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Beyond School Financing: Defining the Constitutional Right to an Adequate Education

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COMMENT

Beyond School Financing: Defining the Constitutional Right to an Adequate Education

"Today, education is perhaps the most important function of state and local governments.... 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."[1]

"There are greater, more certain and more immediate penalties in this country for serving up a single rotten hamburger than for furnishing a thousand schoolchildren with a rotten education."[2]

"If every failed student could seek ... damages against any teacher, administrator and school he feels may have shortchanged him at some point in his education, the courts could be deluged and schools shut down."[3]

INTRODUCTION

For the last quarter century, American courts have steadfastly refused to hold teachers and school systems liable for failing to educate individual students.[4] Despite widespread concern about the quality of education offered in the nation's public schools,[5] state

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1. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

2. William Bennett, former U.S. Secretary of Education, *quoted in* John N. Maclean, *Indiana Makes Book on Theory of Education Reform*, CHI. TRIB., Oct. 4, 1987, § 4, at 1.

3. Ross v. Creighton Univ., 740 F. Supp. 1319, 1329 (N.D. Ill. 1990), *aff'd in part, rev'd in part on other grounds*, 957 F.2d 410 (7th Cir. 1992).

4. *See, e.g.*, Sellers v. School Bd., 960 F. Supp. 1006, 1012–14 (E.D. Va. 1997); *Ross*, 740 F. Supp. at 1332; Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 855 (Cal. Ct. App. 1976); Donohue v. Copiague Free Sch. Dist., 391 N.E.2d 1352, 1353 (N.Y. 1979).

5. *See, e.g.*, NATIONAL COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 5 (1983) (warning of a "rising tide of mediocrity" in public schools); Jonathan Kozol, *Illiteracy Statistics: A Numbers Game*, N.Y. TIMES, Oct. 30, 1986, at A31 (discussing the results of a study indicating that 10 million American adults are illiterate and 36 million cannot read at an eighth-grade level); Tamar Lewin, *Schools Taking Tougher Stance with Standards: New Emphasis on Tests, and New Penalties*, N.Y. TIMES, Sept. 6, 1999, at A1 (reporting a "harsher atmosphere" in the 1999–2000 academic year as states use standardized tests, school report cards, and teacher pay penalties to increase accountability); *Quality Counts: State of the States*, EDUC. WK., Jan. 7, 1999, *available at* <http://www.edweek.org/sreports/qc99/exsum.htm> (providing state report cards on school reform efforts such as standardized testing

courts have refused to hear so-called "educational malpractice" claims brought against local schools.[6] In rejecting these claims, state judges have said they are not sure how to evaluate teachers' performance when there is no public or professional consensus about what works in the classroom.[7] Even in relatively clear-cut cases,[8] they have refused to grant relief for fear of entanglement in daily school operations and a flood of lawsuits by disgruntled parents.[9]

Yet even as judges have barred the courtroom doors to individual educational malpractice claims, they have begun to hold public schools accountable for providing an adequate education on a statewide level. In the last thirty years, litigants have filed constitutional challenges to public school financing in more than forty states.[10] Despite concerns about separation of powers and the lack of judicially manageable standards,[11] most courts have agreed to hear

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programs and state takeovers of failing schools); Rene Sanchez, *U.S. High School Seniors Rank Near Bottom: Europeans Score Higher in Math, Science Test*, WASH. POST, Feb. 25, 1998, at A1 (reporting that American students ranked close to last among 21 nations participating in a rigorous new math and science exam).

6. *See, e.g.*, *Peter W.*, 131 Cal. Rptr. at 855; *Donohue*, 391 N.E.2d at 1353. Although most cases have focused on negligence and malpractice theories, families also have pursued claims based on breach of contract, *see* Rich v. Kentucky Country Day, Inc., 793 S.W.2d 832, 833 (Ky. Ct. App. 1990), and negligent misrepresentation, *see Peter W.*, 131 Cal. Rptr. at 862–63. Only one state court has suggested that a claim for educational malpractice is a viable cause of action, and that opinion has been seriously undermined by more recent cases. *See* B.M. v. State ("B.M. II"), 698 P.2d 399, 401 (Mont. 1985); B.M. v. State ("B.M. I"), 649 P.2d 425, 427 (Mont. 1982) (plurality opinion); *infra* note 122 and accompanying text.

7. *See, e.g.*, *Peter W.*, 131 Cal. Rptr. at 860 ("Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury.").

8. Courts have not only banned claims for general failures to educate, but also for blatant errors in diagnosing disabilities and placing students in appropriate classroom settings. *See, e.g.*, Hoffman v. Board of Educ., 400 N.E.2d 317, 318–19 (N.Y. 1979) (rejecting a claim by a speech-impaired student who was misdiagnosed and placed in classes for students with mental handicaps for 13 years); *see also* D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 628 P.2d 554, 554 (Alaska 1981) (rejecting a claim based on a failure to diagnose learning disabilities and to provide an appropriate education program upon discovery); Doe v. Board of Educ., 453 A.2d 814, 814–15 (Md. 1982) (rejecting a claim based on a misdiagnosis of learning disabilities).

9. *See, e.g.*, *Hoffman*, 400 N.E.2d at 320 (predicting that recognition of educational malpractice claims would force courts to examine "each of the procedures used in the education of every student in our school system").

10. *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 185–94 (1995) (summarizing cases through 1995); *infra* note 22 (citing cases through 1999).

11. *See, e.g.*, Coalition for Adequacy and Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 406–08 (Fla. 1996) (per curiam) (expressing concerns about usurping the Florida legislature's responsibility for education and the lack of manageable standards in evaluating education); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill.

school financing cases, and a growing number have held that their state constitutions create an enforceable right to an "adequate"[12] or "basic"[13] education. Several courts have classified this right as "fundamental," holding that only a compelling government interest justifies its infringement.[14]

Because most of the school financing cases recognizing a right to a substantive level of education have been decided in the last decade,[15] it is not clear yet whether families will be able to use this constitutional right to hold local school systems accountable for

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1996) (finding no judicially manageable or discoverable standards to enforce constitutional language requiring "high-quality" educational services); City of Pawtucket v. Sundlun, 662 A.2d 40, 57 (R.I. 1995) (directing the plaintiffs to seek relief from the Rhode Island legislature because it had "virtually unreviewable discretion" over public schools).

12. *E.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 211 (Ky. 1989) (holding that each Kentucky child must be provided with equal opportunity and access to an "adequate education"); Claremont Sch. Dist. v. Governor ("Claremont I"), 635 A.2d 1375, 1376 (N.H. 1993) (holding that the New Hampshire public schools have a duty to provide a "constitutionally adequate education" to every educable child).

13. *E.g.*, Board of Educ. v. Nyquist, 439 N.E.2d 359, 368–69 (N.Y. 1982) (holding that the New York schools must provide a "sound basic education"); Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (holding that the North Carolina Constitution guarantees every child the opportunity to receive a "sound basic education"); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 76–77 (Wash. 1978) (en banc) (holding that the Washington legislature must provide funding to ensure a "basic education" to students).

14. *See, e.g.*, Alabama Coalition for Equity, Inc. v. Hunt, No. CV-90-883-R (Ala. Cir. Ct. 1993), *reprinted in* Opinion of the Justices No. 338, 624 So. 2d 107, 110, 159 (Ala. 1993); Claremont Sch. Dist. v. Governor ("Claremont II"), 703 A.2d 1353, 1359 (N.H. 1997); *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261.

15. *See Alabama Coalition for Equity, Inc.*, 624 So. 2d at 159 (1993); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 814 & n.7 (Ariz. 1994) (en banc) (plurality opinion); Idaho Schs. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 734 (Idaho 1993); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1183–87 (Kan. 1994); *Rose*, 790 S.W.2d at 211 (1989); School Admin. Dist. No. 1 v. Commissioner, 659 A.2d 854, 857 n.5 (Me. 1995); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 787 (Md. 1983); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993); Skeen v. State, 505 N.W.2d 299, 315 (Minn. 1993) (en banc); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690 (Mont. 1989), *amended by* 784 P.2d 412 (Mont. 1990); *Claremont I*, 635 A.2d at 1376 (1993); Robinson v. Cahill, 303 A.2d 273, 294 (N.J. 1973); *Nyquist*, 439 N.E.2d at 368–69 (1982); *Leandro*, 346 N.C. at 347, 488 S.E.2d at 255 (1997); DeRolph v. State, 677 N.E.2d 733, 745 (Ohio 1997); Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135, 1149 (Okla. 1987); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 150–52 (Tenn. 1993); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); *Seattle Sch. Dist. No. 1*, 585 P.2d at 94–95; Pauley v. Kelly, 255 S.E.2d 859, 877–78 (W. Va. 1979); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995); *see also* Exira Community Sch. Dist. v. State, 512 N.W.2d 787, 789, 796 (Iowa 1994) (recognizing the right to an adequate education in a case challenging Iowa's open enrollment law, which allows families to enroll their children in schools outside the districts in which they live); Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985) (recognizing a right to an adequate education in a case focusing on student suspensions).

failure to educate their children. A handful of constitutional claims against local school districts have been asserted, however,[16] and plaintiffs have found some success in states where courts have declared the right to education to be fundamental.[17]

This Comment explores the issues involved in applying the constitutional right to a quality education beyond the school financing context. Part I uses the school financing cases as a starting point, analyzing how courts have come to focus on the right to an adequate education as a way to provide poor school districts with meaningful relief.[18] Part II discusses cases subsequent to the school financing precedents seeking relief against local schools for failing to provide an adequate education.[19] The remaining Parts explore legal theories and policy issues that courts likely will encounter in dealing with future claims. Part III discusses three causes of action that parents might advance to enforce their children's constitutional rights.[20] Part IV analyzes whether adequacy litigation is judicially manageable.[21]

I. THE EVOLUTION OF THE CONSTITUTIONAL RIGHT TO A QUALITY EDUCATION

Tracing the historical development of school financing litigation helps to explain the paradox of courts refusing to judge educational quality in one context while simultaneously declaring broad constitutional rights to such quality in another.[22] Parents and school

16. *See, e.g.*, Hayworth v. School Dist. No. 19, Rosebud County, 795 P.2d 470, 472–73 (Mont. 1990) (rejecting a claim by parents who argued that school officials had violated their children's right to education by failing to provide safe schools); Bennett v. City Sch. Dist., 497 N.Y.S.2d 72, 78 (N.Y. App. Div. 1985) (rejecting a claim by a parent that the local school system's program for talented and gifted students violated her child's right to a basic education); Ramsdell v. North River Sch. Dist. No. 200, 704 P.2d 606, 609 (Wash. 1985) (en banc) (declining to recognize a constitutional violation of the right to a basic education based on the evidence presented in the case); *see also* Part II (discussing cases).

17. *See, e.g.*, Butt v. State, 842 P.2d 1240, 1251 (Cal. 1992) (holding that the State must intervene because local mismanagement threatened to close schools six weeks before the official end of the school year); Cathe A. v. Doddridge County Bd. of Educ., 490 S.E.2d 340, 349 (W. Va. 1997) (requiring that school districts provide free alternative education to students suspended for one year). The holdings in both of these cases were based on earlier school financing precedents holding that education is a fundamental right and did not explicitly address whether the level of education provided was inadequate. *See infra* notes 168–71, 179–83 and accompanying text.

18. *See infra* notes 22–93 and accompanying text.

19. *See infra* notes 94–128 and accompanying text.

20. *See infra* notes 129–300 and accompanying text.

21. *See infra* notes 301–352 and accompanying text.

