THE METHODOLOGICAL MIDDLE GROUND: FINDING AN ADEQUACY STANDARD IN ALASKA'S EDUCATION CLAUSE

CHRIS LOTT

In Moore v. State, the plaintiffs argued that the state constitution promises each child in Alaska an adequate education. This Note suggests that there is support for finding an adequacy standard in the Education Clause of the Alaska Constitution, and it urges an approach firmly grounded in Alaskan precedent and educational exigencies which are necessary to meet the unique educational needs of the state.

I. INTRODUCTION

The Framers of the Alaska Constitution envisioned that "[t]he legislature shall by general law establish and maintain a system of public schools open to all children of the State . . . ."[1] The vision was a fairly simple one, placing control over education in the hands of the legislature and opening the schools to all children of the state. The simplicity of the clause has nonetheless left many unanswered questions. Does every Alaskan school-age child have a right to an education? If so, how specific is that right? Do Alaskan children have the right to a school in their hometown? Do they have a right to a certain standard of education? Or must the State merely establish and maintain something that resembles a school? Do those schools have to achieve certain outcomes, such as preparing students to operate in society?

The Alaska Supreme Court has settled some of these questions. It is clear that Alaskan school-age children have a right to an education and that the legislature has a concomitant duty to provide that education.[2] It is also clear that the right is not boundless. Alaskan children, for instance, do not have the right to

1. ALASKA CONST. art. VII, § 1 ("Education Clause").

2. Hootch v. Alaska State-Operated Sch. Sys. (*Molly Hootch*), 536 P.2d 793, 799 (Alaska 1975).

have a school in their hometown.[3] Schools do not have to be uniform, either.[4] Beyond that, however, most of the constitutional questions dealing with the Education Clause have been left unanswered.[5]

Moore v. State[6] seeks to clarify one of the uncertainties arising out of the Education Clause.[7] The plaintiffs in *Moore* asked the trial court to find that the Education Clause promises every school-age child in Alaska an adequate education and that the State has deprived them of this right by underfunding the schools.[8] In effect, the plaintiffs are asking the court to interpret the constitution to promise not only schools "open to all,"[9] but also schools of a certain quality that provide a certain standard of education to every student in the state. The plaintiffs look largely to court decisions handed down in other states holding that each child has a constitutional right to an adequate education.[10] The State has duly responded that the Education Clause promises students only a minimally adequate education.[11] Qualitative educational decisions should be made by educators and elected officials, the State argues, not the courts.[12]

This Note lays out a middle ground between the approaches urged by the plaintiffs and by the State. Principally, it argues that

---

3. *Id*. at 804.

4. *Id.* at 803 ("Unlike most state constitutions, the Constitution of Alaska does not require uniformity in the school system.").

5. *Cf.* Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391 (Alaska 1997) (involving an equal protection challenge to the state's funding system).

6. No. 3AN-04-9756 Civ. (Alaska Super. Ct. filed Aug. 9, 2004).

7. At the time this Note was finalized, the case was undecided. Oral arguments ended on December 20, 2006, and a decision by the trial court was set to be rendered within six months of that date. Because of the gravity of the issue, the author believes that the case will almost certainly be heard by the supreme court in the near future. This Note outlines both sides of the argument and offers an analysis of how the court might approach this issue.

8. Second Amended Complaint at 1–2, *Moore* (filed Dec. 3, 2004) [hereinafter Second Amended Complaint].

9. ALASKA CONST. art. VII, § 1.

10. As explained more fully below, the plaintiffs argue that there should be an adequacy standard in the constitution for two reasons: (1) other states have found adequacy standards that are consistent with contemporary educational necessities in Alaska and (2) by reference to the North Carolina Supreme Court's use of the state's policy decisions. Plaintiffs' Pretrial Brief at 11–14, *Moore* (filed Sept. 22, 2006) [hereinafter Plaintiffs' Pretrial Brief].

11. State's Trial Brief at 7, Moore v. State, No. 3AN-04-9756 Civ. (Alaska Super. Ct. filed Sept. 22, 2006) [hereinafter State's Trial Brief].

12. *Id.* at 9–10.

an adequacy standard above and beyond a minimally adequate education can, but by no means must, be found in the Education Clause. It should not, however, be found on the terms proposed by the plaintiffs, who advocate either adopting the standards created by other states or using current educational policy to determine what the constitution requires.[13] Instead, the approach should be, as suggested below, grounded in Alaskan precedent, principally the interpretive framework established by the Alaska Supreme Court in *Molly Hootch v. Alaska State-Operated School System*.[14] The trend in other states may be instructive, but the unique challenges facing educators in Alaska and the distinctive wording of the Education Clause necessitate a state-specific solution.[15]

Part I begins by offering an overview of school-finance litigation across the country. Part II then explains the specific claims and counterclaims in *Moore*, highlighting the plaintiffs' and the State's arguments for and against finding an adequacy standard in the Education Clause. Part III examines the *Molly Hootch* case, both in respect to its holding and to the interpretive framework it establishes. Its holding will be important in assessing the adequacy claim in *Moore*, but the more essential point is the interpretive framework the court established for defining rights and duties under the Education Clause. Part IV then applies the *Molly Hootch* interpretive framework to the adequacy claim in *Moore*, pointing out some of the arguments against finding an adequacy standard under *Molly Hootch* but centering most of the effort on justifying why an adequacy standard should be found. Part V concludes by offering some thoughts on the possibility for success and the consequences if an adequacy standard is found.[16]

---

13. *See* Plaintiffs' Pretrial Brief, *supra* note 10, at 11–14.

14. 536 P.2d 793 (Alaska 1975). For more on *Molly Hootch*, see *infra* Part III.

15. *See* Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 148 (Tenn. 1993) ("[T]he decisions of the courts in those jurisdictions [which have already heard school-funding challenges] provide little guidance in construing the reach of the education clause of the Tennessee Constitution . . . because the decisions by the courts of other states are necessarily controlled in large measure by the particular wording of the constitutional provisions of those state charters regarding education and, to a lesser extent, organization and funding.").

16. As will become clear, this Note will focus solely on the adequacy question. Exploring whether the State has violated its constitutional duty and prescribing the best remedial solutions are beyond the scope of this paper and are premature. Since it is unclear whether the Alaska Constitution affords each child an adequate education, it is impossible to predict whether the State has violated this obligation or what the best solutions are. Whether there is an adequacy requirement and the extent of constitutional adequacy must be determined first; only then can the

II. OVERVIEW OF SCHOOL-FINANCE LITIGATION

Ever since the United States Supreme Court decided *Brown v. Board of Education*,[17] litigation has increasingly been used as a tool to achieve equal educational opportunities.[18] *Brown*'s legal mandate, ordering the states to end *de jure* segregation of African-American students,[19] has led to years of protracted litigation, and the remnants of this litigation still exist today.[20] However, *Brown*'s more ethereal promise, that "education is perhaps the most important function of state and local governments . . . which must be made available to all on equal terms,"[21] has been the imprimatur for litigation in a variety of educational settings.

School-finance lawsuits have been the most visible equal educational opportunities challenges. Foreclosed on the federal level by *San Antonio Independent School District v. Rodriguez*,[22] school funding challenges have been creatures of state constitutional law,[23] and they have been brought in two separate waves. Starting in the mid-1970s and lasting until the late-1980s, lawsuits focused primarily on the disparate allocation of resources that resulted from state funding formulas that relied heavily on local community dollars to fund public education.[24] Generally, plaintiffs argued under state equal protection clauses that the

---

further questions be fully examined. Each is a highly fact-dependent inquiry not suitable for resolution in this Note.

17. 347 U.S. 483 (1954).

18. *See* John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War*, 57 VAND. L. REV. 2351 (2004); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

19. *Brown,* 347 U.S. at 495.

20. In December 2006, the Supreme Court heard oral arguments in *Parents Involved in Community Schools v. Seattle School District No. 1*, which challenges the use of race in student assignment plans in public schools. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, No. 05-908 (U.S., June 5, 2005), http://www.supremecourtus.gov/qp/05-00908qp.pdf.

21. *Brown*, 347 U.S. at 493.

