236 Mont. 40, 769 P.2d 684 (1989).

43. MONT. CONST. art. II, § 4.

44. State *ex rel.* Bartmess v. Board of Trustees, 223 Mont. 269, 271, 726 P.2d 801, 802 (1986).

45. *Id.* at 271, 726 P.2d at 802. Special Education students and students with learning disabilities are exempted from the 2.0 rule. *Id.*

46. *Id.* at 281, 726 P.2d at 808 (Sheehy, J., dissenting).

47. *Id.* The author does not argue that a "D" average is an acceptable standard. A more stringent academic standard, such as the 2.0 rule, is a reasonable standard to impose on students who wish to participate in extracurricular activities. However, the same standard should apply to all Montana high school students who wish to participate in extracurricular activities, and therefore should be implemented by a statewide body such as the legislature or the Montana Board of Public Education.

high school.[48]

Plaintiffs asked the court to declare the 2.0 rule unconstitutional because it violated the Equal Protection and Education Clauses of the Montana Constitution.[49] The district court granted summary judgment for the Board of Trustees, "declaring the 2.0 rule to be 'a reasonable, fair, equitable and non-discriminatory policy, promulgated for the purpose of implementing the constitutional and [statutorily] mandated educational goals of the school district.' "[50] The district court therefore held that the rule did "not violate any constitutionally protected rights . . . ."[51]

B. The Majority Opinion

The court began its analysis by discussing the standard of review applicable to an equal protection challenge. A court must first determine whether the right involved is fundamental, or less than fundamental.[52] In Montana, a right is fundamental if it is: (1) "found within Montana's Declaration of Rights," or (2) "a right 'without which other constitutionally guaranteed rights would have little meaning.' "[53] After determining the nature of the right involved, a court must evaluate the individual's infringed right and the state's interest in regulating the individual's conduct to determine whether the state or the individual will prevail.[54] To perform this balancing, the court uses one of several different tests depending upon the nature of the right involved. When addressing a fundamental right, the court uses a "strict scrutiny" test, which requires the *state* to prove that the state's action is based on a "compelling state interest."[55] Rarely can the state meet this bur-

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48. *Id.* at 281, 726 P.2d at 808 (Sheehy, J., dissenting). The 2.0 rule, as adopted in *Bartmess*, is not supported by "any scientific or statistical studies showing academic improvement . . . following the adoption of such a policy." *Id.* Currently, there are no statewide grade point average requirements for graduation from a Montana high school. *See* ADMIN. R. MONT. § 10.55.905 (1990).

The author has reservations concerning the implementation of two separate academic standards: one for graduation and a different one for participation in extracurricular activities. The author suggests that separate standards for graduation and participation in extracurricular activities undermine the goals of Montana's educational system. Academics and extracurricular activities are inseparable components of education, and should be governed by the same standard, statewide.

49. *Bartmess*, 223 Mont. at 271, 726 P.2d at 802.

50. *Id.*

51. *Id.*

52. *Id.* at 272, 726 P.2d at 803.

53. Butte Community Union v. Lewis, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986); *See also In re* C.H., 210 Mont. 184, 199, 683 P.2d 931, 940 (1984).

54. *In re C.H.*, 210 Mont. at 197, 202, 683 P.2d at 938, 940.

55. *Bartmess*, 223 Mont. at 272, 726 P.2d at 803 (emphasis added).

den.[56] Because of this high burden of proof, the Montana Supreme Court is "hesitant to expand the number of categories of rights and classes subject to strict scrutiny, when each expansion involves the invalidation of virtually every classification bearing upon a newly covered category."[57]

Traditionally, if a state action violates "a right [that] is not fundamental," a court applies a "rational-relationship" test.[58] This test requires the state to show only that the infringement is "rationally related to a legitimate government objective."[59] This standard is much easier for the state to meet.[60]

The Montana Supreme Court recently recognized a third equal protection test. In *Butte Community Union v. Lewis*,[61] the court concluded that the right to receive welfare, though not a fundamental right, was sufficiently significant under the Montana Constitution to require the state to show a substantial relationship between the questionable welfare legislation and the important state interest involved.[62] The court held that if a right is not fundamental, but is important enough to require a stricter degree of scrutiny than the rational-relationship test provides, the court will use a "middle-tier" analysis.[63]