22. Nearly every state has faced at least one round of school financing litigation. *See, e.g.*, Alabama Coalition for Equity, Inc. v. Hunt, No. CV-90-883-R (Ala. Cir. Ct. 1993), *reprinted in* Opinion of the Justices No. 338, 624 So. 2d 107, 110 (Ala. 1993); Matanuska-

Susitna Borough Sch. Dist. v. State, 931 P.2d 391 (Alaska 1997); Hull v. Albrecht, 960 P.2d 634 (Ariz. 1998); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994) (en banc) (plurality opinion); Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Tucker v. Lake View Sch. Dist. No. 25, 917 S.W.2d 530 (Ark. 1996); DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest ("Serrano II"), 557 P.2d 929 (Cal. 1976); Serrano v. Priest ("Serrano I"), 487 P.2d 1241 (Cal. 1971); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (en banc); Horton v. Meskill ("Horton III"), 486 A.2d 1099 (Conn. 1985); Horton v. Meskill ("Horton I"), 376 A.2d 359 (Conn. 1977); Coalition for Adequacy and Fairness in Sch. Funding v. Chiles, 680 So. 2d 400 (Fla. 1996) (per curiam); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Idaho Schs. for Equal Educ. Opportunity v. State ("ISEEO III"), 976 P.2d 913 (Idaho 1998); Idaho Schs. for Equal Educ. Opportunity v. Idaho State Bd. of Educ. ("ISEEO II"), 912 P.2d 644 (Idaho 1996); Idaho Schs. for Equal Educ. Opportunity v. Evans ("ISEEO I"), 850 P.2d 724 (Idaho 1993); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); People *ex rel.* Jones v. Adams, 350 N.E.2d 767 (Ill. 1976); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170 (Kan. 1994); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Charlet v. Legislature, 713 So. 2d 1199 (La. Ct. App. 1998), *remedial writ denied*, 730 So. 2d 934 (La. 1998), *reconsideration denied*, 734 So. 2d 1221 (La. 1999); School Admin. Dist. No. 1 v. Commissioner, 659 A.2d 854 (Me. 1995); Montgomery County v. Bradford, 691 A.2d 1281 (Md. 1997); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993); Milliken v. Green ("Green II"), 212 N.W.2d 711 (Mich. 1973) (en banc); Milliken v. Green ("Green I"), 203 N.W.2d 457 (Mich. 1972) (en banc); East Jackson Pub. Schs. v. State, 348 N.W.2d 303 (Mich. Ct. App. 1984) (per curiam); Skeen v. State, 505 N.W.2d 299 (Minn. 1993) (en banc); Committee for Educ. Equality v. State ("CEE II"), 967 S.W.2d 62 (Mo. 1998) (en banc); Committee for Educ. Equality v. State ("CEE I"), 878 S.W.2d 446 (Mo. 1994) (en banc); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989), *amended by* 784 P.2d 412 (Mont. 1990); State *ex rel.* Woodahl v. Straub, 520 P.2d 776 (Mont. 1974); Gould v. Orr, 506 N.W.2d 349 (Neb. 1993) (per curiam); Claremont Sch. Dist. v. Governor ("Claremont III"), No. 97-001, 1999 N.H. LEXIS 101 (Oct. 15, 1999); Claremont Sch. Dist. v. Governor ("Claremont II"), 703 A.2d 1353 (N.H. 1997); Claremont Sch. Dist. v. Governor ("Claremont I"), 635 A.2d 1375 (N.H. 1993); Abbott v. Burke ("Abbott V"), 710 A.2d 450 (N.J. 1998); Abbott v. Burke ("Abbott I"), 495 A.2d 376 (N.J. 1985); Robinson v. Cahill ("Robinson VII"), 360 A.2d 400 (N.J. 1976) (per curiam); Robinson v. Cahill ("Robinson I"), 303 A.2d 273 (N.J. 1973); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995); Reform Educ. Fin. Inequities Today v. Cuomo, 655 N.E.2d 647 (N.Y. 1995); Board of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Leandro v. State, 346 N.C. 336, 488 S.E.2d 249 (1997); Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 357 S.E.2d 432 (1987); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Cincinnati Sch. Dist. Bd. of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979); Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135 (Okla. 1987); Coalition for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116 (Or. 1991) (en banc); Olsen v. State, 554 P.2d 139 (Or. 1976); Withers v. State, 891 P.2d 675 (Or. Ct. App. 1995); Marrero v. Commonwealth, 739 A.2d 110 (Pa. 1999); Danson v. Casey, 399 A.2d 360 (Pa. 1979); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); Tennessee Small Sch. Sys. v McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Meno ("Edgewood IV"), 917 S.W.2d 717 (Tex. 1995); Carrollton-Farmers Branch Indep. Sch. Dist. v Edgewood Indep. Sch. Dist. ("Edgewood III"), 826 S.W.2d 489 (Tex. 1992); Edgewood Indep. Sch. Dist. v. Kirby ("Edgewood II"), 804 S.W.2d 491 (Tex. 1991); Edgewood Indep. Sch. Dist. v. Kirby ("Edgewood I"), 777 S.W.2d 391 (Tex. 1989); Scott v. Commonwealth, 443 S.E.2d 138

districts filed the first school financing lawsuits in the 1960s to challenge states' reliance on local property taxes to fund education because population shifts had created glaring disparities between wealthy suburban schools and poor rural and inner-city districts.[23] School finance reformers argued that reliance on local property taxes was inherently unfair because school districts with small tax bases never could raise as much money per student as wealthy districts, even if they set much higher tax rates.[24] Although state courts traditionally had deferred to legislatures' broad discretion over education, state judges decided to hear these cases because they raised important constitutional questions about whether the quality of students' education should depend on where they live.[25]

(Va. 1994); Brigham v. State, 692 A.2d 384 (Vt. 1997) (per curiam); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978) (en banc); Northshore Sch. Dist. No. 417 v. Kinnear, 530 P.2d 178 (Wash. 1974) (en banc); State *ex rel.* Bds. of Educ. v. Chafin, 376 S.E.2d 113 (W. Va. 1988); Pauley v. Bailey, 324 S.E.2d 128 (W. Va. 1984); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); Buse v. Smith, 247 N.W.2d 141 (Wis. 1976); Vincent v. Voight, 589 N.W.2d 455 (Wis. Ct. App. 1998), *petition for review granted*, 602 N.W.2d 758 (Wis. 1999); Lincoln County Sch. Dist. No. 1 v. State, 985 P.2d 964 (Wyo. 1999); Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980).

23. *See, e.g.*, Parker v. Mandel, 344 F. Supp. 1068 (D. Md. 1972); Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd*, 397 U.S. 44 (1970) (per curiam); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969) (per curiam). For background on school finance litigation, see generally MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 591–649 (3d ed. 1992); Enrich, *supra* note 10; William F. Dietz, Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 WASH. U. L.Q. 1193 (1996); Margaret Rose Westbrook, Comment, *School Finance Litigation Comes to North Carolina*, 73 N.C. L. REV. 2123, 2125–35 (1995). All states except Hawaii and Michigan rely on local property taxes to raise a significant portion of school funding. *See* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1171 n.169 (1995); William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 219 n.2 (1990). This system was relatively equitable to begin with, but shifting urbanization patterns concentrated wealth first in cities and then in suburbs over the course of the twentieth century. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 9–15 (1973); Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1074 (1991) [hereinafter *Unfulfilled Promises*].

24. *See, e.g.*, *Horton I*, 376 A.2d at 366–68 (noting that 70% of Connecticut school funding came from local sources and that local tax bases ranged from $20,000 to $170,000 per pupil). Moreover, poor districts that wanted to raise their tax rates often were blocked by state tax rate ceilings. *See Serrano I*, 487 P.2d at 1251–52; Richard J. Stark, *Education Reform: Judicial Interpretation of State Constitutions' Education Finance Provisions—Adequacy vs. Equality*, 1991 ANN. SURV. AM. L. 609, 622; Thro, *supra* note 23, at 219 n.2.

25. *See, e.g.*, *Rose*, 790 S.W.2d at 209 ("This duty must be exercised even . . . when the court's view of the constitution is contrary to that of other branches, or even that of the public."); *Seattle School Dist. No. 1*, 585 P.2d at 87 n.7 ("The power of the judiciary to enforce rights recognized by the constitution, even in the absence of implementing legislation, is clear."); *Campbell County Sch. Dist.*, 907 P.2d at 1264 ("When the

Agreeing to hear the claims, however, was only the first step.[26] Courts have struggled to find a legal theory that would help children in substandard schools without placing heavy political, financial, and legal burdens on state governments.[27] The case law recognizing a constitutional right to an adequate education grew out of this struggle, mushrooming in the last decade as courts determined that adequacy analyses could provide students relief without requiring complicated and controversial programs designed to equalize education between school districts.[28] In focusing on how adequacy theories could solve the school financing problem,[29] however, advocates do not appear to have considered how the right to an adequate education might be applied in other contexts.

A. Original Focus on Equality Arguments

School financing litigation can be divided into three "waves," the first of which focused on equality arguments based in the Equal Protection Clause of the Fourteenth Amendment.[30] Finance reform advocates took this approach in part because the United States Constitution had proven to be an effective mechanism for correcting social injustices since the Supreme Court used the Equal Protection clause in the 1950s and 1960s to dismantle segregation and to protect a broad range of rights.[31] Moreover, constitutional case law appeared

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legislature's transgression is a failure to act, our duty to protect individual rights includes compelling legislative action required by the constitution."). In contrast, when plaintiffs brought individual educational malpractice claims based on negligence and other theories, state courts often dismissed the cases because of concerns about separation of powers. *See, e.g.*, Hoffman v. Board of Educ., 400 N.E.2d 317, 320 (N.Y. 1979) ("[T]he courts will intervene in the administration of the public school system only in the most exceptional circumstances involving gross violations of defined public policy." (internal quotation marks omitted)); *supra* notes 4, 6–8 and accompanying text (discussing cases).

26. Indeed, some state courts agreed to hear the claims, only to hold that separation of powers precluded relief. *See, e.g.*, *McDaniel*, 285 S.E.2d at 157 (emphasizing the importance of judicial review); *id.* at 165 (deferring to the Georgia legislature to define constitutional language requiring the provision of an "adequate" education).

27. *See infra* Part I.A.

28. *See infra* Part I.B.

29. *See* Enrich, *supra* note 10, at 166–70; Heise, *supra* note 23, at 1168–76; Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325 (1992); Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 326–33 (1991); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 603–04 (1994).

30. U.S. CONST. amend. XIV, § 1 ("No state shall ... deny to any person within its jurisdiction the equal protection of the laws."); Thro, *supra* note 29, at 597–604 (discussing the three waves of litigation).

31. *See* Enrich, *supra* note 10, at 124; Heise, *supra* note 23, at 1153–54.

to provide strong support for school financing challenges. The school desegregation cases had hinted that students might have a constitutional right to education,[32] and federal courts had handed down a number of other decisions requiring states to provide critical government services to poor citizens for free when the citizens could not afford to pay associated fees.[33]

Using the framework of equal protection analysis that the federal courts had developed in the 1950s and 1960s, school finance reformers argued that education was a fundamental right and that the courts should subject state financing systems to "strict scrutiny."[34] Under the strict scrutiny analysis, infringements upon fundamental rights are constitutional only if they are narrowly tailored to achieve a compelling government interest.[35] By comparison, courts apply a "rational relation" test to economic and social legislation that does not infringe on fundamental rights, upholding such legislation as long as it is reasonably related to a legitimate government objective.[36] The California Supreme Court adopted a strict scrutiny analysis in 1971 and struck down the state's school financing system,[37] but the victory

32. In particular, *Brown v. Board of Education*, 347 U.S. 483 (1954), inspired equal protection challenges because of its strong language. *See supra* note 1 and accompanying text. *Brown* stated that the "opportunity [to obtain a public education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown*, 347 U.S. at 493; *see also* Enrich, *supra* note 10, at 117 (suggesting that *Brown*'s invitation to pursue the right to education beyond the context of segregation was "both obvious and difficult to decline").

33. These cases involved both equal protection and substantive due process claims. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (holding that denying divorce because of a party's inability to pay court costs violates due process); Douglas v. California, 372 U.S. 353, 357–58 (1963) (holding that equal protection requires counsel to be provided for appeals of right to indigent criminal defendants); Enrich, *supra* note 10, at 117–19; Thro, *supra* note 23, at 223 n.18, 224 n.28.

34. *See, e.g.*, Serrano v. Priest ("Serrano I"), 487 P.2d 1241, 1258 (Cal. 1971). Federal courts apply "strict scrutiny" analysis in cases in which the government treats similar people differently based on a "suspect classification" or in a way that burdens some groups' ability to exercise fundamental rights. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629–30 (1969) (right to interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665–66 (1966) (right to vote); *Brown*, 347 U.S. at 493 (race). "Quasi-suspect" classifications are examined under "heightened scrutiny" to ensure that they are substantially related to an important government interest. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988) (legitimacy); Craig v. Boren, 429 U.S. 190, 197–98 (1976) (gender).

35. *See, e.g.*, *Shapiro*, 394 U.S. at 630–32.

36. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7 (1981).

37. *See Serrano I*, 487 P.2d at 1244 (striking down the state's school financing system under both the federal and state equal protection clauses). The California Supreme Court not only held that education was a fundamental right, but also applied strict scrutiny because it concluded that a suspect classification—poverty—was involved in the case. *See id.* at 1244, 1258. Later courts rejected arguments that people in poverty are a suspect class because the courts feared that such a holding would apply strict scrutiny to a broad

proved short lived. In 1973, the United States Supreme Court held that education is not a federal fundamental right in *San Antonio Independent School District v. Rodriguez*.[38]

In *Rodriguez*, parents sued an urban Texas school district that contributed only $26 per pupil in local property taxes, compared with $333 per pupil in the most affluent district in the San Antonio area.[39] The parents challenged the Texas financing system on the grounds that it interfered with their children's exercise of a fundamental right to an education.[40] The Court acknowledged that the funding disparities were "substantial," but refused to remedy them in part because of concern that such a precedent would extend to other public services funded by local tax dollars.[41] The majority declined to hold that education was a fundamental right, reasoning that "fundamental" status is limited to those rights that are explicitly or implicitly included in the U.S. Constitution.[42] Instead, the Court held that education should be evaluated under the rational relation test because it is an affirmative government service.[43] Under this test, the Court upheld the Texas financing system as a rational attempt to

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range of government services. *See, e.g.*, Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1019–22 (Colo. 1982) (en banc); McUsic, *supra* note 29, at 313–14; *infra* note 40 (discussing the U.S. Supreme Court's rejection of a claim that poverty is a suspect class).