22. 411 U.S. 1 (1974). The Supreme Court held that Texas's policy of using local taxes, in addition to state taxes, did not violate equal protection by discriminating against poor neighborhoods. *Id.* at 5–6. The Court refused to apply strict scrutiny when questioning how a state spends its tax money on the traditional state, not federal, service of public education. *Id.* at 28–29, 38.

23. ACCESS reports that challenges to school funding have been brought in forty-five out of the fifty states. National Access Network, Teachers College: Litigation: Overview, Columbia University, http://www.schoolfunding.info/litigation/litigation.php3 (last visited Feb. 26, 2007).

24. *See, e.g.*, Serrano v. Priest, 487 P.2d 1241 (Cal. 1971) (en banc).

education clauses in the state constitutions made education a fundamental right and that the state could not advance a compelling interest with narrowly tailored means to justify the vast funding disparities.[25] Courts initially accepted such arguments,[26] and they provided a broad array of remedial solutions—from mandating the state legislature to take action to equalize funding between the schools[27] to ordering states to comply with complex equalizing formulas for funding.[28] By the late 1980s, however, it became clear that the so called "equity" cases were failing to achieve educational equality.[29] Solutions were either too impractical, too politically impossible, or both.[30] Courts began rejecting, and litigants stopped bringing, lawsuits demanding strict equity in resource allocation.[31]

The failure of equity lawsuits led to a new era of equal educational opportunity litigation focusing on adequacy

---

25. *See, e.g.*, *Serrano*, 487 P.2d. at 1255; *see also* Dayton & Dupre, *supra* note 18, at 2359–60 (overview of *Serrano* principle). Another common argument that courts accepted was that there was simply no rational basis for large funding disparities. For instance, in *Tennessee Small School District v. McWherter*, the Tennessee Supreme Court held that the State's choice to leave funding to individual communities was not even rationally related to its asserted goal—more local control over education—because the disparate allocation of funds actually took local control away from some communities who did not have enough funds to provide basic educational necessities. 851 S.W.2d 139, 154–55 (Tenn. 1993).

26. *See, e.g.*, *Serrano*, 487 P.2d. at 1255; *see also* Dayton & Dupre, *supra* note 18, at 2359–60.

27. *See* Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, *in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218, 225 (Timothy Ready, Christopher Edley, Jr. & Catherine E. Snow eds., 2002), *available at* http://www.schoolfunding.info/resource_center/research/adequacychapter.pdf (discussing the fiscal neutrality principal).

28. Other examples of courts finding for the plaintiffs in equity cases include: *Dupree v. Alma School District No. 30*, 651 S.W.2d 90 (Ark. 1983); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); and *Washakie County School District No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980). For a detailed discussion of the equity cases, see Rebell, *supra* note 27, at 226–27. *See generally* Dayton & Dupre, *supra* note 18.

29. *See* Rebell, *supra* note 27, at 227.

30. *See id.* ("Equalizing tax capacity does not by itself equalize education. The educationally relevant disparities not only reflect the tax based inequalities, but local political and administrative choices as well . . . ." (quoting Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 147 (1995))).

31. *See id.* (reporting that by 1988, of the twenty-two states which had heard equity cases, fifteen ruled for the defendants).

standards.[32] The ultimate goals of adequacy lawsuits are still exposure and amelioration of resource inequalities.[33] However, adequacy litigation takes a more nuanced approach, focusing on three questions.[34] The first two, around which this Note will be centered, deal primarily with the question of educational outcomes. First, litigants ask the court to recognize that the Education Clause confers on each child in the state a broad right to a certain level of education—adequate education.[35] The broad right to education may be found in the constitutional text,[36] or it may be found implicitly by reference to the commonly-held notion that every child has the constitutional right to an education that will prepare him to be a productive member of the democracy.[37] For instance, in *Leandro v. State*,[38] the North Carolina Supreme Court used a

32. *See id.* at 228; Dayton & Dupre, *supra* note 18, at 2391 ("Law and finance scholars have documented a trend in school funding cases that has moved from a focus on equity to an increased focus on adequacy in funding litigation."); Charles F. Sabel, *Destabilizing Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1027 (2004) ("[T]he new accountability approach is widely regarded as the most promising recent development in public school reform.").

33. *E.g.*, Plaintiffs' Pretrial Brief, *supra* note 10, at 1–4.

34. Some argue that the adequacy approach has a higher potential for success than equity cases. *See* Rebell, *supra* note 27, at 230 ("[T]he marked trend toward plaintiff victories . . . can be directly correlated to a greater reliance . . . on claims of a denial of basic educational opportunities guaranteed by the applicable state constitution . . . ."). *But see* Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2450 (2004) ("Critical to litigation efforts is that these variables are located deeper *inside* schools and classrooms and, as such, further away from the reach of lawsuits and court decisions." (emphasis added)).

35. Plaintiffs' Pretrial Brief, *supra* note 10, at 11.

36. *See, e.g.*, WASH. CONST. art. IX, § 1 ("It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."). In *Seattle School District No. 1 v. State*, the Supreme Court of Washington held that the Education Clause did indeed promise every child an adequate education. 585 P.2d 71, 94 (Wash. 1978) (en banc) ("[T]he State's constitutional duty . . . embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas.").

37. *See, e.g.*, Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973) (defining the promise of a "thorough and efficient" education to mean "that educational opportunity which is needed in the contemporary setting to equip a child for his role as citizen and as a competitor in the labor market"). For an article detailing the role of language in school-funding litigation, see William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 ED. LAW REP. 19 (1993).

38. 488 S.E.2d 249 (N.C. 1997).

number of factors—previous court decisions, the explicit guaranty of the constitutional provisions, and the contemporary policy judgments of the legislature—to find that the state's constitution promises every student the opportunity to receive "sound basic education."[39]

Second, adequacy litigants urge that the broad standard must have some substance, answering the essential question: what skills should an educated student learn?[40] In *Leandro*, the court defined a sound basic education in the following way:

> (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices . . . ; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.[41]

In the final step, adequacy litigants attempt to prove that not every student in the state is receiving an adequate education.[42] Disparities in the allocation of educational resources, the argument typically goes, have deprived many students of the right to an adequate education, and the State must ameliorate the disparities to ensure that every student is educated adequately.[43] To be sure,

---

39. *Id.* at 254.

40. *See, e.g.*, Plaintiffs' Pretrial Brief, *supra* note 10, at 11–12.

41. *Leandro*, 488 S.E.2d at 255; *see* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).

42. *See, e.g.*, Plaintiffs' Pretrial Brief, *supra* note 10, at 12–14.

43. *See, e.g.*, Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 391 (N.C. 2004) ("[W]e affirm those portions of the trial court's order that . . . require the State to assess its education-related allocations to the county's schools so as to correct any deficiencies that presently prevent the county from offering its students the opportunity to obtain a *Leandro*-conforming education."); Second Amended Complaint, *supra* note 8, at 2 ("[T]he [S]tate of Alaska . . . has failed consistently and repeatedly to adequately fund [education]. As a result, students with special needs of all kinds find those needs unmet, exceptional children receive unexceptional instruction, some children receive no instruction although instruction is required, and a myriad of children for a myriad of reasons fail examinations . . . .").

perfect equality is not the goal of adequacy litigation.[44] Courts accepting adequacy challenges have expressly recognized that their states' constitutions do not mandate strict equality.[45]

III. *MOORE V. STATE*

In August of 2004, a number of rural school districts, parents of school-age children, and educational organizations filed an adequacy lawsuit, *Moore v. State*,[46] charging that the State of Alaska inadequately funds the education system and consequently deprives every school-age child in the state of a constitutionally adequate education.[47] The plaintiffs alleged rampant educational inequalities, especially among low-income students and Alaska Natives, who had a forty-three percent graduation rate in 2004–2005.[48] The cause of the disparities, according to the plaintiffs, is the State's reluctance to fund programs that would help all students succeed, such as preschool, one-on-one tutoring, small group lessons, and highly trained staff.[49] The plaintiffs asked the trial court to conduct a study of the costs of an adequate education and to order the State to comply with its constitutional duty to provide an adequate education.[50]

The State disagreed with the plaintiffs' assertions.[51] According to state officials, schools are not only fully funded, as evidenced by sharp increases in funds in the 1980s and between 2004–2007,[52] but students also perform well on standardized tests.[53] The State did admit to room for improvement, but it argued that its methods and educational approaches—which are consistent with the Federal No Child Left Behind Act[54]—are best suited to achieve the educational goals of the state.[55] Finally, the State alleged that more funding

---

44. *See* Rebell, *supra* note 27, at 230–31 (explaining that adequacy litigation does not threaten local control over education, thus leaving local communities free to augment educational spending).