In *Bartmess*, the court adopted the middle-tier analysis from *Butte Community Union* and applied it to determine whether the 2.0 rule unconstitutionally infringed the Helena students' rights to participate in extracurricular activities.[64] The court stated:

> Our analysis of the educational provisions of our Montana Constitution demonstrates there are competing and in some cases contradictory viewpoints which must be considered in determining whether the educational aspects of extracurricular activities are a right under our Constitution. We conclude that the only standard

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56. *Id.* at 275, 726 P.2d at 804.

57. *Id.* (quoting Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976)).

58. *Bartmess*, 223 Mont. at 272, 726 P.2d at 803.

59. *Id.*

60. *Butte Community Union*, 219 Mont. at 434, 712 P.2d at 1314; *In re C. H.*, 210 Mont. at 199, 683 P.2d at 939.

61. 219 Mont. 426, 712 P.2d 1309 (1986).

62. *Id.* at 434, 712 P.2d at 1313-14.

63. *Id.* at 434, 712 P.2d at 1313.

64. *Bartmess*, 223 Mont. at 275, 726 P.2d at 804-05. The right to receive welfare benefits and the right to an education, however, are distinguishable. The right to education is a textually explicit right found in article X, section 1 of the 1972 Montana Constitution, while the right to welfare benefits is not textually explicit. At least one justice recognized this distinction as well. Justice Morrison wrote in his concurring opinion, "Education cannot be characterized as merely a benefit as was welfare in *Butte Community Union* . . . . The right to an education is not restricted in any manner. *One need not qualify. Education is for all.*" *Bartmess*, 223 Mont. at 278, 726 P.2d at 806 (Morrison, J., concurring) (emphasis added).

> of constitutional review which allows a careful balancing of these competing interests is the middle-tier analysis.[65]

In applying this analysis, the court first acknowledged the importance of education, by suggesting that "various aspects of education under our Montana Constitution *could* be classed as 'fundamental.' "[66] The court then refused, however, to delineate which aspects of education it perceived to be fundamental. Unfortunately, the court held that participation in extracurricular activities was not one of the aspects qualifying as a fundamental right.[67] Therefore, the court weakened the possible protection extended to the Helena students' rights to participate in extracurricular activities by removing the possibility of using a strict scrutiny analysis.[68]

In order for the 2.0 rule to pass the middle-tier analysis, the Helena Board of Trustees then had only to prove "that its classification [was] substantially related to an important governmental objective."[69] The court concluded that the classification created by the 2.0 rule was "a reasonable one."[70] In doing so, the *Bartmess* court noted that although physical and moral development are important in Montana's educational system, "the government interests in developing the full educational potential of each person and providing a basic system of quality public education by the enactment of the 2.0 rule outweigh the students' interest in participating in existing extracurricular activities."[71]

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65. *Id.* at 275, 726 P.2d at 804.

66. *Id.* at 274, 726 P.2d at 804 (emphasis added).

67. *Id.* at 275, 726 P.2d at 805. The Montana Supreme Court, citing San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), acknowledged the fact that neither the right to an education, nor the right to participate in extracurricular activities are fundamental under the United States Constitution. *Bartmess*, 223 Mont. at 272, 726 P.2d at 803. It is important to note that the United States Constitution does *not* contain language similar to the language contained in Montana's education clause.

68. *Bartmess*, 223 Mont. at 274-75, 726 P.2d at 804.

69. *Id.* at 275, 726 P.2d at 805. In *Butte Community Union*, the court provided guidance to determine when to use the middle-tier test.

> A benefit lodged in our State Constitution is an interest whose abridgement requires something more than a rational relationship to a governmental objective. . . . Where constitutionally significant interests are implicated by governmental classification, arbitrary lines should be condemned. *Further, there should be balancing of the rights infringed and the governmental interest to be served by such infringement.*

Butte Community Union, 219 Mont. at 434, 712 P.2d at 1313-14 (emphasis added).