38. 411 U.S. 1 (1973).

39. *See id.* at 9–15 (citing 1967–68 budget figures). In addition to the local money, the state provided roughly $225 per student, and the federal government provided a small amount of funding. *See id.*

40. *See id.* at 17, 29. Although the plaintiffs were Hispanic and brought their class action on behalf of minority students *or* students who were poor and lived in poor school districts, the Court did not discuss racial or ethnic classifications in its opinion. *See id.* at 4–5. The Court also rejected arguments that the school financing scheme burdened a suspect class. *See id.* at 28. By focusing on poor school districts rather than poor individuals, the *Rodriguez* Court distinguished the case from its earlier decisions requiring governments to provide services for the indigent. *See id.* at 20–25.

41. *Id.* at 15, 53–54 (suggesting that local taxation and government services require "jurisdictional boundaries that are inevitably arbitrary"). The Court also raised federalism concerns, noting that it usually defers to state legislatures on fiscal and education policy. *See id.* at 40–44.

42. *See id.* at 33–35. The Court acknowledged its broad language in *Brown v. Board of Education*, but held that importance to society or to individuals is not enough to make a right fundamental. *See id.* at 29–30; *see also supra* notes 1, 32 and accompanying text (quoting *Brown*). Although the plaintiffs argued that a right to education was implied in the Constitution as an essential component of the rights to vote and to free speech, the Court rejected this logic because it might also extend to food, shelter, and other basic needs. *See Rodriguez*, 411 U.S. at 35–37; Lindsey v. Normet, 405 U.S. 56, 74 (1972) (refusing to hold that housing is a fundamental right); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (refusing to hold that welfare benefits are a fundamental right).

43. *See Rodriguez*, 411 U.S. at 37–39 (suggesting that strict scrutiny is not "sensitive" to the nature of affirmative education programs).

enhance local control of public schools.[44]

Although *Rodriguez* hinted that the outcome might have been different had the plaintiffs been deprived of an adequate education,[45] the defeat triggered a second wave of litigation as school finance reformers shifted their focus from federal to state constitutional arguments.[46] Because all fifty states' constitutions contain clauses providing for free public education,[47] reformers brought state equal protection claims and relied on *Rodriguez* to argue that education was a fundamental right because it was explicitly specified in the state constitutional texts.[48] Most courts rejected this logic, however,

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44. *See id.* at 49, 54–55.

45. The Court stated that there was no basis for finding interference with fundamental rights when "no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." *Id.* at 37. The Court has not clarified this statement in subsequent decisions. *See* Kadramas v. Dickinson Pub. Schs., 487 U.S. 450, 458 (1988); Papasan v. Allain, 478 U.S. 265, 285 (1986); Plyler v. Doe, 457 U.S. 202, 221–23, 230 (1982). Accordingly, some commentators argue that there is a federal right to an adequate education. *See, e.g.*, Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 567 (1992); Julius Chambers, *Adequate Education for All: A Right, an Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 67–72 (1987).

46. *See* Heise, *supra* note 23, at 1157. The shift was hastened by a New Jersey Supreme Court decision two weeks after *Rodriguez* that struck down the state's school finance system based entirely on state constitutional arguments. *See* Robinson v. Cahill ("Robinson I"), 303 A.2d 273, 295 (N.J. 1973); *infra* notes 60–61 and accompanying text.

47. *See* 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, § 1; ME. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. V, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1, cl. a; MONT. CONST. art. X, § 1; NEB. CONST. art. VII § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4, para. 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; 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. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1; *see also infra* note 218 (discussing the debate over the interpretation of the Mississippi Constitution). Many of these provisions are reprinted in ROBERT L. MADDEX, STATE CONSTITUTIONS OF THE UNITED STATES (1998), and in Hubsch, *supra* note 29, at 1343–48.

48. *See Rodriguez*, 411 U.S. at 33. Not all states have explicit constitutional equal protection clauses, but many state courts have interpreted other provisions to mandate equal protection. *See* Thro, *supra* note 23, at 229–30 & nn.49–50; Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196 (1985).

because they were concerned that the *Rodriguez* test would require them to categorize a wide variety of other public services enumerated in their state constitutions as fundamental rights.[49] Instead, the majority of jurisdictions upheld their school financing systems as rationally related to the goal of increasing local control over public schools.[50] Only four courts struck down their school financing systems during the second wave of litigation based solely on state equal protection arguments.[51]

Part of the state courts' reluctance to recognize education rights as fundamental may have been prompted by the experiences in those states where school financing cases had succeeded.[52] Although

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Plaintiffs in a few states also argued for equal funding based on language in their constitutions' education articles. *See, e.g.*, Thompson v. Engelking, 537 P.2d 635, 636 (Idaho 1975) (focusing on a constitutional provision requiring "uniform" public schools).

49. State courts rejected the *Rodriguez* test because their constitutions tend to be more statutory in nature than the federal Constitution in that they contain provisions on a wide variety of relatively minor government activities. *See, e.g.*, Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 786 (Md. 1983) (expressing concern about creating a fundamental rights precedent that would apply to constitutional provisions on parking and loan financing); Board of Educ. v. Nyquist, 439 N.E.2d 359, 366 n.5 (N.Y. 1982) (explaining that because the state constitution is not required to list a complete declaration of all powers of the state government, it covers a broad range of subjects of varying importance to society); Olsen v. State, 554 P.2d 139, 144–45 (Or. 1976) (refusing to hold that education is a fundamental right for fear that such a precedent would apply to the state constitution's liquor-by-the-drink provision).

State courts were also reluctant to find that education was a fundamental right based on a more general test looking at its importance to society because they saw no easy way to distinguish other basic needs for food, shelter, and safety. *See, e.g.*, *Robinson I*, 303 A.2d at 283–84; McUsic, *supra* note 29, at 313–14; Thro, note 23, at 242.

50. *See* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1023 (Colo. 1982) (en banc); McDaniel v. Thomas, 285 S.E.2d 156, 167–68 (Ga. 1981); *Thompson*, 537 P.2d at 645; *Hornbeck*, 458 A.2d at 788; East Jackson Pub. Schs. v. State, 348 N.W.2d 303, 305–06 (Mich. Ct. App. 1984) (per curiam); *Nyquist*, 439 N.E.2d at 366; Cincinnati Sch. Dist. Bd. of Educ. v. Walter, 390 N.E.2d 813, 821 (Ohio 1979); Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135, 1147 (Okla. 1987); *Olsen*, 554 P.2d at 146–47; Danson v. Casey, 399 A.2d 360, 367 (Pa. 1979); Richland County v. Campbell, 364 S.E.2d 470, 472 (S.C. 1988); *see also* Shofstall v. Hollins, 515 P.2d 590, 592–93 (Ariz. 1973) (declaring education to be a fundamental right, but applying a rational relation test); Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 289–90, 357 S.E.2d 432, 436–37 (1987) (concluding that access to education is a fundamental right but that equal educational opportunity is not).

51. Arkansas struck down its school financing system under a rational relation test, *see* DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983), while three other state courts held that education is a fundamental right and invalidated their school financing systems under strict scrutiny. *See* Serrano v. Priest ("Serrano II"), 557 P.2d 929, 950–51 (Cal. 1976); Horton v. Meskill ("Horton I"), 376 A.2d 359, 374 (Conn. 1977); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333, 335 (Wyo. 1980); *see also infra* note 189 (discussing later changes to Connecticut's strict scrutiny analysis).

52. *See* Thro, *supra* note 23, at 233 n.64 (suggesting that New Jersey's experience may have made other states more cautious).

equality seemed a simple concept in the abstract, courts and legislatures had difficulty deciding what exactly should be equalized—the capacity to raise money, the actual money provided, the quality of educational services, or educational outcomes such as test scores—and how to achieve such equality.[53] Reform efforts also generated a backlash from people who wanted to preserve local control of schools[54] and from residents of wealthy districts who resented spending caps.[55] In a few states, reform efforts stalled for years and created significant tensions between the judicial and legislative branches,[56] prompting commentators and state judges to question whether courts were capable of accomplishing meaningful reform.[57]

By the early 1980s, the number of school financing cases and victories began to drop, and some observers believed the reform movement was dying out.[58] The emergence of a new argument based

53. *See* Enrich, *supra* note 10, at 145–55; Heise, *supra* note 23, at 1168–69. The debate was also complicated by conflicting evidence about whether increases in school spending actually improved student achievement. *See* William H. Clune, *New Answers to Hard Questions Posed by* Rodriguez*: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 724–27 (1992); Heise, *supra* note 23, at 1166–68; Stark, *supra* note 24, at 614–15.

54. *See* Enrich, *supra* note 10, at 160–61; Heise, *supra* note 23, at 1169–72.

55. In at least one state, taxpayers successfully challenged a "negative aid" provision requiring that money from wealthy districts be redistributed to poorer school systems. *See* Buse v. Smith, 247 N.W.2d 141, 143 (Wis. 1976).

56. In New Jersey, for instance, school finance reform measures cost more than $1 billion and finance litigation continued for 25 years. *See, e.g.*, Abbott v. Burke ("Abbott V"), 710 A.2d 450 (N.J. 1998); Abbott v. Burke ("Abbott I"), 495 A.2d 376 (N.J. 1985); Robinson v. Cahill ("Robinson VII"), 360 A.2d 400 (N.J. 1976); Robinson v. Cahill ("Robinson I"), 303 A.2d 273 (N.J. 1973); Russell S. Harrison & G. Alan Tarr, *School Finance and Inequality in New Jersey*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 178, 178–201 (G. Alan Tarr ed., 1996) (reporting that court-ordered changes had a relatively modest effect on school funding despite the political controversy); Enrich, *supra* note 10, at 129–35; *Unfulfilled Promises*, *supra* note 23, at 1075–78. To force the New Jersey legislature to complete finance reform, the state supreme court at one point threatened to redistribute school aid itself and later issued an injunction forbidding the operation of the state's school system as unconstitutional. *See* Harrison & Tarr, *supra*, at 182.

Texas also spent several years and more than $1 billion reforming its school financing system. *See* Edgewood Indep. Sch. Dist. v. Meno ("Edgewood IV"), 917 S.W.2d 717 (Tex. 1995); Carrollton-Farmers Branch Indep. Sch. Dist. v Edgewood Indep. Sch. Dist. ("Edgewood III"), 826 S.W.2d 489 (Tex. 1992); Edgewood Indep. Sch. Dist. v. Kirby ("Edgewood II"), 804 S.W.2d 491 (Tex. 1991); Edgewood Indep. Sch. Dist v. Kirby ("Edgewood I"), 777 S.W.2d 391 (Tex. 1989). One observer compared the process to a Russian novel: "[I]t's long, tedious, and everyone dies at the end." Mark Yudof, *School Finance Reform in Texas: The* Edgewood *Saga*, 28 HARV. J. ON LEGIS. 499, 499 (1991).

57. *See* Thro, *supra* note 23, at 232–33 n.63.

58. *See, e.g.*, *id.* at 232 n.62 (reporting that the number of cases dropped 40% from 1981 to 1989 compared with 1973 to 1981). *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983), was the only successful case in the early 1980s.

on a constitutional right to an adequate education re-energized parents, activists, and poor school systems in the 1990s.

B. *New Focus on Adequacy Arguments*

While most of the second-wave cases dealt with equality arguments, a minority focused on state constitutional language requiring the provision of "adequate" or "thorough" systems of public education.[59] *Robinson v. Cahill*,[60] a New Jersey case handed down just a few weeks after *Rodriguez*, started this trend by striking down the state's school financing system for failure to provide a "thorough and efficient" system of schools rather than for violating equal protection.[61] A handful of other state courts also recognized that their constitutions required a substantive level of education, but concluded that current school funding systems met those requirements.[62] After *Robinson*, only two other second-wave courts struck down their school financing systems based on adequacy arguments.[63]

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59. For analyses of the textual support for adequacy arguments in state constitutional provisions, see McUsic, *supra* note 29, at 309 & n.4, 319–26, 333–39; Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814–16 (1985); Thro, *supra* note 23, at 243–46 & nn.130–41.

60. 303 A.2d 273 (N.J. 1973).

61. *Id.* at 283, 295 (declining to decide the case based on New Jersey's equal protection clause for fear that the clause "may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis upon which the State must act"). Later New Jersey opinions have focused more on equality arguments than adequacy concerns, prompting both equality and adequacy proponents to cite the New Jersey cases for support. *See* Enrich, *supra* note 10, at 129–35; *supra* note 56 (describing the 25-year history of New Jersey litigation).