45. *Leandro*, 488 S.E.2d at 256–57.

46. Moore v. State, No. 3AN-04-9756 Civ. (Alaska Super. Ct. filed Aug. 9, 2004).

47. Second Amended Complaint, *supra* note 8, at 2.

48. Plaintiffs' Pretrial Brief, *supra* note 10, at 3.

49. *Id.* at 3–4.

50. Katie Pesznecker, *Case Rests with Judge on Schools*, ANCHORAGE DAILY NEWS, Dec. 20, 2006.

51. *See* Amended Answer, *Moore* (filed Feb. 14, 2005).

52. State's Trial Brief, *supra* note 11, at 2–3.

53. *Id.* at 3.

54. 20 U.S.C. § 6301 (2006).

55. State's Trial Brief, *supra* note 11, at 4–6.

would not solve the problem,[56] arguing that evidence from other states demonstrates that more money alone is not the answer.[57] Rather, the State suggested that the money that has been allocated must be spent more efficiently and effectively.[58]

Each side has a different position on the question of whether and what level of adequacy is required by the Education Clause.[59] The plaintiffs urged the court to find an adequacy standard in one of two places. First, the plaintiffs suggested that the court should adopt a detailed adequacy standard similar to the one articulated by the Kentucky Supreme Court in *Rose v. Council for Better Education*.[60] The apparent justification for adopting such a position is that "numerous other courts have adopted similar definitions."[61] The standard would require that each student receive:

> i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[62]

In the alternative, the plaintiffs analogized to the North Carolina Supreme Court's decision in *Leandro v. State* and suggested that the court look to education goals and standards within the state to find an adequacy standard: "As *Leandro* demonstrates, even if this court is not inclined to adopt Alaska's state standards as a constitutional minimum, they are nevertheless evidence of what all

---

56. *Id.* at 6–7.

57. *See id.* at 10–11.

58. *Id.*

59. In response to a pretrial motion, the trial court made clear that it will make a decision on the adequacy question. Order re: State's Motion to Establish a Standard of Review at 4, Moore v. State, No. 3AN-04-9756 Civ. (filed June 13, 2006) [hereinafter Order] ("This court finds that it is the court's responsibility to determine 'a constitutional floor with respect to educational adequacy. . . .'").

60. 790 S.W.2d 186, 212 (Ky. 1989).

61. Plaintiffs' Pretrial Brief, *supra* note 10, at 12.

62. *Rose*, 790 S.W.2d at 212.

children in today's society need to learn to participate in society as adults."[63] The plaintiffs conclude that subjects such as math, science, geography, and government are essential to an adequate education and therefore should be constitutionally required.[64]

The State, in contrast, argued that the state constitution requires only a minimally adequate education.[65] "Even if a student's exercise of the right to an education was 'burdened by certain disadvantages,' the existence of those disadvantages would not constitute a violation of the Education Clause."[66] Relying on the supreme court's decision in *Molly Hootch v. Alaska State-Operated School System*, the State argued that the constitution promises only the opportunity to receive an education.[67] The State suggested that the court should allow the legislative and executive branches to do the line drawing and list making,[68] leaving the constitution a "flexible document that is to be implemented and funded by the political process."[69]

IV. *MOLLY HOOTCH*: HOLDING AND INTERPRETIVE FRAMEWORK

Resolution of *Moore*, and specifically resolution of the adequacy issue, will almost certainly be made with reference to the *Molly Hootch* case.[70] *Molly Hootch* is the Alaska Supreme Court's only major elaboration of the Education Clause.[71] It is also a close analogue to *Moore*, at least in respect to the broad question it presents: what is the extent of the rights and duties under the Education Clause?[72] However, there are a number of key differences between *Molly Hootch* and *Moore*, discussed below, which call into question the State's contention that *Molly Hootch*

63. Plaintiffs' Pretrial Brief, *supra* note 10, at 12.

64. *Id.*

65. State's Trial Brief, *supra* note 11, at 7.

66. *Id.* at 8 (quoting Hootch v. Alaska State-Operated Sch. Sys., 536 P.2d 793, 804 (Alaska 1975)).

67. State's Trial Brief, *supra* note 11, at 8.

68. *Id.* at 10 ("*Molly Hootch* explicitly reserves educational policy decisions and line-drawing exercises for the legislative and executive branches, not the court.").

69. *Id.*

70. Hootch v. Alaska State-Operated Sch. Sys. (*Molly Hootch*), 536 P.2d 793, 799 (Alaska 1975).

71. ALASKA CONST. art. VII, § 1.

72. *Molly Hootch*, 536 P.2d at 799 ("Appellants seek a definition of the constitutional provision . . . .").

disposes of the adequacy question in *Moore*.[73] Accordingly, the holding in *Molly Hootch* is less important in determining whether the Education Clause requires adequacy than it is for the interpretive framework that was established.

A. The Holding

In *Molly Hootch*, school-aged children from three isolated rural towns claimed that the legislature violated the Education Clause because it did not provide secondary schools in the students' hometowns.[74] Specifically, the students claimed that the Education Clause's promise of public schools "open to all"[75] conferred upon all Alaskan school-age children a fundamental right to be educated in their hometowns, that the right could not be impaired unless a compelling government interest was advanced, and that no such interest was advanced.[76] Refusing to reach the question of a constitutional violation, the Alaska Supreme Court held that the Education Clause does not promise school-age children in Alaska the right to be educated in their hometowns.[77] Rather, "[t]he phrase 'open to all' is a unitary phrase embodying a requirement of nonsegregated schools."[78] Each student must have access to a nonsegregated school, the court held, but the constitution says nothing about how many schools there must be or where they must be located.[79]

The supreme court did not directly rule on the question of whether the constitution promises an adequate level of education. However, as the State's brief in *Moore* points out, it did make a number of points that may influence the court in *Moore*.[80] Most important, the supreme court explained that, "[u]nlike most state constitutions, the Constitution of Alaska does not require uniformity in the school system."[81] Rather, "the Alaska Constitution appears to contemplate different types of educational opportunities . . . without requiring that all options be available to

73. State's Trial Brief, *supra* note 11, at 7.

74. *Molly Hootch*, 536 P.2d at 796–97. The students also claimed a state equal protection violation, but the cause was remanded for further proceedings. *Id.* at 808.

75. ALASKA CONST. art. VII, § 1.

76. *Molly Hootch*, 536 P.2d at 797.

77. *Id.* at 801, 803.

78. *Id.* at 801.

79. *Id.* at 803.

80. State's Trial Brief, *supra* note 11, at 7–8.

81. *Molly Hootch*, 536 P.2d at 803.

all students."[82] The question of which students get what services is a complex policy question that is expressly delegated to the legislative and executive branches; the constitution says nothing about "when it is feasible to establish local secondary schools . . . ."[83]

In this light, it is possible that, as the State argues, the trial court may dispose of the adequacy issue based on the holding in *Molly Hootch* alone.[84] Since students merely must have the *opportunity* to attend a school,[85] it follows that the standard of education promised to Alaskan school-age children is minimal.[86] Moreover, *Molly Hootch* held that educational opportunities do not have to be the same—the constitution contemplates that there will be differences, and in doing so it does not compel the State to promise each child the same educational outcome.[87] Finally, finding an adequacy standard in the Education Clause may well usurp the province, expressly recognized in *Molly Hootch*, of the legislative and executive branches to make policy.[88]

The better conclusion, however, is that there are enough differences between *Molly Hootch* and *Moore* to make such a cursory disposition of the adequacy issue unlikely. For instance, that *Molly Hootch* promised mere opportunities, not guaranteed outcomes, does not preclude a court from holding that the Education Clause promises every student a basic standard of education. A court may decide that every student has the absolute right to receive an adequate education; or, a court may decide that every student must have the opportunity to receive that sort of education. Either way, the standard of education that must be offered is the same, and therefore opportunity is not incompatible with adequacy.[89]

Furthermore, an adequacy standard is consistent with *Molly Hootch*'s holding that differences in the quality and type of education are constitutional. As the trial court recognized in a

---

82. *Id.*

83. *Id.* at 804.