70. *Bartmess*, 223 Mont. at 276, 726 P.2d at 805. "[T]he rule is an incentive for those students who wish to participate in extracurricular activities. It also promotes adequate time to study for those students who have not maintained a 2.0 grade average." *Id.*

71. *Id.* at 276, 726 P.2d at 805.

C. The Dissent

Justice Sheehy, in his dissenting opinion, took a different approach to this dispute. He admonished his fellow justices for avoiding the real issues involved in *Bartmess*.[72] Justice Sheehy charged the majority with the failure to address the discriminating effect of the 2.0 rule implemented by the Helena Board of Trustees.

Although Justice Sheehy acknowledged the discriminatory nature of the 2.0 rule, he failed to develop any analysis on the important constitutional issue raised in *Bartmess*: Is the right to education fundamental?[73] Rather, Justice Sheehy limited his analysis to refuting the majority's characterization of extracurricular activities. If Justice Sheehy had answered the question of whether the right to education is fundamental he would have strengthened his argument, and substantiated his conclusion. For example, if Justice Sheehy had stated that the right to education is fundamental,[74] then, following *McNair*, he could have concluded that the right to participate in extracurricular activities is fundamental as well. Instead, Justice Sheehy quoted language from the 1972 Constitutional Convention Transcripts to support his conclusion that the right to participate in extracurricular activities is fundamental.[75] Justice Sheehy's emotional appeal seems to set the stage for a reconsideration of the majority decision by providing examples of

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72. *Id.* at 285, 726 P.2d at 811 (Sheehy, J., dissenting). "We should not resort to high-flown concepts of equal protection law . . . to deny constitutional protection to these affected students." *Id.* at 285-86, 726 P.2d at 811 (Sheehy, J., dissenting).

73. Although Justice Morrison, in his concurring opinion, agreed with the decision reached by the majority, he did not agree with the analysis used. Justice Morrison answered the question that the majority refused to answer: Is education a fundamental right?

Justice Morrison began his analysis by discussing the United States Supreme Court decisions which have held that education is *not* a fundamental right—namely, San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1972) and Plyler v. Doe, 457 U.S. 202 (1981). *Bartmess*, 223 Mont. at 276-77, 726 P.2d at 805-06 (Morrison, J., concurring). He then set the stage for the remainder of his analysis by recognizing that Montana may adopt its own analysis of education, assuming "independent state grounds exist for developing expanded rights under our state Constitution." *Id.* at 277, 726 P.2d at 806 (Morrison, J., concurring).

Justice Morrison found that the requisite independent state grounds did exist. Specifically, Justice Morrison used language from the 1972 Constitutional Convention Transcripts as support for the conclusion "that *basic education is a fundamental right under the Montana Constitution.*" *Id.* at 278, 726 P.2d at 806 (Morrison J., concurring) (emphasis added). Justice Morrison then employed a strict scrutiny analysis to determine whether the 2.0 rule violated this right. Ironically, Justice Morrison found that the rule actually furthered the state's "interest in educating its citizens," rather than inhibiting it. *Id.* at 280, 726 P.2d at 807 (Morrison J., concurring).

74. *See supra* section IV(A).

75. *See infra* note 87. In addition, Justice Sheehy cited several earlier Montana cases which acknowledged the importance of extracurricular activities. *Bartmess*, 223 Mont. at 281-84, 726 P.2d at 808-10 (Sheehy, J., dissenting).

the discriminatory effect of the 2.0 rule.[76]

IV. MONTANA SHOULD RECONSIDER

A. *The Right to Education is Fundamental*

The people of Montana deserve a system of education that provides instruction and opportunity for development inside and outside the classroom.[77] By categorizing the right to an education as something less than fundamental, and by ignoring the importance of extracurricular activities in Montana's educational system, the *Bartmess* decision cripples the intended effect and meaning of Montana's education clause. The *Bartmess* decision stands because the Montana Supreme Court has failed to recognize that the right to an education is fundamental.