62. *See, e.g.*, McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981) (acknowledging that the Georgia Constitution required the provision of an "adequate education," but declining to provide relief because no evidence had been offered to show that students in any particular district were being deprived of such an education); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 787 (Md. 1983) (holding that the plaintiffs were not being denied the right to an adequate education as guaranteed by the Maryland Constitution); Board of Educ. v. Nyquist, 439 N.E.2d 359, 369 (N.Y. 1982) (recognizing a constitutional requirement of a sound basic education, but stating that courts would intervene only in cases of "gross and glaring inadequacy"); Cincinnati Sch. Dist. Bd. of Educ. v. Walter, 390 N.E.2d 813, 825 (Ohio 1979) (holding that the state's school financing system is constitutional to the extent that it ensures that each child receives an adequate education); Fair Sch. Fin. Council of Okla. v. State, 746 P.2d 1135, 1146, 1149 (Okla. 1987) (recognizing a constitutional guarantee of a basic, adequate education according to state school board standards, but noting that the plaintiffs had not alleged that they were deprived of such an education).

63. *See* Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 78 (Wash. 1978) (en banc); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979).

The first case, *Seattle School District No. 1 v. State*,[64] challenged Washington's reliance on special voter-approved levies to provide local funding for schools.[65] Relying on a constitutional provision stating that it was "the paramount duty of the state to make ample provision for the education of all children residing within its borders,"[66] the Washington Supreme Court held that the state legislature has an affirmative duty to provide funding to ensure students receive a "basic education."[67] The court stated broadly that a basic education is not limited to reading, writing, and arithmetic, but also includes the opportunities needed to equip children as citizens, workers, and competitors in the "marketplace of ideas."[68] Despite making this proclamation, the court left the details and execution to the legislature.[69]

One year later, in *Pauley v. Kelly*,[70] the West Virginia high court went even further than its Washington counterpart and interpreted its constitution's education provision as requiring public schools to meet "high quality" standards.[71] *Pauley* declared that education is a fundamental right for equal protection purposes, an issue that *Seattle School District No. 1* never explicitly addressed.[72] Rather than turning the job over to the legislature, the West Virginia court detailed its own quality standards and remanded the case.[73] On

64. 585 P.2d 71 (Wash. 1978) (en banc).

65. *See id.* at 78.

66. WASH. CONST. art. IX, § 1. The court emphasized that education is the only "paramount duty" listed in the Washington Constitution and held that students have a correlative "right" of equal stature, but did not discuss whether this right is fundamental for equal protection purposes. *Seattle Sch. Dist. No. 1*, 585 P.2d at 85, 91–92.

67. *Seattle Sch. Dist. No. 1*, 585 P.2d at 96–97.

68. *Id.* at 94–95.

69. The court overruled the trial court's decision to retain jurisdiction in the case as inconsistent with the assumption that the legislature would do its job. *See id.* at 105.

70. 255 S.E.2d 859 (W. Va. 1979).

71. *See id.* at 878.

72. *See id.*; *supra* note 66 (discussing *Seattle Sch. Dist. No. 1*).

73. *See Pauley*, 255 S.E.2d at 878. The court defined "thorough and efficient" schools, stating:

> Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work—to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.
>
> Implicit are supportive services: (1) good physical facilities, instructional

remand the lower court held that the existing benchmarks adopted by the state board of education did not meet *Pauley*'s "high quality" standards and struck down the school financing system.[74]

The Washington and West Virginia cases emerged as critical precedents a decade later when decisions by several state courts in 1989 triggered a "third wave" of school financing litigation based largely on adequacy arguments.[75] The most influential of the early third-wave cases was *Rose v. Council for Better Education, Inc.*,[76] in which the Kentucky Supreme Court invalidated not only the state's school financing scheme but its entire *system* of public education.[77] After interpreting constitutional language regarding "efficient" schools as requiring that every child receive an equal opportunity to obtain an adequate education, the Court held that the legislature had failed in its duty to provide "efficient" schools.[78] In what would become a prototype for other state courts around the country, the Kentucky opinion provided guidelines about the substantive content of the constitutional requirement:

> [A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a

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materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.

Id. at 877. The opinion emphasized that "great weight" should be given to legislatively established standards created through democratic procedures, but did not suggest that courts were institutionally incapable of defining the constitutional requirements. *Id.*

74. *See* Pauley v. Bailey, 324 S.E.2d 128, 131, 136–37 (W. Va. 1984) (upholding the lower court decision).

75. *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215–16 (Ky. 1989); Helena Elem. Sch. Dist. No. 1 v. State, 769 P.2d 684, 692 (Mont. 1989); Edgewood Indep. Sch. Dist. v. Kirby ("Edgewood I"), 777 S.W.2d 391, 397 (Tex. 1989); Kukor v. Grover, 436 N.W.2d 568, 585 (Wis. 1989). Commentators dubbed the decisions in Kentucky, Montana, and Texas as the beginning of a "third wave" of school financing litigation because they based their holdings solely on their state constitutions' education articles, rather than equal protection analysis. *See* Thro, *supra* note 23, at 221–22, 239. However, all of the 1989 opinions reflected a mix of adequacy and equality concerns. *See Rose*, 790 S.W.2d at 211, 212, 215 (interpreting the Kentucky constitution as requiring "equal" educational opportunity); *Helena Elem. Sch. Dist No. 1*, 769 P.2d at 689, 692 (guaranteeing a quality education that provides equal educational opportunity to each person in the state); *Edgewood I*, 777 S.W.2d at 397 (focusing on "efficiency" of public schools); *Kukor*, 436 N.W.2d at 579, 582 (suggesting that failure to meet state education standards might implicate a fundamental right); *see also supra* note 56 (discussing later Texas cases).

76. 790 S.W.2d 186 (Ky. 1989).

77. *See id.* at 215.

78. *See id.* at 205–13. Although the court repeatedly used terms such as "fundamental right," "equality," and "equal opportunity," it never applied a traditional strict scrutiny analysis. *Id.* at 211, 212, 215.

> 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.[79]

The court determined that state and local officials were free to establish higher targets, but the Kentucky General Assembly at least had to meet the standards set forth in its opinion.[80]

In the wake of *Rose*, commentators enthusiastically endorsed the new focus on adequacy of education as having both a stronger theoretical basis and fewer political and logistical problems than the earlier equality theories. The adequacy approach posed much less risk of creating broad new rights to government services because courts could base their decisions on the unique language of their constitutions' education articles.[81] Moreover, courts could provide relief without requiring substantial interventions to equalize education programs or to interfere with local control mechanisms.[82] By focusing on quality rather than dollar equity, courts could set broad targets and then step back to allow the other branches to determine their own means of meeting the goals.[83] Supporters of the

79. *Id.* at 212 (citation omitted).

80. *See id.* at 212 n.22. The court dismissed concerns about separation of powers, emphasizing that it was only determining "the intent of the framers. Carrying-out that intent is the duty of the General Assembly." *Id.* at 212. The justices did not retain jurisdiction over the case. *See id.* at 214–15.

81. *See* McUsic, *supra* note 29, at 315; Thro, *supra* note 23, at 241–42.

82. *See* Enrich, *supra* note 10, at 180–83; Heise, *supra* note 23, at 1174–75; McUsic, *supra* note 29, at 327–29. Commentators also argued that adequacy would not cost as much as equality and would pose less of a threat to wealthy districts because it did not require "leveling" all programs. *See* Enrich, *supra* note 10, at 168–69, 180; McUsic, *supra* note 29, at 327–38.

83. *See* Heise, *supra* note 23, at 1153; McUsic, *supra* note 29, at 330; Dietz, *supra* note 23, at 1204. This approach also allowed courts to avoid complex equalization formulas and the debate over whether increases in school funding improve student achievement. *See*

adequacy approach acknowledged that defining an adequate education would be a challenge,[84] but they argued that standardized testing and accountability programs implemented in the 1980s would provide objective measures of educational quality.[85]

Courts soon faced a flood of adequacy-based school financing claims. Between 1990 and 1999, at least a dozen states recognized a cause of action for failure to provide an adequate education or to meet other substantive state constitutional requirements.[86] Several of

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McUsic, *supra*, note 29, at 315–17. *But see* Thro, *supra* note 29, at 616 (concluding that except for the Kentucky court, all third-wave cases assumed automatically that money would solve adequacy problems).

84. *See* Enrich, *supra* note 10, at 179–82 (discussing the risk in giving up the "moral high ground" by adopting an adequacy approach and the risk that standards would be set so low as to be meaningless); Dietz, *supra* note 23, at 1203 (arguing that the right to an adequate education "is meaningless without a workable, and hence enforceable, standard to measure adequacy"); *Unfulfilled Promises*, *supra* note 23, at 1078–85 (arguing that the New Jersey saga is partially attributable to lack of clear judicial standards).

85. By adopting generally accepted standards, commentators argued, courts could maintain their traditional enforcement role without having to make policy. *See* Heise, *supra* note 23, at 1175–76 (discussing the educational standards movement); McUsic, *supra* note 29, at 329–33 (arguing that accountability programs and standardized testing provide objective measures of educational outputs); Dietz, *supra* note 23, at 1212–19 (arguing that courts should rely on existing state standards to preserve their legitimacy).

86. *See, e.g.*, Alabama Coalition for Equity, Inc. v. Hunt, No. CV-90-883-R (Ala. Cir. Ct. 1993), *reprinted in* Opinion of the Justices No. 338, 624 So. 2d 107, 159 (Ala. 1993) (holding that Alabama schools must provide "substantially equitable and adequate educational opportunities"); Idaho Schs. for Equal Educ. Opportunity v. Idaho State Bd. of Educ. ("ISEEO I"), 850 P.2d 724, 734–35 (Idaho 1993) (recognizing a claim based on a constitutional provision requiring a "thorough" system of public schools); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1183–87 (Kan. 1994) (upholding a lower court decision using existing education standards to determine whether the quality of education met a constitutional requirement for "suitable" public school financing); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993) (holding that the quality of education in poor school districts did not meet constitutional standards); Skeen v. State, 505 N.W.2d 299, 315 (Minn. 1993) (en banc) (holding that cases alleging failure to provide an adequate education should be analyzed under a strict scrutiny analysis); Claremont Sch. Dist. v. Governor ("Claremont II") 703 A.2d 1353, 1359 (N.H. 1997) (holding that an adequate public education is a fundamental right); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 667–68 (N.Y. 1995) (reinstating a claim alleging violation of the duty to provide adequate education under the New York Constitution); Leandro v. State, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997) (holding that a "sound basic education" is a fundamental right); DeRolph v. State, 677 N.E.2d 733, 745 (Ohio 1997) (striking down a school financing system that failed to provide the resources needed to give students "a minimally adequate education"); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999) (holding that the South Carolina Constitution requires the legislature to provide each child with the opportunity to receive a "minimally adequate education"); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994) (holding that the Virginia Constitution mandates that each school division meet standards of quality as established by the state legislature); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1263–64 (Wyo. 1995) (holding that the constitutional right to receive a "quality" education is judicially enforceable); *see also* Roosevelt Elem. Sch. Dist. No. 66 v. Bishop,

the decisions followed the trend started in *Rose* and *Pauley* by establishing judicially created definitions of an adequate education,[87] while other decisions fell more in line with *Seattle School District No. 1* by looking to state statutory and administrative standards to define their constitutions' requirements.[88] A few indicated that they would recognize adequacy claims, but did not define the constitutional standards because they were not decisive in the case at hand.[89]

As the number of adequacy precedents grew and courts became more comfortable with the idea of adjudicating educational quality, later third-wave cases abandoned much of the caution with which earlier courts had approached the issue of fundamental rights and began to combine adequacy requirements with equal protection analyses.[90] A number of the recent cases have declared explicitly that the right to an adequate education is fundamental and have used broad language regarding the courts' duty to apply strict scrutiny analysis.[91] The New Hampshire Supreme Court, for example, stated

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877 P.2d 806, 814–15 & n.7 (Ariz. 1994) (en banc) (plurality opinion) (recognizing a "substantive education requirement" in the Arizona Constitution, but deciding the case on other grounds); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 150–52 (Tenn. 1993) (holding that the Tennessee General Assembly's duty to provide a public school system that meets certain substantive standards is judicially enforceable, but deciding the case on other grounds). *See generally* Thro, *supra* note 29, at 598–99 (concluding the third wave has been the most significant in the number of cases and victories for plaintiffs).

87. *See McDuffy*, 615 N.E.2d at 554 (adopting the *Rose* criteria as "guidelines" as to what constitutes an "education" under the Massachusetts Constitution); *Claremont II*, 703 A.2d at 1359 (adopting the *Rose* criteria as "benchmarks" for New Hampshire schools).

Four other states developed their own criteria. *See Alabama Coalition for Equity, Inc.*, 624 So. 2d at 166; *Campaign for Fiscal Equity, Inc.*, 655 N.E.2d at 666; *Leandro*, 346 N.C. at 347, 488 S.E.2d at 255; *Abbeville County Sch. Dist.*, 515 S.E.2d at 540; *see also infra* Part IV.A (discussing the judicial standards in more depth).