84. *See* State's Trial Brief, *supra* note 11, at 7.

85. *Molly Hootch*, 536 P.2d at 803.

86. *See* State's Trial Brief, *supra* note 11, at 7.

87. *See id.* at 9.

88. *See id.*

89. To this end, the Supreme Court of North Carolina has expressly held that the state constitution requires only the opportunity for a "sound basic education." *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) ("We conclude that . . . the North Carolina Constitution . . . guarantee[s] every child of this state an opportunity to receive a sound basic education in our public schools.").

pretrial order, its job is to establish a constitutional floor not uniform requirements making every school equal.[90] Thus, while all options do not have to be open to all students,[91] it is possible that some options might still have to be available to every student. Not every school has to have a swimming pool, for instance, but every school may have to offer an art class.

Finally, finding an adequacy standard is not the same as making a policy decision. The standard does not, as the State suggests, "inevitably reflect[] the policies and priorities of the list-maker rather than the policies and priorities of the people . . . ."[92] If done properly, an adequacy standard can be found through well-accepted methods of constitutional interpretation, reflecting the combined values of the Framers, the people, and contemporary exigencies.[93] To be sure, there may be some overlap between policy decisions and the adequacy standard. For instance, the constitution may require that every student be taught basic oral and writing skills, and the statutes and regulations may prescribe the same. But the standards are derived in two different ways. The policy choice is a conscious decision by the legislative or executive branch; the adequacy standard, while once a choice by the Framers, is an immutable constitutional value promised to every child.

B. Analytical Framework

Although the holding in *Molly Hootch* should not dispose of the adequacy question, the interpretive framework it established for defining rights under the Education Clause provides a helpful roadmap for determining whether and to what extent the constitution promises every child an adequate education. Three primary interpretive principles can be gleaned from the opinion. The starting point is the express guaranty of the Education Clause.[94] In construing the text, the court explained that "[t]he general rule . . . is to give import to every word and make none nugatory."[95] Second, "[the court] must look to the intent of the Framers of the constitution concerning the nature of the right itself, the problems which they were addressing and the remedies they sought."[96] Finally, the court recognized that the constitution "must

90. Order, *supra* note 59, at 4.

91. *See* Hootch v. Alaska State-Operated Sch. Sys. (*Molly Hootch*), 536 P.2d 793, 803 (Alaska 1975).

92. State's Trial Brief, *supra* note 11, at 10.

93. *See Molly Hootch*, 536 P.2d at 800.

94. *Id.* at 799.

95. *Id.* at 801.

96. *Id.* at 800.

be construed in light of changing social conditions," but nonetheless may not be interpreted such that it departs "so far from its original terms and meaning as to constitute a radical invasion by the judiciary into an area specifically delegated . . . to the legislature."[97]

Consistent with the approach urged by the plaintiffs,[98] the court in *Molly Hootch* said that "[c]omparison of the education provision in the Alaska Constitution with those in other states is also instructive . . . ."[99] Examining the Education Clauses from a number of other states, the court concluded that the Alaska Constitution is "[u]nlike most state constitutions"[100] and accordingly distinguished the holdings of a number of other state courts.[101]

From an interpretive standpoint, then, the plaintiffs are not incorrect in urging the court to examine the interpretations of other courts. However, by asking the court to adopt the interpretation of or the approach used by another state,[102] the plaintiffs have relied more heavily on the interpretations of other courts than the *Molly Hootch* framework permits. In so doing, the plaintiffs glossed over the fact that in drafting the constitution, the Framers "had in mind the vast expanses of Alaska, its many isolated small communities which lack effective transportation and communication systems, and the diverse culture and heritage of its citizens."[103]

The *Molly Hootch* framework thus provides an approach geared toward producing a state-specific solution. Thus, interpretations of other courts should be used, if at all, in a comparative perspective, and should merely instruct the court, not provide the answer.[104]

---

97. *Id.* at 804.

98. Plaintiffs' Pretrial Brief, *supra* note 10, at 11–14.

99. *Molly Hootch*, 536 P.2d. at 801.

100. *Id.* at 803.

101. *Id.* at 802 n.28 ("Those ca[s]es which do interpret this or similar language are distinguishable.").

102. *See* Plaintiffs' Pretrial Brief, *supra* note 10, at 11–14. For an outline of the arguments in *Moore*, see discussion *supra* Part II.

103. *Molly Hootch*, 536 P.2d at 803.

104. *Id.* at 802. Accordingly, the decisions of other courts in adequacy litigation are discussed no further in this Note. This is not to say that those decisions are unhelpful, but rather to say that they are unnecessary to the proper resolution of the adequacy question and beyond the scope of this Note. For background on adequacy litigation in other states, see Dayton & Dupre, *supra* note 18, at 2390–94; Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in*

V. THE CONSTITUTIONAL PRINCIPLES

Before applying the *Molly Hootch* framework to the Education Clause, it is important to note that it is impossible to predict which factors the court will use to find (or not find) an adequacy guarantee in the constitution. That said, a majority of the analysis in *Molly Hootch* focused on two factors—the Education Clause's explicit guarantee and the historical framework under which it was enacted—both of which will be discussed at length below. Moreover, it is important to keep in mind that, at this stage of the analysis, the alleged disparities in education are irrelevant.[105] The question is: what is the scope of the constitutional rights and duties? The court's job is to define these contours. Once these constitutional rights are defined, alleged violations become pertinent.[106]

A. Explicit Guarantee

The Education Clause provides, in relevant part, that "[t]he legislature shall by general law establish and maintain a system of public schools open to all children of the State . . . ."[107] On its face, the clause commands a specific duty of the legislative branch—the establishment and maintenance of public schools—and a corollary right to all Alaskan children to have access to those schools.[108] The most obvious omission from the Education Clause is an explication of a particular standard of education that the legislature is required to administer.[109] The legislature does not have to establish and

---

the Kansas School Finance Litigation, 54 U. KAN. L. REV. 1021, 1031–34 (2006); and Rebell, *supra* note 27, at 232–39.

105. *Molly Hootch*, 536 P.2d at 800 ("In determining the scope of a constitutional right, the focus of the court's inquiry is not, however, on the question of whether there is a burden on the exercise of that right.").

106. Alleged violations and possible remedies are beyond the scope of this paper. The remedial issue, however, has been approached from a number of different points of view. *Compare generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991), *and* Heise, *supra* note 34, at 2456–60 (casting doubt on the potential for adequacy litigation to bring about equal educational opportunities because plaintiffs seek to reach too far into the classroom), *with* Rebell, *supra* note 27, at 230 (arguing that adequacy litigation is more judicially manageable than equity litigation and therefore has a higher potential for actually achieving equal educational opportunities).

107. ALASKA CONST. art. VII, § 1.

108. *See Molly Hootch*, 536 P.2d at 799.

109. *Cf.* GA. CONST. art. VIII, § 1, para. 1 ("The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia."); WASH. CONST. art. IX, § 1 (stating that "It is the paramount duty of

maintain an efficient, effective, or quality system of public schools; it merely must establish and maintain public schools.[110] The children are simply guaranteed public schools that are "open to all,"[111] not public schools that prepare them to compete in society and allow each student to go to college if he pleases.[112]

The initial issue, therefore, is whether the lack of an explicit standard is dispositive of the adequacy issue.[113] On the one hand, if the Framers intended to require a certain standard of educational quality in the constitution, they could have said so explicitly.[114] The omission, in turn, could be considered if not evidence of a purpose not to include an adequacy standard, then at least evidence that it was not contemplated in the first place. Indeed, such an argument is consistent with the general framework of the Education Clause. The duty placed on the legislature and the rights afforded to Alaskan children are, on the whole, broad and unspecific. To this end, the Framers intended to delegate the authority of maintaining and enforcing standards to the legislature, understanding fully that educational standards are more suitably answered by the people's

---

the state to make ample provision for the education of all children residing within its borders . . . .").