The express language of Montana's education clause[78] provides a strong basis for the Montana Supreme Court to decide that the right to an education in Montana is fundamental.[79] Moreover,

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76. Justice Sheehy pointed out in his dissent:

> Now a Helena High School girl with a 1.98 grade average and a good soprano voice is excluded from singing with the Helena Starlighters. A Gary Cooper or a Myrna Loy, both Helena products, may now be excluded from the Helena drama classes. . . . In any test of fair dealing, those results should instantly be held irrational, but this Court does not want to apply rationality standards. It wants to talk about strict scrutiny and middle [tier] reviews to deny these students perhaps the only time in their lives to use their God-given skills to run in track, to twirl batons, to play in bands.

Id. at 285, 726 P.2d at 811 (Sheehy, J., dissenting).

77. II TRANSCRIPTS, *supra* note 4, at 721; *see also supra* notes 11-14 and accompanying text.

78. For the text of Montana's education clause see text accompanying *supra* note 3. In addition, "the constitutions of all fifty states have . . . recognized an affirmative obligation of government to educate its citizens." Hubsch, *supra* note 1, at 96-97. For a complete listing of the education clauses of all fifty states, see *id.* at 134-40 (appendix). Below is a list of those clauses: ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, preamble & § 1; ME. CONST. art. VIII, §1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. II, ch. V, § 2; MICH. CONST. art. VIII, §§ 1 & 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X §§ 1(1) & 1(3); NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, §§ 1 & 2; N.H. CONST. pt. II, art. LXXXIII; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, §§ 1 & 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, §§ 1 & 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1. *Id.*

79. Other state courts have interpreted constitutional language similar to Montana's to establish a fundamental right to education. For example, in Buse v. Smith, 74 Wis. 2d

delegates' comments at the 1972 Constitutional Convention Transcripts imply that the delegates intended Montana's education clause to create a fundamental right. "Education occupies a place of *cardinal importance* in the public realm. . . . Because of the overriding importance of education, this committee recognizes the awesome task of providing the appropriate Constitutional provisions necessary to protect and nurture the public educational system."[80] To interpret this language as anything other than the creation of a fundamental right would not fulfill the delegates' stated intent.

If education does not qualify as an enumerated fundamental right, then clearly it fits into the second of the two tests used to determine if a right is fundamental: If a right is necessary for individuals to exercise other constitutionally guaranteed rights, then that right is fundamental regardless of whether it is enumerated in Montana's Declaration of Rights.[81] Applying this test to education reveals the fundamental nature of education.

Because an education is a prerequisite for participation in political or community activities,[82] society is obligated to educate its citizens.[83] A person who cannot read, for example, will have a difficult time exercising his or her fundamental right to vote.[84] Hence,

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550, 247 N.W.2d 141 (1976), the Wisconsin Supreme Court interpreted the language from the Wisconsin Constitution, "equal opportunity for education," as a fundamental right. *Id.* at 567, 247 N.W.2d at 149. The language of the Wisconsin Constitution, "equal opportunity for education" is substantially similar to the language in Montana's education clause, "equality of educational opportunity." *See also* Hubsch, *supra* note 1, at 114-15 n.1 (outlining eight other states which have found the right to education to be fundamental).

80. II TRANSCRIPTS, *supra* note 4, at 721 (emphasis added).

81. *See supra* note 53 and accompanying text.

82. Unlike the United States Supreme Court's holding in *Rodriguez* the California Supreme Court, in Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601, (1971), held that the right to education in California is a fundamental right. *Serrano*, 5 Cal. 3d at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

> The California court did not rely upon the explicitness of education rights in the state constitution but, significantly, upon the nexus of education with citizenship: "education is a unique influence on a child's development as a citizen and his participation in political and community life." The California court concluded that "the distinctive and priceless function of education in our society warrants, indeed compels, our treatment of it as a 'fundamental interest.'"

Hubsch, *supra* note 1, at 125 (quoting *Serrano*, 5 Cal. 3d at 605, 608-09, 487 P.2d at 1256, 1258, 96 Cal. Rptr. at 616, 618).