88. *See ISEEO I*, 850 P.2d at 734 (holding that school districts must meet state board of education requirements); *Unified Sch. Dist. No. 229*, 885 P.2d at 1183–87 (agreeing with the district court's analysis relying upon education standards adopted by the Kansas legislature and state board of education); *Skeen*, 505 N.W.2d at 308 (looking to Minnesota's minimum accreditation standards); *Scott*, 443 S.E.2d at 142 (stating that schools must meet standards of quality established by the Virginia legislature).

89. *See, e.g., Roosevelt Elem. Sch. Dist. No. 66*, 877 P.2d at 814–15 & n.7; *Tennessee Small Sch. Sys.*, 851 S.W.2d at 150–52.

90. *See supra* notes 49–51, 61 and accompanying text (discussing state courts' concerns that declaring education to be a fundamental right would necessitate the extension of the same reasoning to other government services and require massive and controversial equalization programs). The West Virginia court was the only court to apply strict scrutiny analysis in the original adequacy cases. *See Pauley*, 255 S.E.2d at 878.

91. *See Alabama Coalition for Equity, Inc.*, 624 So. 2d at 159; *Claremont II*, 703 A.2d at 1359; *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261; *Scott*, 443 S.E.2d at 142; *Campbell County Sch. Dist.*, 907 P.2d at 1263. Other states have limited strict scrutiny to cases alleging failure to provide an adequate education and use the rational relation test to evaluate issues above that level. *See, e.g., Skeen*, 505 N.W.2d at 315.

that "when an individual school or school district offers something less than educational adequacy, the governmental action or lack of action that is the root cause of the disparity will be examined by a standard of strict judicial scrutiny."[92]

The cases and commentaries on school financing reform have paid little attention to what the recognition of these newfound constitutional rights to an adequate education—particularly where those rights have been accorded fundamental status—will mean outside the context of school finance litigation. The increasingly broad language used by the New Hampshire Supreme Court and other recent third-wave decisions, however, suggests that constitutional violations are not limited to statewide financial problems, but rather may include individual deprivations of an adequate education.[93] As Part II demonstrates, a few plaintiffs have moved from challenging statewide problems to bringing individual constitutional claims against local school systems for failing to provide quality academics, enrichment programs, and safe environments. It may be only a matter of time before other third-wave courts are asked to rule on the right to an adequate education in the larger context of public school operations.

II. ADEQUACY BEYOND THE SCHOOL FINANCING CONTEXT

To date, most of the cases that have built on the school financing litigation have focused on the significance of education as a fundamental right without testing the qualitative standards recognized in the original cases.[94] Plaintiffs in a few states, however,

92. *Claremont II*, 703 A.2d at 1359.

93. *See, e.g.*, McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 548, 553, 555 (Mass. 1993) (referring to "all" and "each" child in holding that Massachusetts has an affirmative duty to provide an education); *Leandro*, 346 N.C. at 347, 354, 355, 488 S.E.2d at 255, 259 (referring broadly to "every," "any," and "each" child as having a constitutional right to a sound basic education Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 541 (S.C. 1999) (stating that the legislature has a duty "to ensure the provision of a minimally adequate education to each student in South Carolina"); Thro, *supra* note 29, at 613 (stating that *McDuffy*'s language suggests that failure to provide an adequate education to any pupil creates a constitutional violation); Kevin P. McJessy, Comment, *Contract Law: The Proper Framework for Litigating Educational Liability Claims*, 89 NW. U. L. REV. 1768, 1781–83 (1995) (suggesting that *McDuffy* would support recovery in individual cases alleging failure to educate); William Kent Packard, Note, *A Sound, Basic Education: North Carolina Adopts an Adequacy Standard in* Leandro v. State, 76 N.C. L. REV. 1481, 1517–18 (1998) (suggesting that the standards adopted in North Carolina's school financing litigation imply that any student who fails to receive an adequate education has a cause of action against the state, but arguing that courts should defer to the legislature to define the limits of the constitutional claims).

94. For a discussion of the fundamental rights cases, see *infra* Part III.A.2.

have brought claims against local schools alleging failure to provide an adequate education to individual children.[95] While none of these claims have succeeded, the decisions suggest that some state courts may grant relief to individual students at least in severe cases.[96]

Among the second-wave courts that struck down their states' school financing systems based on adequacy arguments, only Washington appears to have faced subsequent challenges alleging that local schools failed to provide the substantive level of education required by the financing precedents.[97] In *Ramsdell v. North River School District No. 200*,[98] two parents brought a claim alleging that their local school system had failed to provide a "basic" education and asking that their children be permitted to attend schools in a neighboring system.[99] Evidence indicated that the students had received some good grades and reports while in local schools, but below-average grades and test scores when sent to live with their uncle in the adjacent town.[100] The Washington Supreme Court

95. *See, e.g.*, Hayworth v. School Dist. No. 19, 795 P.2d 470, 471 (Mont. 1990); Ramsdell v. North River Sch. Dist., No. 200, 704 P.2d 606, 609 (Wash. 1985) (en banc). Other adequacy cases have been brought against urban school districts in Illinois, where the state constitution requires an "efficient system of high quality public educational institutions and services." ILL. CONST. art. X, § 1. However, state courts have refused to adjudicate educational quality both in the urban adequacy cases and in school financing litigation in part because of concerns about judicially manageable standards for "high quality" or even minimally adequate education. *See* Lewis E. v. Spagnolo, 710 N.E.2d 798, 800 (Ill. 1999) (rejecting a constitutional claim charging that state and local school district officials had failed to provide an adequate education in East St. Louis schools); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996) (refusing to grant relief in school financing litigation because the court could find no judicially manageable or discoverable standards for judging "high quality" education); Jenkins v. Leininger, 659 N.E.2d 1366, 1372 (Ill. Ct. App. 1995) (holding that plaintiffs had failed to state a cause of action under the Illinois education article in a suit against Chicago school officials); *see also* Greg D. Andres, Comment, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795, 796 (1995) (discussing the *Leininger* plaintiffs' request that they receive vouchers so that their children could attend better schools); *see supra* notes 335–39 (discussing vouchers as a possible remedy in adequacy cases).

96. *See, e.g., Ramsdell*, 704 P.2d at 609 (rejecting the plaintiffs' claim where evidence showed their children were not "blossoming," but not questioning the existence of a cause of action for violations of the right to an adequate education).

97. West Virginia courts have heard several claims focusing on the status of education as a fundamental right, but not involving quality issues. *See infra* notes 169–71 and accompanying text (discussing cases). Kentucky courts have focused mainly on challenges over school reforms adopted after the *Rose* decision. *See, e.g.*, Kentucky Dep't of Educ. v. Risner, 913 S.W.2d 327, 329 (Ky. 1996) (anti-nepotism laws); Triplett v. Livingston County Bd. of Educ., 967 S.W.2d 25, 27 (Ky. Ct. App. 1997) (mandatory standardized testing).

98. 704 P.2d 606 (Wash. 1985).

99. *See id.* at 609. The home district was fully certified by the state, but only had about 50 students. *See id.* at 608.

100. The parents relied on standardized California Achievement Tests indicating that

rejected the claim based on the record, acknowledging that there appeared to be a difference in the academic intensity of the two districts, but declining to hold, without additional evidence, that the disparity amounted to a constitutional violation.[101]

Three years later in *Camer v. Seattle School District No. 1*,[102] the Washington Court of Appeals also rejected a constitutional claim based on the specific facts of the case.[103] The court held that res judicata barred the plaintiff from bringing most of her claims for academic inadequacy because she had brought two similar law suits several years before.[104] Regarding the remaining claim, which alleged failure to teach students the Washington Constitution, the appeals court held that the plaintiffs did not allege facts that amounted to a violation of the constitution's education article.[105] Nevertheless, the court generally affirmed that the education provision "imposes a judicially enforceable affirmative duty on the State to make ample provision for the education of children."[106]

While the Washington cases appear to leave the door open to individual claims, the New York courts have cast serious doubt on whether the New York Constitution's educational article is enforceable against local school systems. Three years after the state high court held in *Board of Education v. Nyquist*[107] that its state constitution required the New York legislature to provide public schools that offer a "sound basic education,"[108] an appellate court

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their son was in the 29th percentile nationally and that their daughter was below the 50th percentile in all areas and in the bottom one percent in third-grade reading. They also presented report cards from the home district reporting that the son was "ahead" and that the daughter was "blossoming in academic work." *Id.* at 608. The court placed little weight on the daughter's first percentile reading score, however, because she moved up to the 27th percentile when retested later the same year. *See id.* at 610–11.

101. *See id.* at 609. The court found no evidence that the home district needed to hire more employees or improve its physical facilities, and stated that the plaintiffs had failed to set forth other standards by which the schools could be judged constitutionally deficient. *See id.*

102. 762 P.2d 356 (Wash. Ct. App. 1988).

103. *See id.* at 360.

104. *See id.* at 359. The previous suits had alleged violations of state education laws and the right to an adequate education, but were rejected at every level of the court system. *See id.* at 358; Camer v. Eikenberry, 703 F.2d 574, 574 (9th Cir.), *cert. denied*, 464 U.S. 828 (1983); Camer v. Brouillet, 31 Wash. App. 1097, 1097 (unpublished opinion), *pet. for rev. denied*, 97 Wash. 2d 1042 (1982).

105. *See Camer v. Seattle Sch. Dist. No. 1*, 762 P.2d at 360. The court also concluded that the plaintiffs had not shown actual damage and therefore lacked standing. *See id.*

106. *Id.* (citing Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978) (en banc)).

107. 439 N.E.2d 359 (N.Y. 1982).

108. *Id.* at 369. Despite its holding, the New York court had warned that it would be reluctant to intervene except in cases of "gross and glaring inadequacy." *Id.* In 1995, the

rejected a constitutional claim against a local school system for the level of education provided to "talented and gifted" students.[109] The court in *Bennett v. City School District*[110] gave little explanation for its holding, stating that the constitutional provision

> was never intended to impose a duty flowing directly from a local school district to individual pupils to ensure that each pupil receives a minimum level of education, the breach of which duty would entitle a pupil to compensatory damages.
>
> Here petitioner has not alleged, nor in all likelihood could she prove, that the modified [talented and gifted] program or even the conventional classroom, would not provide a "quality education," let alone a "sound basic education."[111]

The court's reasoning is unclear. The first sentence is an unmarked but direct quote from the first educational malpractice case in New York, *Donohue v. Copiague Union Free School District*,[112] which included a claim based on the state constitution's education article as well as one based on negligence.[113] The *Donohue* court, which reached its decision three years before the *Nyquist* school financing case,[114] rejected the constitutional claim because it read the education article as placing responsibility for public schools solely on the state legislature, rather than local school districts.[115]

Curiously, however, the *Bennett* decision did not simply recite *Donohue*'s no-duty rule. Instead, the court emphasized that the plaintiffs did not allege, and probably could not prove, that they had been deprived of a sound basic education.[116] However, the court never explained why this fact was significant if there was no duty to provide such an education in the first place. The implication is that the plaintiff lost not because the district owed no *duty* to the student,

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court held that the plaintiffs in a subsequent school financing challenge had alleged gross educational adequacies sufficient to withstand a motion for summary judgment. *See* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 668 (N.Y. 1995).

109. *See* Bennett v. City Sch. Dist., 497 N.Y.S.2d 72, 77 (N.Y. App. Div. 1985). The district offered a small full-time program for which students were chosen by lottery. The plaintiff's daughter was not chosen in the lottery and was placed in a part-time program instead. *See id.* at 74–75.

110. 497 N.Y.S.2d 72 (N.Y. App. Div. 1985).

111. *Id.* at 79 (quoting 1982 N.Y. Laws, ch. 740, § 1; *Nyquist*, 439 N.E.2d at 369).

112. 391 N.E.2d 1352, 1353 (N.Y. 1979).

113. *See id.* The state education provision reads, "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. CONST. art. XI, § 1.

114. *Nyquist*, 439 N.E.2d at 369.

115. *See Donohue*, 391 N.E.2d at 1353; *infra* notes 129–30 and accompanying text.

116. *See Bennett*, 497 N.Y.S.2d at 79.

but rather because there had been no *breach* of the constitutional duty recognized in *Nyquist*.[117] If this latter interpretation is correct, plaintiffs who could provide stronger evidence of educational deprivations might still be able to seek relief in New York courts.