110. *Cf.* PA. CONST. art. III, § 14 ("The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.").

111. ALASKA CONST. art. VII, § 1.

112. CAL. CONST. art. IX, § 1 ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.").

113. In the early 1990s, some scholars were predicting that the strength of the explicit wording of a state's Education Clause would have an influential effect on whether or not an adequacy standard would be found. *See* Thro, *supra* note 37, at 22 (arguing that since historical analysis is often unclear, "the language arguably becomes the decisive factor"). For instance, Thro suggested a weak clause, like Alaska's, promised only a free public education and no qualitative standard. *Id.* at 28. Thro's hypothesis has not, however, been borne out. Some states with what he characterizes as the strongest education clauses have failed to find a constitutional standard of adequacy, *see, e.g.*, Lewis E. v. Spagnolo, 710 N.E.2d 798 (Ill. 1999); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996), while other states with weaker Education Clauses have found a constitutional promise of adequacy, *see, e.g.,* Abbeville County Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999).

114. *See, e.g.*, GA. CONST. art. VIII, § 1, para. 1.

representatives, not in a static, transcendent constitutional command.[115]

On the other hand, to interpret the State's duty to provide public education, and Alaskan children's right to receive that education, as a standardless right is to effectively render the words "public school" nugatory, something that the *Molly Hootch* court explicitly rejected.[116] That is, "public schools open to all"[117] must have some meaning.[118] The Framers may have delegated a significant amount of authority over the control of public education to the legislature, but the Framers nonetheless had *something* in mind when they opened the schools to all school-aged children in Alaska. They must have conceived of having the basics: teachers, books, and classes. They may have believed public schools should prepare their children to function in society.[119] In short, there must have been some standard of education contemplated, otherwise the legislature could render the right to public schooling no right at all.[120]

To this end, not every constitutional command is written explicitly in the constitution. Some, undoubtedly, are found

---

115. In large part, this is the argument advanced by the State in its brief. *See* State's Trial Brief, *supra* note 11, at 10 ("The legislature, state board, and local school boards are the proper bodies to set educational goals and requirements."); *see also Ex parte* James, 836 So. 2d 813, 815 (Ala. 2002) ("[B]ecause the duty to fund Alabama's public schools is a duty that—for over 125 years—the people of this state have rested squarely upon the shoulders of the Legislature, it is the Legislature, not the courts, from which any further redress should be sought."); *Comm. for Educ. Rights*, 672 N.E.2d at 1189 ("[Q]uestions relating to the quality of education are solely for the legislative branch to answer.").

116. Hootch v. Alaska State-Operated Sch. Sys. (*Molly Hootch*), 536 P.2d 793, 801 (Alaska 1975).

117. ALASKA CONST. art. VII, § 1.

118. The Tennessee Supreme Court took a similar position in *Tennessee Small School District v. McWherter*, 851 S.W.2d 139 (Tenn. 1993). In responding to the State of Tennessee's challenge that the word "education" had no substance, the court explained, "the word 'education' has a definite meaning and needs no modifiers in order to describe the precise duty imposed upon the legislature." *Id.* at 150. While the Alaska Constitution does not specifically mention education, a similar argument could be applied to the use of public schools, which are places of instruction where students become prepared to be productive members of society.

119. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

120. *See Tenn. Small Sch. Dist.*, 851 S.W.2d at 138–41.

implicitly,[121] others are found historically, and still others are found combining these or other factors.[122] The court's job, essentially, is to give import to words in the constitution; that import must be fair, but fairness does not preclude the court from providing meaning to specific terms in the constitution.[123] Furthermore, an adequacy standard does not have to be so specific that the court, in finding and defining the adequacy right, necessarily usurps the explicit delegation of authority to the legislature. Rather, the very point of adequacy litigation is to move away from defining specific educational rights in relation to, for instance, intricate and complex funding formulas,[124] and move toward applying broad conceptions of educational adequacy which apply in the past, the present, and the future.

In sum, although the Framers surely meant something by the words "public schools open to all,"[125] it is not wholly clear from the face of the Education Clause the standard of public schooling they intended. Did they, for instance, contemplate merely a minimally adequate education? Or was there a greater conception that public schools would operate in a particular way? A review of the history is necessary to answer these questions.

B. Historical Framework

The touchstone of the *Molly Hootch* analysis is defining the scope of the educational right in relation to the intent of the Framers, the problems they were addressing, and the remedies they sought.[126]

1. The History of Education in Alaska: Problems, Reactions, and Remedies Sought. The history of education in Alaska during the time leading up to statehood is a tale of a segregated, dual school system.[127] From the time the United States acquired the Alaska territory until the early twentieth century, education in

121. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973) ("[T]he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.").

122. *See* Hootch v. Alaska State-Operated Sch. Sys. (*Molly Hootch*), 536 P.2d 793, 800 (Alaska 1975).

123. *See* Marbury v. Madison, 5 U.S. 137 (1803).

124. Rebell, *supra* note 27, at 230.

125. ALASKA CONST. art. VII, § 1.

126. *Molly Hootch*, 536 P.2d at 800.

127. *See id.* ("At the time statehood was attained, a dual system of public education existed in Alaska.").

Alaska was administered primarily by the federal government.[128] In the early 1900s, the number of non-Natives in the territory increased with the discovery of gold and the growth of commercial fishing and timber.[129] Unable to educate the growing population, Congress delegated the education and taxation authority to territorial cities and towns.[130] Regional areas petitioned for local control as well, leading to the passage of the Nelson Act in 1905, which reduced federal control of education to unincorporated rural areas.[131] The catch, however, was that only "white children and children of mixed blood leading a civilized life" were permitted to attend the schools.[132] Alaska Native children in rural areas still attended schools operated by the federal government.[133] Although federal government policy on how to educate Alaska Natives rode the pendulum away from civilization programs toward self-determination and then back in the years leading up to statehood,[134] the federal government never relinquished total control over rural Alaska Native education.[135]

By the 1950s, education in Alaska existed on three fronts. In urban, modern, and growing towns and cities, public schools were operated in similar fashion to most urban centers around the United States.[136] In the rural areas, a system of segregated schools still persisted.[137] The federal government operated a number of Alaska Native elementary and secondary boarding schools, which

---

128. Carol Barnhardt, *A History of Schooling for Alaska Native People*, 40 J. AM. INDIAN EDUC. 1, 8–11 (2001), *available at* http://jaie.asu.edu/v40/V40I1A1.pdf.

129. *Id.* at 11.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Starting in the 1930s, John Collier initiated a series of reforms that led to the devolution of some of the control over Alaska Native education to the Alaska Territorial Board of Education. *Id.* at 12. Between 1942 and 1954, forty-six elementary schools controlled by the Federal Bureau of Indian Affairs were transferred to the territory. Monetary concerns and the push for statehood, however, slowed the transfer of federally controlled schools to territorial control. *Id.* at 13–14.

135. *Id.* at 12.

136. Most Alaska Natives were concentrated in rural areas, and therefore segregated schools did not exist in urban centers. Those Alaska Natives who did reside in urban areas were considered "civilized" and could attend public schools. *Id.* at 14.