83. Hubsch, *supra* note 1, at 99.

84. "In *Rodriguez*, it was argued that education is fundamental because it is essential to the effective exercise of First Amendment freedoms and the right to vote." *Bartmess*, 223 Mont. at 276, 726 P.2d at 805 (Morrison, J., concurring). The United States Supreme Court in *Rodriguez* refused to give the right to education fundamental status. *Rodriguez*, 411 U.S. at 35 (1972). In a more recent United States Supreme Court case, *Plyler v. Doe*, the Court reaffirmed its holding that education is not a fundamental right, but emphasized the impor-

a lack of education inhibits, and may deny, a person's right to vote. By holding that the right to education is anything less than fundamental, the court risks the effective denial of a fundamental, enumerated right—the right to vote.

In sum, Montana's "educational system is charged with the task of shaping and cultivating the mind of each succeeding generation and with *developing the capacities for cultural and technical advancement of society.*"[85] Therefore, without an education, individuals will find many doors in Montana closed to them.

B. Extracurricular Activities: An Essential Component of Education

After determining that the right to an education is fundamental, a court needs to analyze the interplay between education and extracurricular activities. The express language of Montana's education clause, namely, "full educational potential of each person" and "quality,"[86] implies that extracurricular activities are not an entity apart from education, but rather a fundamental component of education.[87] Simply stated, the right to an education necessarily encompasses the right to participate in extracurricular activities. The two rights are inseparable.

Both the 1972 Constitutional Convention delegates and the Montana Supreme Court have previously recognized the non-severability of these two rights. The *Bartmess* decision is a departure from this principle and contravenes both the intent of the delegates and prior court decisions. Specifically, the delegates defined a quality education as "not simply a minimum educational system, but one which meets contemporary needs and produce[s] capable, well-informed citizens."[88] Moreover, in *McNair* the court stated: "Education may be particularly directed to either mental, moral,

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tance of education to maintain society's "basic institutions, and the lasting impact of its deprivation on the life of the child . . . ." *Bartmess*, 223 Mont. at 277, 726 P.2d at 806 (Morrison, J., concurring) (quoting *Plyler*, 457 U.S. at 221).

85. II TRANSCRIPTS, *supra* note 4, at 721 (emphasis added).

86. MONT. CONST. art. X, § 1.

87. At least one justice noted this principle in the *Bartmess* decision, stating,

> We have been shown no record from the 1972 Constitutional Convention that would indicate that the constitutional framers wanted to divert extracurricular activities in schools from the other educational goals. Indeed, *the language used by the constitutional framers in 1972 seems to encompass physical development in the term "educational potential."* For this must be true, if nothing else is, that the end of our educational system must be to develop students physically, mentally and morally to meet the challenges of life.

Bartmess, 223 Mont. at 285, 726 P.2d at 811 (Sheehy, J., dissenting) (emphasis added).

88. II TRANSCRIPTS, *supra* note 4, at 724.

or physical powers or faculties, *but in its broadest and best sense it embraces them all.*"[89] This language, from *McNair*, is instructive because the court in *Bartmess* stated that it was not disturbing the *McNair* holding.[90] Therefore, Montana should not distinguish between academics and extracurricular activities when defining "the full educational potential of each person."[91]

Montana could also look to courts in other states to determine the role extracurricular activities play in education. Several of these courts have held that extracurricular activities are an integral part of the educational process.[92] The analyses of these courts hinge on the role extracurricular activities play in the overall education of the individual. These analyses are strikingly similar to Justice Sheehy's analysis when he stated, "that participation in extracurricular activities is a fundamental ingredient of the educational process . . . ."[93]

Finally, Montana courts could review recent studies that have shown a significant relationship between participation in extracurricular activities and academic success.[94] One such study, per-

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89. *McNair*, 87 Mont. at 428, 288 P. at 190.

90. *Bartmess*, 223 Mont. at 276, 726 P.2d at 805.

91. MONT. CONST. art. X, § 1(1). "A rule which places physical, educational and moral development below mental education slaps at the three legs upon which the educational stool is built." *Bartmess*, 223 Mont. at 286, 726 P.2d at 811 (Sheehy, J., dissenting).