The third state to address an inadequate education claim at the appellate level is Montana, where the state supreme court had ruled in a 1989 school financing case that the Montana Constitution requires "a system of quality public education granting to each student [] equality of educational opportunity."[118] One year after the school financing case, a family brought a damages suit against a local school system in *Hayworth v. School District No. 19*,[119] arguing that school officials had violated their children's constitutional right to an education by failing to provide a safe learning environment.[120] The court rejected the claim based on Montana's sovereign immunity statute, which bars claims for damages, and distinguished the earlier school financing case on the grounds that it had sought a form of relief that was not barred by the statute.[121] Although an earlier Montana opinion had suggested that educational malpractice claims might be recognized in the state, the court indicated that under its current interpretation of sovereign immunity, claims seeking damages from local schools would not be allowed under any legal theory.[122]

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117. This interpretation is supported by another passage in which the court compared the plaintiffs' case to *Johnpoll v. Elias*, 513 F. Supp. 430 (E.D.N.Y. 1980). *See Bennett*, 497 N.Y.S.2d at 79. *Johnpoll*, decided prior to the *Nyquist* school financing case, involved a student who had been classified as both talented and gifted and handicapped and who claimed that he had been deprived of a " 'decent education.' " *Johnpoll*, 513 F. Supp. at 430–31 (quoting a memo by the plaintiff). The boy's father sought a preliminary injunction to allow his son to attend the high school of his choice, but the district court held that disallowing school choice did not deny the right to an education. *See id.* at 431–32. Similarly, the *Bennett* court reasoned, "the fact [that the plaintiff's daughter] is not being permitted to attend the educational program of her choice is not a denial of her constitutional right to an education." *Bennett*, 497 N.Y.S.2d at 79. Again, this language implies that an enforceable right exists, but that it was not violated in the case.

118. Helena Elem. Sch. Dist. No. 1 v. State, 769 P.2d 684, 690 (Mont. 1989). The Montana court held that the constitutional provision is binding on all branches of government at all levels, including individual school districts. *See id.*

119. 795 P.2d 470 (Mont. 1990).

120. *See id.* at 471. The children had social problems that led to frequent fights with their peers. The plaintiffs removed their children from school and sued on both constitutional and negligence theories. *See id.*

121. *See id.* at 473 (noting that the school financing case had sought a declaratory judgment). The statute provides immunity from damages claims against "governmental entities" for acts or omissions by their "legislative bodies" and members, officers, and agents of those bodies. MONT. CODE ANN. § 2-9-11 (1997). The court held that the defendant school officials were agents of the school board, a legislative body. *See Hayworth*, 795 P.2d at 472.

122. *See Hayworth*, 795 P.2d at 473 (discussing B.M. v. State ("B.M. I"), 649 P.2d 425,

Taken together, the cases from Washington, New York, and Montana suggest that state courts generally will be cautious about enforcing the constitutional right to an adequate education against local school systems. To discourage such claims if not bar them outright, state courts may require evidence of serious educational deprivation[123] or invoke sovereign immunity statutes.[124] Nevertheless, these meager precedents suggest that plaintiffs who can show more than low test scores or lack of enrichment programs may be able to bring claims for failure to provide an adequate education, particularly if they seek a remedy other than damages.[125]

Moreover, it may be significant that these cases came from states where the school financing decisions neither established detailed judicial standards to define an adequate education nor declared education to be a fundamental right.[126] In handling subsequent cases, these courts had broad discretion to define individual students' rights against local schools. As discussed in Part I, however, many of the more recent school finance decisions not only have provided detailed adequacy definitions, but also have declared as fundamental the right to a quality education.[127] By locking themselves into strict scrutiny analysis, such courts may have curtailed their freedom of

427 (Mont. 1982) (plurality opinion)). *B.M. I* is the only court opinion to suggest that educational malpractice might be a cognizable cause of action. *See* Sellers v. School Bd. of Manassas, 960 F. Supp. 1006, 1014 & n.34 (E.D. Va. 1997) (discussing the history of educational malpractice litigation and noting that the Montana courts are the only ones that have not explicitly barred such claims). The Montana court held that school officials owed a duty to the plaintiff based on statutes governing the testing and placement of special education students, but the plaintiff lost upon remand. *See* B.M. v. State ("B.M. II"), 698 P.2d 399, 400–401 (Mont. 1985) (upholding summary judgment against the plaintiff because she had failed to raise an issue of material fact as to actual injury). In light of the statement in *Hayworth* regarding sovereign immunity, it appears that Montana courts will no longer allow such claims. 795 P.2d at 473.

123. *See* Ramsdell v. North River Sch. Dist. No. 200, 704 P.2d 606, 609 (Wash. 1985) (en banc).

124. *See Hayworth*, 795 P.2d at 473.

125. *See Ramsdell*, 704 P.2d at 609; *cf.* Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 856 (Cal. Ct. App. 1976) (involving a plaintiff who had been allowed to graduate from high school despite reading at a fifth-grade level); Hoffman v. Board of Educ., 400 N.E.2d 317, 318–19 (N.Y. 1979) (involving a plaintiff with a speech impediment who had been misdiagnosed as having a mental handicap for 13 years). For a more detailed discussion of damages and other remedies, see *infra* Parts III.B, IV.B.

126. *See* Helena Elem. Sch. Dist. No. 1 v. State, 769 P.2d 684, 690 (Mont. 1989); Board of Educ. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94–95 (Wash. 1978) (en banc); *supra* notes 64–69 and accompanying text (discussing *Seattle Sch. Dist. No. 1*). The New York courts did not explain what a "sound basic education" entailed until 10 years after *Bennett* was decided. *See* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995).

127. *See supra* notes 88, 91 and accompanying text.

interpretation in future cases.[128] Part III discusses this issue in more depth, outlining possible constitutional causes of action both in states that have declared the right to an adequate education to be fundamental and in those states that have not.

III. CONSTITUTIONAL CLAIMS BASED ON THE FAILURE TO EDUCATE ADEQUATELY

Although it has received little attention in school financing cases, the strategy of suing local schools for failure to provide an adequate education based on constitutional grounds is not new. New York courts rejected a constitutional claim in one of the country's first educational malpractice cases, *Donohue v. Copiague Union Free School District*,[129] although subsequent cases focused mainly on negligence theories.[130] Likewise, educational malpractice commentators have devoted the bulk of their attention to negligence theories, but several have suggested that states may have a constitutional duty to provide an adequate education as a quid pro quo for depriving students of liberty through compulsory attendance

128. *See infra* Part III.A.

129. 391 N.E.2d 1352, 1353 (N.Y. 1979); *see also supra* notes 112–14 and accompanying text (discussing *Donohue* and noting that it was decided before the New York courts recognized a constitutional right to a sound basic education).

130. The popularity of negligence theories may be due to the fact that the *Donohue* court acknowledged an educational malpractice claim "might . . . state a cause of action within traditional notions of tort law." 391 N.E.2d at 1354. The court rejected the claim because it did not want to adjudicate school policies and their day-to-day implementation, but subsequent cases have tended to stick to malpractice theories and contract claims when private schools or universities are parties. *See supra* notes 4, 6–8 (discussing cases).

The only educational malpractice case in the country to recognize a duty toward students cited its state constitution as an example of general education policy, but appeared to base its holding on state statutory grounds. *See* B.M. v. State ("B.M. I"), 649 P.2d 425, 427 (Mont. 1982) (plurality opinion) (citing MONT. CONST. art. X, § 1, but describing the complaint as alleging that "the school district failed to follow the statutory and regulatory policies governing the placement of students in the special education program"); *see also* Hayworth v. School Dist. No. 19, 795 P.2d 470, 473 (Mont. 1990) (concluding that damages claims against schools are now barred in Montana by sovereign immunity); *supra* notes 119–21 and accompanying text (discussing *Hayworth* and *B.M. I*). At least two other cases have raised constitutional issues. *See* Carlson v. Midway R-I Sch. Dist., No. 91-0702-CV-W-6, 1994 U.S. Dist. LEXIS 10602, at *6–7 (W.D. Mo. July 25, 1994) (rejecting a constitutional claim as "more akin to a form of educational malpractice," but stating that it was not "inconceivable" that it would be a sound theory of duty under some fact patterns); Agostine v. School Dist. of Phila., 527 A.2d 193, 195 (Pa. Commw. Ct. 1987) (rejecting a common law claim "derived from the Commonwealth's Constitution" based in part on *Danson v. Casey*, 399 A.2d 360 (Pa. 1979), a school financing case holding that students have no right to a particular level of educational quality).

laws.[131] Two of these commentators, both writing before the third wave of school financing cases gathered momentum, concluded that state constitutions' education provisions also could provide a basis for individual claims against local schools.[132]

These sources and traditional constitutional law analyses suggest three causes of action under which families could seek relief for violations of the constitutional right to an adequate education: substantive due process, equal protection, and constitutional tort claims. Substantive due process and equal protection claims appear most promising in states where the right to an adequate education has been declared fundamental and therefore subject to strict scrutiny.[133] The third possible avenue of relief, so-called "constitutional tort" claims, would seek recognition of a cause of action based directly on a

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131. *See, e.g.*, Frank D. Aquila, *Educational Malpractice: A Tort En Ventre*, 39 CLEV. ST. L. REV. 323, 339–42 (1991); Richard Funston, *Educational Malpractice: A Cause of Action in Search of a Theory*, 18 SAN DIEGO L. REV. 743, 766–71 (1981); James S. Liebman, *Implementing* Brown *in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 405–13 (1990); Ratner, *supra* note 59, at 823–28; Thomas G. Eschweiler, Comment, *Educational Malpractice in Sex Education*, 49 SMU L. REV. 101, 103 (1995); Charles M. Masner, Note, *Educational Malpractice and a Right to Education: Should Compulsory Education Laws Require a Quid Pro Quo?*, 21 WASHBURN L.J. 555, 565–79 (1982); Patricia Wright Morrison, Note, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796, 796–810 (1975). The quid pro quo argument draws on federal cases holding that patients who have been involuntarily confined in mental hospitals are entitled to minimally adequate training to justify their confinement. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 316–19 (1982). Commentators have recognized that there are difficulties in applying these precedents to educational cases: the patients in the federal litigation were confined 24 hours per day, whereas the infringement upon students' liberty is much less severe. *See* Aquila, *supra*, at 342; Masner, *supra*, at 575; Morrison, *supra*, at 808. Moreover, because the cases measured treatment in terms of whether certain procedures were followed rather than whether the patients made progress, some commentators have suggested that they are inapposite to educational malpractice claims. *See* Funston, *supra*, at 770; Masner, *supra*, at 575; Morrison, *supra*, at 808.

132. *See* Liebman, *supra* note 131, at 406; Ratner, *supra* note 59, at 814–29.

Professor Liebman concluded that claims based on state constitutions' education provisions were promising, but suggested that equal protection claims might be more difficult because courts might be reluctant to declare education a fundamental right. *See* Liebman, *supra* note 131, at 420–27 (citing second-wave school financing cases). However, the recent third-wave decisions holding that students have a fundamental right to an adequate education appear to have overcome this barrier. *See supra* note 91 and accompanying text. Gershon M. Ratner, a former deputy executive secretary at the U.S. Department of Health, Education, and Welfare, analyzed state constitutional education provisions and concluded that they could be interpreted as establishing a duty to educate effectively. *See* Ratner, *supra* note 59, at 814–22 (citing second-wave cases). *But see* McUsic, *supra* note 29, at 309 & n.4 (criticizing Ratner's analysis). Ratner also outlined federal and state equal protection theories. *See* Ratner, *supra* note 59, at 828–51; *see also infra* Part III.A (discussing such theories in more detail).

133. *See infra* Part III.A.

state constitution's education provision.[134]

A. *Substantive Due Process and Equal Protection*

Substantive due process and equal protection are the traditional constitutional theories used to protect individual rights—particularly fundamental rights—from government intrusion.[135] In adjudicating these claims, state courts often rely heavily on federal constitutional law,[136] both because it is better developed[137] and because state courts face considerable pressure to legitimize their decisions by harmonizing them with federal precedents.[138] Thus, although courts may interpret state constitutions as providing more extensive rights than the Federal Constitution,[139] federal case law often "casts a

134. *See infra* Part III.B.

135. *See* JOHN E. NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 10.7 (5th ed. 1995). As discussed in Part I, equal protection claims focus on government actions that treat groups differently based on their status as minorities or in ways that infringe upon members' fundamental rights. *See supra* note 34. Substantive due process claims, in contrast, focus on whether the government has the constitutional authority to take certain actions at all. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7 (2d ed. 1988). Although the two claims are conceptually distinct, the federal courts apply strict scrutiny analysis under both theories to protect fundamental rights. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) (substantive due process); Shapiro v. Thompson, 394 U.S. 618, 630–32 (1969) (equal protection).

136. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1136 (1999); Ratner, *supra* note 59, at 829 n.215; Williams, *supra* note 48, at 1197; Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 354–62 (1984); Note, *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1326–31 (1982) [hereinafter *Developments in the Law*].

137. *See* Ratner, *supra* note 59, at 829 n.215 (discussing equal protection).

138. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 174–85 (1998); Williams, *supra* note 136, at 354–56. A few judges have suggested that state courts should only deviate from Supreme Court precedents when there are textual differences between federal and state provisions, unique legislative histories, or other specific differences. *See* State v. Hunt, 450 A.2d 952, 965–67 (N.J. 1982) (Handler, J., concurring). *But see* Williams, *supra* note 136, at 388–89 (arguing that such criteria should not limit state courts' ability to conduct independent constitutional analyses). Even when "state-specific" factors are present, many state courts still resolve fundamental rights claims by referencing federal constitutional law. *See Developments in the Law*, *supra* note 136, at 1400–01 (speech rights), 1459–60 (education and privacy rights).

139. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (urging state courts to develop their constitutions as an independent source of liberties). States' declarations of rights predate their federal counterpart and were thought by the original framers to be sufficient to protect citizens from tyranny. *See id.* at 501; *Developments in the Law*, *supra* note 136, at 1327. People did not rely upon the Federal Constitution to protect rights until most of the Federal Bill of Rights was incorporated into the Fourteenth Amendment. However, state constitutions can expand the level of protection and the roster of rights recognized under

shadow" over state litigation.[140]

As the following discussion will show, however, relying on federal jurisprudence in dealing with affirmative constitutional duties to provide government services is problematic because of the federal courts' underlying assumptions about the nature of constitutional rights and violations.[141] Prior state court precedents are also of limited use in determining whether schools have provided students with an adequate education.[142] In dealing with the right to an adequate education, state courts are entering new territory and may need to develop new analyses to adjudicate constitutional claims.[143]

1. The Baseline: Federal Courts

As discussed in Part I, federal courts have held that legislation that infringes upon a fundamental right must be narrowly tailored to achieve a compelling government interest.[144] Statutes that do not infringe upon fundamental rights, however, will be upheld "if there is any reasonably conceivable state of facts" that would justify the action as a rational means of achieving a legitimate government interest.[145] In the context of government provision of public services,

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federal case law. *See* Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 959 (1985); *Developments in the Law*, *supra* note 136, at 1328–34.

140. *See* Williams, *supra* note 136, at 355–56. Many commentators argue that because state courts do not face federalism concerns, they may interpret identical constitutional provisions differently from federal precedent. *See* Brennan, *supra* note 139, at 502; Williams, *supra* note 136, at 397–401; *Developments in the Law*, *supra* note 136, at 1348.

141. *See infra* Part III.A.1.

142. *See infra* Part III.A.2.

143. *See infra* Part III.A.3.

144. *See supra* note 35. Some commentators have described strict scrutiny as " 'strict' in theory but fatal in fact," but this appears accurate only in describing cases dealing with suspect classifications. TRIBE, *supra* note 135, § 16-6 (quoting Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)). Though rare, federal courts have upheld infringements upon fundamental rights. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 29 (1976) (upholding federal ceilings on campaign contributions); Roe v. Wade, 410 U.S. 133, 155, 163–64 (1973) (upholding state bans on abortions after the second trimester). *See generally* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Underanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988) (cataloging cases discussing compelling government interests).

145. FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993); *see also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7 (1981) ("[T]his Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.' " (quoting Weinberger v. Weinsenfeld, 420 U.S. 636, 648 n.16 (1975))). Federal courts make an exception, however, when the government action treats people differently based on a "suspect" or "quasi-suspect" classification, thereby raising

the courts sometimes apply a variation of the rational relation test and will intervene only when there is such a substantial departure from professional norms as to demonstrate that the decisionmaker did not exercise professional judgment.[146]

Before mechanically applying these tests to the right to an adequate education, however, it is important to note that the federal courts have developed these analyses in the context of several core assumptions about the Federal Constitution. First, federal courts have assumed that constitutional rights are "negative rights"—that is, that the rights guarantee that the government will not act in a way that interferes with certain protected private activities such as voting, travel, or speech, but do not require the government to act affirmatively to help individuals exercise such rights.[147] While this

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equal protection concerns and triggering strict or heightened scrutiny. *See supra* note 34.

146. *See, e.g.*, Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 217, 225 (1985) (applying the professional services analysis to a decision to dismiss the plaintiff from a medical education program); Youngberg v. Romeo, 457 U.S. 307, 316–17 (1982) (applying the professional services analysis to treatment provided to involuntarily committed mental patients). In *Ewing*, the plaintiff alleged that early dismissal for failing a critical competency test violated his "property" interest in continued enrollment in a university medical program. The Court held that even if there was such a property right, only a substantial departure from academic norms as to demonstrate that the decisionmaker did not exercise professional judgment would warrant judicial overturning of such "genuinely academic decisions." *Ewing*, 474 U.S. at 225. However, the Court never actually ruled that there was a substantive due process right involved in the case. *See id.* at 229 (Powell J., concurring) (concluding that no such right existed); *see also* Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978) (alleging a procedural due process violation on a similar fact pattern).

147. *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 182, 196 (1989) (holding that the right to be free from bodily harm does not include the right to government protection); Regan v. Taxation with Representation, 461 U.S. 540, 546 (1983) (holding that the right to free speech does not include right to public funding for groups involved in political lobbying); Harris v. McRae, 448 U.S. 297, 316 (1980) (holding that the right to abortion does not include the right to public funding); Rodriguez v. San Antonio Sch. Dist., 411 U.S. 1, 35–37 (1973) (holding that the rights to vote and to free speech do not include the right to education services). The Seventh Circuit has been particularly forceful in articulating the negative rights theory, especially with reference to the framers' intent. *See, e.g.*, Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("[T]he Constitution is a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them." (citations omitted)). *But cf.* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 1991 DUKE L.J. 507, 546–71 (arguing that the framers of the Fourteenth Amendment intended to create a constitutional right to protection).

Critics and even some supporters of the negative rights theory point out that the Constitution includes some affirmative language and rights. *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 887 (1986) (identifying positive federal rights and concluding that the interpretation of the Constitution as a charter of negative liberties is a valuable and generally valid insight, but not a talisman).

theory has been hotly debated by scholars[148] and subject to occasional exception by the Supreme Court itself,[149] federal courts consistently have rejected general claims of entitlement to government services based on substantive due process and equal protection theories.[150] Instead, they have reasoned that because the government has no duty to act in the first place, there generally is no constitutional violation

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The Sixth Amendment, for instance, requires speedy and impartial trials, confrontation of witnesses, compulsory process, and assistance of counsel for criminal defendants. *See* U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963) (recognizing an affirmative right to trial counsel for indigent criminal defendants). The Due Process Clauses themselves arguably impose an affirmative duty to afford fair procedures before depriving people of life, liberty, or property. *See* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2312 (1990); Currie, *supra*, at 872.

148. *See, e.g.*, Bandes, *supra* note 147, *passim*; Peter B. Edelman, Essay, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 24–25 (1987); Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731, 756–62 (1997); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, *passim* (1984); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13–19 (1969); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependency*, 99 HARV. L. REV. 330, 333–35 (1985); Martha Christine Foley, Note, *Hospitalization Requirements for Second Trimester Abortions: For the Purpose of Health or Hindrance?*, 71 GEO. L.J. 991, 1009 n.100 (1983).

149. The first major exception involves rights to judicial process for indigent parties when fundamental rights or "severe forms of state action" are at stake. M.L.B. v. S.L.J., 519 U.S. 102, 128 (1996) (right to fee waiver in appeal of termination of parental rights); *see also* Ross v. Moffitt, 417 U.S. 600, 610–11 (1974) (no right to counsel for discretionary criminal appeals); United States v. Kras, 409 U.S. 434, 446 (1973) (no right to fee waiver in bankruptcy case); Boddie v. Connecticut, 401 U.S. 371, 382–83 (1971) (right to fee waiver in divorce); Douglas v. California, 372 U.S. 353, 354, 357–58 (1963) (right to attorney for appeal of right); Griffin v. Illinois, 351 U.S. 12, 19–20 (1956) (right to free trial transcript for criminal conviction appeal). The second group of cases involves plaintiffs who are in state custody through imprisonment or incarceration. *See, e.g.*, *Youngberg*, 457 U.S. at 316–17 (right to treatment for involuntarily committed patients); Bounds v. Smith, 430 U.S. 817 (1977) (right to legal materials and access to the courts for prisoners); Estelle v. Gamble, 429 U.S. 97 (1976) (right to medical care for prisoners). The Supreme Court and some commentators have suggested that the state's duty to act in such cases exists only because the government already has taken affirmative action by depriving individuals of their liberty. *See DeShaney*, 489 U.S. at 199–200; Currie, *supra* note 147, at 874. *But see* Bandes, *supra* note 147, at 2295–96 (arguing that dependence on the state should create a duty regardless of whether the party has been deprived of liberty). Even when the government does assume such duties, the courts may apply a low standard of care. *See Estelle*, 429 U.S. at 106 (holding that medical malpractice does not become an Eighth Amendment violation simply because the victim was a prisoner); *supra* note 146 and accompanying text (explaining holdings that courts will intervene in the provision of professional services only when the facts indicate that no professional judgment was used).

150. *See, e.g.*, *DeShaney*, 489 U.S. at 196 (no right to protective services); *Rodriguez*, 411 U.S. at 33 (no right to education); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (no right to housing); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (no right to welfare).

when it decides voluntarily to provide public services but then fails to do so in a reasonable manner.[151]

The second core assumption, based in part on the language of the Equal Protection and Due Process Clauses themselves,[152] is that the constitutional limitations only apply to government actions.[153] In the absence of "state action," courts generally have held that there can be no substantive due process or equal protection violation even if private actors or general social conditions severely infringe upon individuals' constitutional rights.[154] Even when government involvement has been extensive, the federal courts have often applied a narrow definition of state action and have focused only on affirmative acts.[155] Thus, as long as the government does not actively and directly infringe on a plaintiff's rights, there generally is no constitutional violation even if a government omission leads to a substantial infringement upon a constitutional right.[156]

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151. *See DeShaney*, 489 U.S. at 197–200; Archie v. City of Racine, 847 F.2d 1211, 1223 (7th Cir. 1988) (911 dispatch); Jackson v. Byrne, 738 F.2d 1443, 1448 (7th Cir. 1984) (firefighting services); *Jackson v. City of Joliet*, 715 F.2d at 1206 (police services).

152. *See, e.g.*, U.S. CONST. amend. XIV, § 1 ("No *State* shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)).

153. Soon after ratification of the Fourteenth Amendment, the Supreme Court held that it did not apply to private actors, *see, e.g.*, The Civil Rights Cases, 109 U.S. 3, 11 (1883), but later broadened its definition of "state action" to include some public-private entanglements. *See* NOWAK & ROTUNDA, *supra* note 135, §§ 12.1–.5 (discussing the evolution of the definition of "state action").

154. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 718–20 (1974) (refusing to enforce court-ordered desegregation plans when segregation was caused by housing patterns and other societal factors); NOWAK & ROTUNDA, *supra* note 135, § 12.4(d) (citing cases distinguishing between de jure and de facto school segregation as a classic example of the state action doctrine). Nevertheless, the Court has strained the state action doctrine to its limits in voting rights cases. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 540, 568 (1964) (holding that the Equal Protection Clause is violated where demographic changes rather than state action caused voting district populations to become uneven); Terry v. Adams, 345 U.S. 461, 470 (1953) (striking down a whites-only unofficial primary election under the Fifteenth Amendment despite the lack of a formal state connection).

155. *See, e.g.*, *DeShaney*, 489 U.S. at 201. *DeShaney* involved a four-year-old boy whom a social services agency monitored for two years because of reports of abuse by his father. Although the agency had ordered the boy taken into temporary custody, released him back to his father, and made repeated visits during which social workers noted signs of abuse, the Court concluded that the government played no part in the dangers he faced. Returning the boy to his father's custody "placed him in no worse position than in which he would have been had it not acted at all," the Court reasoned, so private action—not state action—infringed on the boy's right to be free from bodily harm. *Id.*

156. *See id.*; TRIBE, *supra* note 135, § 16-1 n.21 (describing federal courts' traditional reluctance to redress disadvantages or injuries not thought to be "actively engineered" by the government itself). This doctrine finds some support in the common law, which holds defendants liable for misfeasance that creates new risks of harm, but not for nonfeasance that makes situations no worse. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON

By defining constitutional rights as negative and state action as discrete and affirmative, federal courts have greatly restricted the focus of substantive due process and equal protection claims. They generally do not apply either the strict scrutiny or the rational relation tests to government omissions or negligence occurring in the course of providing ongoing public services because such claims usually do not involve "constitutional rights" or "state action" as federal courts have defined the terms.[157] Instead, courts only use the strict scrutiny and rational relation tests to evaluate deliberate, official state actions that either penalize or directly restrict protected private activities.[158] Accordingly, federal case law provides little guidance in evaluating substantive due process and equal protection claims based on the right to an adequate education because it suggests that the government has no obligation to provide services, let alone to provide services at a given level of quality.[159]

2. States' Struggle with Positive Rights

Many states have adopted the federal strict scrutiny and rational relation tests in their substantive due process and equal protection analyses despite the fact that their constitutions differ considerably from the federal model.[160] Unlike the United States Constitution,

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ON THE LAW OF TORTS § 56 (5th ed. 1984). Even the common law, however, treats inaction as misconduct when an omission occurs during an ongoing course of action. *See id.* ("Failure to blow a whistle or to shut off steam, although in itself inaction, is readily treated as negligent operation of a train, which is affirmative misconduct."). Thus, some scholars have criticized the federal courts for relying too much on rigid distinctions between action and inaction, particularly in cases involving the ongoing provision of public services. *See, e.g.*, Bandes, *supra* note 147, at 2285–97. For a broad discussion of the state action doctrine and its critiques, see Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985); William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking" State Action*, 80 NW. U. L. REV. 558 (1985); Erwin Chemerinsky, *More is Not Less: A Rejoinder to Professor Marshall*, 80 NW. U. L. REV. 571, 572 (1985).