137. Hootch v. Alaska State-Operated Sch. Sys. (*Molly Hootch*), 536 P.2d 793, 800 (Alaska 1975).

often overlapped with elementary and secondary schools operated by the Alaska Territorial Board of Education.[138] As *Molly Hootch* explained, segregation was the primary problem that the Framers addressed in 1955 and 1956 at the Constitutional Convention.[139] The answer, of course, was to provide that the public schools would be "open to all" children in the new state.[140] As the *Hootch* court also explained, the Framers' intent was to promote unity in the school system, not uniformity.[141] Recognized differences between rural and urban areas in the state were replete throughout the Constitutional Convention minutes.[142] When the constitution was finally enacted, such differences were preserved and coveted, not abandoned.[143]

Although the Framers were reacting to a system of segregated public schools that differed depending on regional location, they were not reacting to a completely inadequate system of schools. Accounts suggest that, in many respects, the schools operating in the Alaska territory before statehood were comparable to schools across the United States. According to a report by the Department of Interior in 1950, "[t]eachers in the Territorial public schools compare favorably in training and experience with those in the States."[144] Accreditation was required for both teachers and administrators,[145] and minimum salaries exceeded the national average.[146] Furthermore, a large number of public high schools in the state were accredited by the Northwest Association of

138. Barnhardt, *supra* note 128, at 22. ("Although some of the most harmful consequences of the original dual system no longer existed (i.e. there were few communities in which students attended separate schools on the basis of race), many of the other negative consequences of the dual system continued (e.g. lack of coordination, competition for teachers and resources, high expenses, duplication of services).").

139. *Molly Hootch*, 536 P.2d at 801.

140. *Id.*

141. *Id*. at 803.

142. *See, e.g.*, Minutes of the Alaska Constitutional Convention, Day 58 (Jan. 19, 1956), *available at* http://www.law.state.ak.us/doclibrary/conconv/58.html.

143. *See* ALASKA CONST. art. X.

144. U.S. DEP'T OF THE INTERIOR, OFFICE OF TERRITORIES, MID-CENTURY ALASKA (1951), http://www.alaskool.org/projects/history/mid_century/Mid_Century_Alaska.htm.

145. *Id*.

146. David Albert & David U. Levine, *Teacher Satisfaction*, 65 PEABODY J. EDUC. 47, 53 (1988). In 1950, the average teacher salary in the United States was $3126. *Id.* By contrast, a minimum salary law in Alaska required school boards to pay teachers minimum salaries ranging from $3300 to $3700, depending on the location. DEP'T OF THE INTERIOR, *supra* note 144.

Secondary and Higher Schools; the rest, mostly rural schools, were accredited by the Territorial Department of Education.[147]

Alaskans also had a broad conception that schools were a tool to prepare the youth to contribute thoughtfully in the democracy.[148] Urban schools prepared students to work in the burgeoning fishing and timber industries, and more than a thousand students received postsecondary instruction at the University of Alaska.[149] Rural schools, which mostly served Alaska Natives, were especially attuned to inculcating democratic values and preparing students to be an active part in the economic and social climate.[150] To this end, the assimilationist philosophy of Alaska Native primary schools was centered around teaching basic English language and social skills in addition to the normal curriculum.[151] Federally-run boarding schools at White Mountain and Mt. Edgecumbe went even further, offering vocational and college preparatory courses.[152]

While not perfect, public schools in Alaska were nonetheless sophisticated and operated with the goal of including Alaskans, both Native and non-Native, in the democratic fabric of the United States. The quality of public schools thus did not appear to be a problem that needed to be addressed by the Framers—there was at least a conception of what a school should look like at the time. That adequacy was not first on the list of problems the Framers had to address, of course, does not lead *a fortiori* to the conclusion that there is an implicit adequacy standard in the constitution. It does, however, offer an explanation for why an explicit adequacy standard was not included in the constitution: the term "public schools" actually had meaning. They had tangible, first-hand experience with how a public school operates and with what services it should offer its students, and such a conception was inherently rolled into the words "public schools" when they were written into the constitution.

The point becomes clearer when contrasting the Alaska conception of public schools to conceptions of public schooling in states which enacted education clauses in the nineteenth century. A state such as Indiana, which enacted its Education Clause in 1851,[153] and which included illustrative descriptions of the duties

147. DEP'T OF THE INTERIOR, *supra* note 144.
148. *See generally id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. IND. CONST. art. VIII, § 1.

and obligations of the state in providing education,[154] was reacting to vastly different conceptions of public education. Indeed, public education was nascent at most in its development in the nineteenth century,[155] and it was not widely offered until the twentieth century.[156] With little conception of what a system of public schooling should offer and achieve, states such as Indiana codified expectations by clarifying those requirements in the text of their constitutions.[157] The Framers of the Alaska Constitution, in contrast, adopted the Education Clause during a time when the widely accepted contemporary purpose of education was to inculcate democratic values and prepare youth for success in the democracy.[158] The Framers, furthermore, adopted the clause in a

---

154. Indiana's Education Clause provides, "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it should be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual scientific, and agricultural improvement; and provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." *See also* KY. CONST. § 183 ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.").

155. Although public education has its roots in America all the way back to colonial times, and although educational movements began in Massachusetts in the nineteenth century and spread to other states, public education on a widespread scale is a twentieth century creation. *See* VICTORIA J. DODD, PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY 9–10 (2003). For instance, even by 1910, only six percent of Americans had a high school education. *Id.* at 9.

156. *Id.* at 9–10.

157. To this end, of the twenty-six states which passed Education Clauses in or around the nineteenth century and have yet to amend the provisions, twenty have enacted some sort of language qualifying the quality of education the state or legislature must offer, *see* COLO. CONST. art. IX, § 2 ("The general assembly shall . . . provide for the establishment and maintenance of a thorough and uniform system of free public schools . . . ."); DEL. CONST. Art. X, § 1 ("The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools . . . ."), or a preamble highlighting the importance of education in society, *see* CAL. CONST. art. IX, § 1 ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people . . . ."). For a resource collecting the Education Clauses from all fifty states, see KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW (6th ed. 2005).

158. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954):

> Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

contextual environment where resources and quality teachers were already being provided to serve those ends.[159] In this light, the recitation of "public schools" in the constitution had substance, and it is quite possible that a standard was not stated explicitly because there was already a widely accepted standard.[160]

2. The Constitutional Minutes: The Intent of the Framers? If an implicit standard was in fact adopted, one would expect the Framers to have at least mulled over similar standards at the Constitutional Convention. Unfortunately, the Education Clause was seldom, if ever, discussed at the Constitutional Convention.[161] As one historian of the convention noted, "the [Education Clause] was not controversial,"[162] and therefore consumed very little floor time.[163] What little can be gleaned from the minutes of the Constitutional Convention make it clear that the Framers had two express goals in enacting the Education Clause.[164] The first dealt with means: to delegate to the legislature broad authority to administer the public schools.[165] The second dealt with ends: the

---

The social benefit theory of education was not a new creature in the twentieth century. For centuries, education has been seen as a tool to prepare young men and women to operate in society. *See Education, the Balance-Wheel of Social Machinery, Horace Mann's Twelfth Report*, AMERICAN PUBLIC SCHOOL LAW 29 (6th ed. 2005).

> Under the Providence of God, our means of education are the grand machinery by which the "raw material" of human nature can be worked up into inventors and discoverers, into skilled artisans and scientific farmers, into scholars and jurists, into the founders of benevolent institutions, and the great expounders of ethical and theological science.

Id.

159. DEP'T OF THE INTERIOR, *supra* note 144.

160. In a similar vein, Hawaii's Education Clause, enacted shortly after Alaska's in 1959, provides merely a simple statement of the state's educational duty: "The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control . . . ." HAW. CONST. art. X., §1.

161. *See* VICTOR FISCHER, ALASKA'S CONSTITUTIONAL CONVENTION 140 (1975).

162. *Id.* The Constitutional Convention began on November 8, 1955, and ended on February 6, 1956. *See* University of Alaska, Constitutional Convention, http://www.alaska.edu/creatingalaska/convention/.

163. *See id*.