92. The California Supreme Court recognized the importance of extracurricular activities in Hartzell v. Connell, 35 Cal. 3d 899, 679 P.2d 35, 201 Cal. Rptr. 601 (1984):

> It can no longer be denied that extracurricular activities constitute an integral component of public education. Such activities are " 'generally recognized as a fundamental ingredient of the educational process.' " They are "[no] less fitted for the ultimate purpose of our public schools, to wit, the making of good citizens physically, mentally, and morally, than the study of algebra and Latin . . . ."

Id. at 909, 679 P.2d at 42, 201 Cal. Rptr. at 608 (quoting *Moran*, 350 F. Supp. at 1184) (also quoting Alexander v. Phillips, 31 Ariz 503, 513, 254 P. 1056, 1059 (1927)). *See also* Brenden v. Independent School Dist. No. 742, 477 F.2d 1292, 1298 (8th Cir. 1973) (quoting Thompson v. Barnes, 200 N.W.2d 921, 926 n.11 (Minn. 1972)) ("[I]nterscholastic activities . . . [are] today recognized . . . as an important and integral facet of the . . . education process . . . ."); Kelley v. Metropolitan County Bd. of Educ., 293 F. Supp. 485, 493 (M.D. Tenn. 1968) (extracurricular activities are "generally recognized as a fundamental ingredient of the educational process."). For a discussion of the importance of athletics in California's educational system, see Note, *Protection of Public High-School Athletics Under the California Constitution: Steffes v. California Interscholastic Federation*, 22 U.S.F. L. REV. 587 (1988).

93. *Bartmess*, 223 Mont. at 284-85, 726 P.2d at 810 (Sheehy, J., dissenting). *Compare also supra* section II(A).

94. *See e.g.*, M. Harvancik & G. Golsan, Academic Success and Participation in High School Extracurricular Activities: Is There a Relationship? (August 1986) (available on microfiche at the Mansfield Library, University of Montana, ED273887). Although the particular results from this study were inconclusive because of the use of student self-reported material from ACT Assessment Reports, the paper provides a list of a number of studies that did find a positive correlation between participation in extracurricular activities and academic success.

formed by the United States Department of Education, polled "[o]ver 30,000 sophomores and 28,000 seniors enrolled in 1,015 public and private high schools across the Nation."[95] This study concluded that a significant relationship exists between extracurricular activities and academic success.[96] Experts in the field of education have noted the importance of extracurricular activities in the educational process, because of the positive effect that extracurricular activity participation has on students' academic performance. Denying students the right to participate in extracurricular activities may have adverse affects on "student morale"[97] and consequently, academic performance. Thus, by refusing to protect the right to participate in extracurricular activities, the *Bartmess* court may have actually inhibited students' opportunity to succeed academically, which would clearly contradict the intended purpose of the Education Clause.

C. Equality v. Flexibility: The Bartmess Conflict

Montana's equal protection clause, in conjunction with Montana's education clause, creates a constitutional mantle which encompasses Montana's education system, and protects the individual educational rights of Montana citizens.[98] These two clauses create an affirmative duty to provide a quality system of education, as well as guarantee that *all* Montana citizens will have access to an education.[99] Clearly, the *Bartmess* 2.0 rule invades this constitutionally protected territory by *allowing only certain Helena high school students to participate in extracurricular activities.*

The Helena Board of Trustees and other proponents of the 2.0 rule argued that courts in other states had upheld the constitutionality of rules similar to the *Bartmess* 2.0 rule.[100] The rules discussed in those cases are distinguishable, however, from the 2.0 rule found in *Bartmess*, because the implemented rules had state-

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95. OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, U.S. DEPT. OF EDUC., EXTRACURRICULAR ACTIVITY PARTICIPANTS OUTPERFORM OTHER STUDENTS (Sept. 1986) (available on microfiche at the Mansfield Library, University of Montana, ED279740).

96. *Id.* The study qualified its conclusions by recognizing that participation in extracurricular activities "does not guarantee improved performance" for a student. *Id.* The study used four criteria, namely, "course credits, hours of homework, test scores, and grade average." *Id.*

97. *Id.*

98. *See supra* section II(B)(2).

99. *See supra* note 33 and accompanying text.