164. A third goal, inconsequential to the examination in this paper, is clear as well: to insulate schools from sectarian control. *See id.*

165. *See* Minutes of the Alaska Constitutional Convention, Day 48 (Jan. 9, 1956), *available at* http://www.law.state.ak.us/doclibrary/conconv/48.html.

purpose of the education system was to prepare Alaskan youth to become active participants in society.[166]

In the only significant exposition of the meaning of the Education Clause, Delegate R. Roland Armstrong, a member of the Committee on Health, Education, and Welfare, explained:

> The Convention will note that in Section 1 that the Committee has *kept a broad concept and has tried to keep our schools unshackled by constitutional road blocks*. May I draw to your attention further the fact that we have used the words "to establish and maintain by general law." This is a clear directive to the legislature to set the machinery in motion *in keeping with the constitution* and whatever future needs may arise.[167]

Armstrong's comments confirm that the Framers delegated to the legislature almost full authority over the establishment and maintenance of public schools. The Framers expressly realized that "future needs may arise" and that the legislature must have the tools to react to the changing environment.[168]

The legislative duty to operate public schools, however, had limits. The legislature was to "set the machinery in motion," but it would have to do so "keeping with the constitution."[169] "Keeping with the constitution," of course, applies in any of a number of contexts. In establishing and maintaining the schools, the legislature surely had to avoid sectarian control,[170] follow the Declaration of Rights,[171] and respect the division of powers between the three branches of government.[172] But "keeping with the constitution" was an internal reference to the ends that public education was supposed to achieve as well. Ends, indeed, that Armstrong expressly recognized just a few sentences later when discussing the provision in the Education Clause that prevented state funds from directly benefiting religious institutions: "This section gives the education department, or other departments, the right to seek out the child, independent of his religious affiliation, *to help him to become a strong and useful part of society wherein it touches health and matters of welfare*."[173] Armstrong's comments are strong evidence that the Framers shared in the then-

166. *See id.*
167. *Id*. (emphasis added).
168. *Id.*
169. *Id.*
170. *See* ALASKA CONST. art. VII, § 1.
171. *See* ALASKA CONST. art I.
172. *See* ALASKA CONST. art II, III, and IV.
173. Minutes of the Alaska Constitutional Convention, Day 48 (Jan. 9, 1956), *available at* http://www.law.state.ak.us/doclibrary/conconv/48.html (emphasis added).

contemporary view that education's ultimate purpose was to prepare youth to be productive members of society. In light of this understanding, the Framers simple use of "public schools" in the Education Clause meant more than just a school house and some buses where students convene each day; in their minds, public schools were a place where school-age children would have a right to become active and productive members of society.

Taken together, Armstrong's comments confirm what the historical context showed:[174] while the legislature certainly had broad authority to react to the unique challenges that the pre-existing segregated system of schools presented, that authority was at its outer limits bounded by the students' right to receive an education that would prepare them to become active and productive members of society. This was the adequate education that the Framers envisioned each student would receive. *How* such an education would be offered was certainly a legislative question; *whether* such an education could be offered was a constitutional question.

At the intersection of the legislative and constitutional questions is a further question: How specific is the right to education in Alaska? That is, given that Alaska school-age children have the right to an education that will prepare them to operate productively in society, is there any more specific constitutional requirement, such as particular subjects that must be taught or a certain quality of instruction that must be offered, with which the legislature must comply?

There are two basic answers to this question: no and yes. If "no," then an adequate education is one that simply provides each child with the tools to succeed in society. However, the possible breadth of this definition is enormous, and judicial conceptions will vary widely. Education in Alaska may, in effect, begin to reflect "the policies and priorities of the list-maker rather than the policies and priorities of the people."[175]

If "yes," then the more detailed rights must be found somewhere other than the historical context or the minutes of the Constitutional Convention, which provide little in the way of specifics. The rest of the Note will therefore be dedicated to exploring what, if any, specific rights are guaranteed by the Education Clause by examining the final *Molly Hootch* factor—contemporary views of education—in light of the constitutional values discussed above.

---

174. *See supra* Part IV.B.1.

175. State's Trial Brief, *supra* note 11, at 11

C. Contemporary Views of Education

According to *Molly Hootch*, the constitution "must be construed in light of changing social conditions," but nonetheless may not be interpreted to depart "so far from its original terms and meaning as to constitute a radical invasion by the judiciary into an area specifically delegated . . . to the legislature."[176] The constitution, in other words, is not a static document, but it is not completely malleable either; any interpretation must be consistent with the principles it establishes. The specificity of the right to education, therefore, may be viewed with an eye toward commonly accepted educational standards but only up to the point that those standards collide with the legislature's broad duty to administer the public school system.

It is at this point that the fear expressed by the State in its briefs—that the constitutional standard will become a reflection of state educational policy[177]—might become very real, for there is no better example of the commonly accepted views on education than those enacted by a majority of the people's representatives. In other words, the temptation may be to rely too heavily on education policy to define the constitutional standard. *Molly Hootch*, however, draws a clear line between legislative prerogatives and constitutional standards.[178] Indeed, the logic behind such a restriction is simple—permitting the legislature to effectively define the constitutional standard with its policy choice would "constitute a radical invasion by the judiciary into an area specifically delegated . . . to the legislature."[179] By calcifying the legislature's transient policy choice into a permanent constitutional standard, the judiciary would constrain future policy development to the policy choices of today. Since policy choices, unlike constitutional standards, ebb and flow as research develops and political parties change, allowing the constitution to be defined by present policy would not only be restraining to future policy decisions, but it would also be antithetical to democratic government.

To say that policy choices may not define the constitutional standard is not, however, to say that current policy choices must be ignored completely. To be sure, the constitution cannot be interpreted "in light of changing social conditions" without a clear

176. Hootch v. Alaska State-Operated Sch. Sys. (*Molly Hootch*), 536 P.2d 793, 804 (Alaska 1975).

177. State's Trial Brief, *supra* note 11, at 11.

178. *Molly Hootch*, 536 P.2d at 804.

179. *Id*.

examination of contemporary policy preferences.[180] If contemporary education policy is to affect the constitutional standard at all, then it should magnify those principles that are both consistent with the broad constitutional mandate and unlikely to change with the political fabric.[181] This ensures that the constitution is not interpreted either as a static or a completely fluid body.[182] A brief examination of contemporary views on education is necessary to draw out these constitutionally consistent and politically resistant principles.

Contemporary views of education concentrate on setting challenging academic standards that every student (and school) must meet.[183] Standards-based education seeks to teach every student in the country basic subjects and skills that are necessary to compete in the marketplace.[184] In Alaska, it consists of two component parts. First, the state has set a number of goals and objectives that the education system is designed to achieve.[185] To ensure compliance with these broad goals, the State has established highly detailed and exhaustive content standards,[186] which set

---

180. *Id*.

181. *See id.*

182. *See id.*

183. Rebell, *supra* note 27, at 229; *see* No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2006).

184. In the United States, the standards-based movement began in the 1980s with a number of reports warning of a "rising tide of mediocrity" in American education. Rebell, *supra* note 27, at 229. Pundits and politicians alike warned that the United States was falling behind the rest of the world, and that to keep pace in the increasingly global economy the United States would have to adapt. *Id.* To do so, it was agreed that far more rigorous academic requirements would have to be fashioned. States initially took over the task of adopting standards-based education systems, *id.*, with the federal government giving a strong push in 2002 with the No Child Left Behind Act, 20 U.S.C. § 6301 (2006).

185. ALASKA ADMIN. CODE tit. 4, § 04.030. The Department of Education and Early Development's regulations state that the public school system is "to provide a working knowledge of (1) English; (2) mathematics; (3) science; (4) geography; (5) history; (6) skills for a healthy life; (7) government and citizenship; (8) fine arts; (9) technology; and (10) world languages." *Id.* The regulations further provide that the goal of the public school system is to graduate students who will: "(1) communicate effectively; (2) think logically and critically; (3) discover and nurture their own creative talents; (4) master essential vocational and technological skills; (5) be responsible citizens; (6) be committed to their own health and fitness; and (7) accept personal responsibility for sustaining themselves economically. ALASKA ADMIN. CODE tit. 4, § 04.020.

186. ALASKA ADMIN. CODE tit. 4, § 04.140. The regulations adopt by reference the content standards, which were most recently published in 2006. STATE OF

curricular goals.[187] The content standards are then linked up to similarly detailed performance standards in reading, writing, mathematics, science, and history. Students are tested on a yearly basis to determine whether they meet the standards, with the ultimate goal of proficiency for every student in every school regardless of race, ethnicity, or socioeconomic class by 2013-2014.[188]

Taken together, content and performance standards exemplify the policy thrust of the standards movement: exacting standards are articulated and implemented to ensure that every student receives a similar education, and therefore similar skills.[189] To guarantee successful implementation, assessments are administered and evaluated in relation to the standards. Schools must meet the standards on a yearly basis, and they are held accountable if they fail.[190]

At its highest level of abstraction, therefore, the educational standards movement in Alaska adopts, as a matter of policy, the constitutional right that the Framers contemplated: providing each student with the skills necessary to be a productive member of society.[191] In this light, the standards movement is a particularly good place to look for a more specific constitutional standard because the educational standards movement essentially amplifies the broader constitutional goals. The specificity of the constitutional standard must, however, be determined by constitutional principles, not policy.[192] In this light, it almost goes without saying that the highly specific content and performance standards should not be mapped onto the constitutional standard. Not only are these standards changed on almost a yearly basis, but they are far too inflexible to adapt to the changing social environment. The curriculum necessary to teach in the field of technology today, for instance, will inevitably change tomorrow.

ALASKA, DEP'T OF EDUC. & EARLY DEV., ALASKA STANDARDS: CONTENT AND PERFORMANCE STANDARDS FOR ALASKA STUDENTS (4th ed. 2006), *available at* http://www.eed.state.ak.us/standards/pdf/standards.pdf.

187. For instance, there are five content standards for English/Language Arts. Content standard A requires that "[a] student should be able to speak and write well for a variety of purposes and audiences." STATE OF ALASKA, DEP'T OF EDUC. & EARLY DEV., *supra* note 186, at 11.

188. ALASKA ADMIN. CODE tit. 4, § 06.805.

189. Rebell, *supra* note 27, at 229.

190. *See* 20 U.S.C. § 6311 (2006) (articulating state standards for receiving federal education funds).

191. *See supra* Part IV.B.1.

192. *See* Hootch v. State-Operated Sch. Sys. (*Molly Hootch*), 536 P.2d 793, 804 (Alaska 1975).

Although the specific standards may be unsuitable to rise to the level of constitutionality, the compartmentalization of those standards into different categories may give a clue as to a more suitable constitutional standard. For instance, mathematics content and performance standards are geared toward developing the basic skills that each student should have to compete in the marketplace. Certainly each skill could not be codified in the constitution, but the broader goal—ensuring that every student has mathematics skills sufficient to compete in the marketplace—could. Similarly broad skills in English language, science, social studies, technology, and vocations could be articulated as well.

The question therefore remains: Are these abstract skills required by the constitution? In other words, are they both consistent with the Framers' vision of the Education Clause and insulated enough from political pressures so that they will not be subject to rapid change?

The Framers, of course, believed that the Education Clause conferred both a broad right to education and a legislative duty to ensure that the right was met.[193] As to the right, and as discussed above, at its very core the standards based movement is consistent with the Framers' goal of providing each child with an education that would permit him or her to become a productive member of society.[194] Knowledge in abstract skills, which broadly entail those skills a productive member of society must have, are thus not only consistent with the Framers' vision of a right to education but also necessary to fulfill the constitutional right. To this end, subjects such as mathematics, reading, and writing have been a touchstone of the education system from the beginning, and they are necessary for students to go on to college or succeed in other professions.[195]

Furthermore, adopting certain abstract skills as a constitutional standard is consistent with the Framers' broad delegation of authority to the legislature. If it is accepted that the Framers adopted the Education Clause with the goal of providing every child a chance to become a productive member of society, the Framers also must have had some conception of the basic components of a productive member of society. Although discretion over, for instance, how the skills would be implemented is clearly a legislative function,[196] the legislature almost certainly was not delegated unmitigated control over defining what a student

193. *See supra* Part IV.B.2.
194. *Id.*
195. *See* DEP'T OF THE INTERIOR, *supra* note 144.
196. *See Molly Hootch*, 536 P.2d at 804.

must learn to receive an adequate education. The legislature, in other words, was delegated significant authority to react and change over time, but certain core functions of the educational system, such as every student learning basic math, English, and science skills, could not be squandered.[197]

Moreover, at a conceptual level, it is not incompatible for the constitution to require both that the legislature provide school children with certain basic skills and to leave the control over that content largely to the legislature. A constitutional floor for the skills that must be provided is only inconsistent with a constitutional delegation of content to the legislature if the constitutionally acceptable skills are defined so specifically that they consume the legislature's clear duty. For instance, to say that the constitution requires a student to learn how to operate both a PC and an Apple computer as part of a technology course would effectively swallow up the legislature's authority to control content. It is quite different to say that every student must be taught the basics of technology that are suitable to prepare them to compete in the marketplace. A broad standard defining basic skills therefore channels, rather than shackles, the legislature toward the end goals that are contemplated in the constitution. Far from being contradictory, it is in fact complementary: the constitutional standard sets the outer limits for the legislature, which then has the authority to act within those bounds.[198]

A constitutional standard articulated in terms of certain abstract skills is not only consistent with the Framers' articulation of a constitutional standard, but it can be insulated from political and policy changes as well. To a large extent, insulating the constitutional standard from rapid change depends on which abstract skills are merged into the constitution. It would be hard to argue against including, for instance, abstract skills in mathematics, language arts, and the sciences in the constitution because these subjects have been taught in schools from the beginning and have

197. Minutes of the Alaska Constitutional Convention, Day 48 (Jan. 9, 1956), http://www.law.state.ak.us/doclibrary/conconv/48.html.

198. Constitutional standards often broadly delegate authority with limits. For instance, the Commerce Clause of the United States Constitution delegates to Congress broad authority to regulate commercial activities. Regulation, however, is not boundless; the activity regulated must be "Commerce . . . among the several States," a phrase the United States Supreme Court has inconsistently defined over time. U.S. CONST. art. I, § 8. Notwithstanding this, a legislative body may have wide authority while still being checked by broad standards.

therefore stood the test of time.[199] Other skills, such as "skills for a better life" and technology, or vocational education, would have to be examined to determine whether they are merely current policy preferences or if they broadly embody what an educational system must achieve. It may be argued that technology should be included because it is the *sine qua non* of contemporary education and will only become more important over time, while "skills for a better life" should not because traditionally it has been the function of the family unit and therefore evinces a policy choice away from tradition that may change as the political and social climate adapts. Whatever the choice, it is clear that certain abstract skills can be chosen that will be insulated from both political and policy change and therefore will serve properly to channel legislative choice.

VI. CONCLUSION

In attempting to shed light on the adequacy question in Alaska, there are two conclusions. The first deals with method, or the correct way to approach determining adequacy. An adequacy standard should be found, if at all, by utilizing an Alaska-specific approach. The task after all is to interpret Alaska's Education Clause—not North Carolina's or Kentucky's or Arizona's—and therefore the solution should be derived from Alaskan constitutional principles and not the decisions by courts in those other states.

The far more contentious conclusion is that there is an adequacy standard in the Education Clause. The text of the Education Clause, the history of its formation, and the contemporary necessities of education in Alaska lead to the conclusion that the Education Clause does promise every student in Alaska an adequate education. This is a contentious conclusion because it is by no means the only conclusion. The simple words, "[t]he legislature shall by general law establish and maintain a system of public schools open to all children of the State,"[200] say nothing about adequacy; the Framers never expressly stated that the constitution promises every child an adequate education; and contemporary necessities are, at least in many people's perspective, irrelevant in constitutional interpretation. There is no clear answer.

---

199. *See, e.g.*, *The Massachusetts Law of 1647*, AMERICAN PUBLIC SCHOOL LAW 28 (6th ed. 2005) ("It is therefore ord'ed . . . to teach all such children as shall resort to him to write & reade . . . .").

200. ALASKA CONST. art. VII, § 1.

However, there is a clear point to be made from this uncertainty: methods are important in determining outcomes. Another may view the plain text of the Education Clause as dispositive of adequacy. Whatever the choice, *how* one approaches interpretation will inevitably lead to *what* he or she interprets. Hence, a proper solution must be a combination of method and outcome. However the court chooses to interpret the constitution, it must do so with issues particular to Alaska and a solution specific to the state in mind.