100. *See e.g.*, Spring Branch v. Stamos, 695 S.W.2d 556 (Tex. 1985) and Bailey v. Truby, 321 S.E.2d 302 (W. Va. 1984) (*cited in* Respondent's Reply Brief at 11, *Bartmess*, 223 Mont. 269, 726 P.2d 801 (1986) (No. 85-540)).

wide effect.[101] In *Bartmess*, the Helena Board of Trustees regulated Class "AA" statewide activities with a rule that affected only those students enrolled in Helena School District No. 1.[102]

Consider the effect of the 2.0 rule. Conceivably, a high school student in Helena could successfully graduate from high school without ever having the opportunity to participate in any extracurricular activities, even though extracurricular activities are an essential component of Montana's education system.[103] If that same Helena student were to move from Helena to Missoula to attend high school, however, that student would then be allowed to participate in extracurricular activities. This anomaly is created because the other "AA" high schools follow the MHSA guidelines requiring only a 1.0 grade point average to participate in extracurricular activities.

The extracurricular activities affected by the 2.0 rule include not only activities performed in the Helena School District, but also those performed statewide, for example, basketball and speech competitions. In a situation involving statewide activities, all Montana "AA" high school students appear to be similarly situated.[104] Yet high school students in Helena are treated differently. Any state action which limits the participation in statewide activities of only high school students in Helena, therefore, should be unconstitutional.

V. CONCLUSION

The Helena Board of Trustees, created under the Local Control Clause,[105] was provided with the authority to implement the 2.0 rule. The effect of this rule is that Montana students who wish to participate in statewide extracurricular activities are affected by the 2.0 rule *only* if they live in Helena.[106] The *Bartmess* case has uncovered a potential conflict between the Education Clause, the

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101. For example, the rule analyzed in *Spring Branch v. Stamos*, is actually a Texas statute commonly referred to as the "no pass, no play" rule. TEX. EDUC. CODE. ANN. § 21.920(b) (Vernon 1987). For a discussion of the "no pass, no play" rule, see Comment, *No Pass, No Play Rules: An Incentive Or An Infringement?*, 19 U. TOL. L. REV. 87 (1987). *All* Texas students who wish to participate in statewide extracurricular activities are similarly affected by the "no pass, no play" rule. TEX. EDUC. CODE ANN. § 21.920(b) (Vernon 1987).

102. *Bartmess*, 223 Mont. at 270, 726 P.2d at 802.

103. *See supra* part IV(B).

104. The Montana Supreme Court never reached this segment of the analysis. It is unclear whether the high school students in Helena were *not* in a similar situation with other "AA" high school students. From the facts of *Bartmess*, no difference is apparent that would warrant unequal treatment of high school students in Helena.

105. *See supra* note 36 and accompanying text.

106. *Bartmess*, 223 Mont. at 270, 726 P.2d at 802.

Equal Protection Clause, and the Local Control Clause, which authorizes the creation of individual boards of trustees. Because of this conflict, discrimination exists. The effect of the 2.0 rule upon high school students in Helena provoked Justice Sheehy to write in his dissenting opinion, "[w]e have never had before us a scheme of government so patently discriminatory."[107]

If the Montana Supreme Court were to recognize the fundamental nature of education and therefore extracurricular activities, the conflict between equality and flexibility would disappear. For example, if education were recognized as a fundamental right, a board of trustees would need a compelling state interest to restrict students' rights to participate in extracurricular activities. The *Bartmess* 2.0 rule would not meet this burden.

In 1990, the people of Montana will decide whether to reconvene a constitutional convention and revise the existing state constitution. Without reservation, Montana has a progressive and viable constitution, and yet, the Montana Constitution is not a perfect document; some problems have arisen in the last eighteen years. For example, *Bartmess* has demonstrated a conflict between three clauses of the Montana Constitution, a conflict that must be resolved. *Bartmess* also demonstrates the need to strengthen and clarify the language in the Education Clause. A clarification of this language would create a closer connection between the 1972 Constitutional Convention delegates' intent, expressed in the convention transcripts, and the language of the Education Clause. Also, a clarification of this constitutional language may force the court to recognize that the right to an education is fundamental—a recognition that is long overdue.

107. *Id.* at 285, 726 P.2d at 811 (Sheehy, J., dissenting).