157. *See supra* notes 147–56 and accompanying text.

158. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629–32 (1969) (penalty for travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) (direct restriction on voting); NOWAK & ROTUNDA, *supra* note 135, § 12.1 ("When a legislature, executive officer, or a court takes some official action against an individual, that action is subjected to review under the Constitution, for the official act of any governmental agency is direct governmental action and therefore subject to the restraints of the Constitution."); TRIBE, *supra* note 135, § 16-7 (explaining that equal protection analysis is used to protect against inequalities that "impinge directly on access to, or levels of" fundamental rights and against inequalities that deter or penalize the exercise of other independent rights); Bandes, *supra* note 147, at 2297 (discussing the Court's "preoccupation with state actions which are not only affirmative in the traditional sense, but *physically tangible*").

159. *See supra* notes 147–56 and accompanying text.

160. *See* Williams, *supra* note 48, at 1221–22. With equal protection, for instance, a number of courts follow federal case law directly; the rest either apply the federal

many state constitutions use positive phrasing to describe core rights and government services. This affirmative language creates a much stronger textual basis for arguing that state governments have a duty to provide support for needy citizens, public education, and other basic services[161] and even that constitutional requirements apply to private actors.[162] While many courts have interpreted state constitutional provisions concerning government services as merely aspirational or advisory,[163] some have held that such provisions create judicially enforceable positive rights.[164] Scholars have argued that

framework of analysis, but do so independently, or reject the federal hierarchy in favor of other means-ends and balancing tests. Some states have used different methods in different cases. *See id.* at 1219–21. One area where state supreme courts have deviated significantly from their federal counterparts is in judicial review of economic legislation, where they continue to strike down laws based on both substantive due process and equal protection claims. *See Developments in the Law*, *supra* note 136, at 1463–93. The federal courts, in contrast, largely abandoned the field to legislative discretion in the 1930s. *See* NOWAK & ROTUNDA, *supra* note 135, §§ 11.3–.4.

161. For instance, more than a third of the states have constitutional provisions explicitly mandating public assistance for the poor. *See* ALA. CONST. art. IV, § 88; CAL. CONST. art. 16, §§ 3, 11, art. 34; HAW. CONST. art. IX, § 3; IDAHO CONST. art. X, § 1; IND. CONST. art. IX, § 3; KAN. CONST. art. 7, § 4; LA. CONST. art. 12, § 8; MISS. CONST. art. XIV, § 262; MONT. CONST. art. XII, § 3 cl.3; NEV. CONST. art. 13, § 1; N.M. CONST. art. IX, § 14; N.Y. CONST. art. XVII, § 1; N.C. CONST. art. XI, § 4; OKLA. CONST. art. 17, § 3; TEX. CONST. art. XI, § 2; W. VA. CONST. art. IX, § 2; WYO. CONST. art. 7, § 18. All 50 states have constitutional provisions regarding public education. *See supra* note 47. For a sampling of substantive provisions on shelter and other topics, see Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893–95 (1989). For a discussion of state courts that have ruled that their constitutions create an enforceable right to a healthful environment, see generally Mary Ellen Cusack, Comment, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173 (1993).

162. *See, e.g.*, Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 345 (Cal. 1979) (holding based on broad, affirmative constitutional language that the right to free speech applies in private shopping centers).

163. *See, e.g.*, Moore v. Ganim, 660 A.2d 742, 755–58 (Conn. 1995) (cataloging cases across the country that have refused to recognize a constitutional right to welfare); Graber, *supra* note 148, at 789–93 (same).

164. *See* Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1077–82 (1993) (citing the school financing cases as the largest example of this trend). Several state courts also have struck down abortion funding restrictions either on equal protection or due process grounds. *See, e.g.*, Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779, 798 (Cal. 1981) (substantive due process); Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387, 397 (Mass. 1981) (substantive due process); Right to Choose v. Byrne, 450 A.2d 925, 928 (N.J. 1982) (equal protection); Williams, *In the Supreme Court's Shadow*, *supra* note 136, at 364–65 (discussing cases). Also, at least two state courts have recognized a positive constitutional right to welfare. *See* Butte Community Union v. Harris, 712 P.2d 1309, 1313 (Mont. 1986) (applying heightened but not strict scrutiny to an equal protection claim against a state welfare program); Tucker v. Toia, 371 N.E.2d 449, 452 (N.Y. 1977) (recognizing an affirmative, substantive duty to

such holdings are warranted not only by the positive constitutional language, but also by the fact that state courts and constitutions are tied more closely to the electorate than their federal counterparts.[165]

Most of the cases dealing with positive rights have focused on the plaintiffs' access to the services or benefits in question. The abortion funding cases, for instance, have focused on state statutes that denied participants access to medical benefits.[166] Most welfare cases have focused on eligibility standards and whether different groups of recipients received equal treatment.[167] Similarly, states that recognized education as a fundamental right in early school financing cases have encountered later challenges over when schools can deny access to education programs by expelling students or restricting transportation.[168] In West Virginia,[169] for instance, the state's highest court has held that schools generally must provide free alternative

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provide assistance to the needy). Judicial recognition of positive rights, however, occasionally has proven so unpopular that states have amended their constitutions to negate the rulings. *See, e.g.*, *Butte*, 712 P.2d at 1313 (subjecting welfare services to heightened scrutiny); Graber, *supra* note 148, at 791 n.343 (describing a subsequent constitutional amendment designed to overturn *Butte*).

165. Specifically, state courts have a stronger tradition of generating law, more flexibility to adapt to local budgets and priorities, and stronger democratic credentials than federal courts because of explicit provisions authorizing judicial review, state judicial elections, and the relative ease of amending state constitutions. *See* Hershkoff, *supra* note 136, at 1155–69; Neuborne, *supra* note 161, at 896–900. State courts do, however, face concerns about separation of powers, particularly in decisions requiring expenditures by other branches. *See* Feldman, *supra* note 164, at 1060.

166. *See, e.g.*, *Committee to Defend Reproductive Rights*, 625 P.2d at 780; *Moe*, 417 N.E.2d at 390; *Right to Choose*, 450 A.2d at 927.

167. *See, e.g.*, Minino v. Perales, 589 N.E.2d 385, 386 (N.Y. 1992) (mem.) (exclusion of aliens); Lee v. Smith, 373 N.E.2d 247, 248 (N.Y. 1977) (program that provided less aid to the elderly, disabled, and blind than to other recipients); *Tucker*, 371 N.E.2d at 450 (rules forbidding aid to people under 21 except under narrow circumstances).

168. *See, e.g.*, Arcadia Unified Sch. Dist. v. State Dep't of Educ., 825 P.2d 438, 439 (Cal. 1992) (upholding a statute allowing fees to be charged for transportation); Kennedy v. Board of Educ., 337 S.E.2d 905, 907–08 (W. Va. 1985) (per curiam) (holding that denial of transportation to two students living on a road in poor condition violated equal protection because it kept them from exercising their fundamental right to education). The *Kennedy* case involved two students with physical handicaps who could not walk to a designated bus stop on a main road. *See id.* However, the court decided the case based on equal protection grounds without reference to federal special education laws. *See id.*

169. As discussed *supra* notes 70–74 and accompanying text, the West Virginia school financing decision *Pauley v. Kelly* held both that education was a fundamental right and that the state constitution required the provision of a high-quality education. 255 S.E.2d 859, 878 (1979). To date, however, the subsequent appellate cases have focused on fundamental rights analysis without involving quality claims. The Supreme Court has heard one case in which a suspended student received only four hours of alternative education per week, but it did not rule on the adequacy of the education because the plaintiff had not appealed a lower court ruling on the issue. *See* Cathe A. v. Doddridge County Bd. of Educ., 490 S.E.2d 340, 349 (W. Va. 1997).

education for students who are placed on long-term suspension for bringing weapons to school.[170] The court acknowledged that schools have a compelling interest in maintaining a safe environment for students, but held that long-term suspensions without alternative programs were not narrowly tailored to achieve such interests.[171]

Applying strict scrutiny to disciplinary measures could have serious consequences for public schools,[172] but the analysis used in such cases and in the welfare rights and abortion funding litigation still fits fairly well within the traditional federal framework.[173] The courts are still focusing on formal government actions that directly interfere with individuals' private activities—only in these cases, the private activities at issue happen to be attending classes, obtaining certain types of health care, or cashing government benefit checks rather than exercising traditional rights such as expressing political views or traveling across state lines.[174] Such fact patterns have not required the courts to determine what quality and quantity of services must be provided to satisfy the affirmative constitutional guarantees or to analyze government omissions and negligence—rather than

170. *See Cathe A.*, 490 S.E.2d at 349; Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 916 (W. Va. 1996); *see also* Magyar v. Tucson Unified Sch. Dist., 958 F. Supp. 1423, 1443 (D. Ariz. 1997) (holding that a school system must provide alternative education to an expelled child to avoid infringing upon his fundamental right to education under the Arizona Constitution as well as to satisfy federal special education laws). *See generally* Roni R. Reed, Note, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582 (1996) (arguing prior to the West Virginia and Arizona cases that strict scrutiny analysis would require schools to provide alternative programs for suspended and expelled students in states that have recognized education as a fundamental right).

171. *See Phillip Leon M.*, 484 S.E.2d at 914. In 1997, the court modified its ruling to allow schools to deny education temporarily in extreme circumstances upon a strong showing of necessity, such as where the safety of others is threatened. *See Cathe A.*, 490 S.E.2d at 350–51.

172. *See* Reed, *supra* note 170, at 582–83 (concluding that strict scrutiny analysis would require schools to provide alternative education for all suspended and expelled students). This prospect has convinced at least one state court to narrow the scope of its school financing decision to avoid making education a fundamental right. In Massachusetts, the high court held in a 1993 school financing case that the state constitution imposed an enforceable duty on legislators and executive branch officials to provide education for all children enrolled in the public schools. *See* McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 548 (Mass. 1993). Two years later, the court held that student disciplinary procedures should be evaluated under a rational relation test, declining to declare education a fundamental right for fear that school officials would have to pass strict-scrutiny analysis any time they suspended a student for safety reasons. *See* Doe v. Superintendent of Schs., 653 N.E.2d 1088, 1095–96 (Mass. 1995).

173. *See supra* notes 166–67 and accompanying text.

174. *See supra* notes 166–71 and accompanying text; *cf. supra* note 147 and accompanying text (discussing the federal view that constitutional rights are negative and only guarantee citizens freedom from government interference with certain activities).

deliberate state action—resulting in violations of the constitutional standards. The handful of cases focusing on these latter issues suggest that state courts are extremely uncomfortable with having to define the scope of constitutional duties to provide public services.

In the New York case *Bernstein v. Toia*,[175] for example, the plaintiffs challenged the sufficiency of state housing assistance just a few months after New York's highest court had held that the state constitution created "an affirmative duty to aid the needy."[176] The *Bernstein* court responded to the housing challenge by defining the right to public assistance in negative terms. The opinion held that the state constitution forbade the legislature from impermissibly excluding the needy from benefit programs, but refused to restrict the legislature's discretion in determining the amount of aid.[177] Concluding that the constitution did not require the state to meet "in full measure all the legitimate needs of each recipient," the court upheld the housing assistance program under a traditional rational relation analysis.[178] In effect, the New York court was able to make the problem go away by reverting to the traditional conception of negative rights.

A few isolated state court decisions have been more generous in construing the positive nature of the right to education and have required government officials to take affirmative action to protect that right. The California Supreme Court, for instance, held in *Butt v. State*[179] that state officials must take over a financially troubled school system in order to prevent infringements upon students' fundamental rights to education.[180] State officials argued that their constitutional duties ended once they delivered the district's share of money under California's equalized financing plan, which had been developed to meet the requirements of the state's earlier school financing cases.[181] Yet, although the district's $29.5 million deficit was not the state's fault, the court held that state officials were not released from their obligations because education is a fundamental right under the state

175. 373 N.E.2d 238 (N.Y. 1977).

176. Tucker v. Toia, 371 N.E.2d 449, 452 (N.Y. 1977).

177. *See Bernstein*, 373 N.E.2d at 244.

178. *Id.*; *see also* Hershkoff, *supra* note 136, at 1150–51 (noting a few lower court decisions that have examined the substantive adequacy of the benefit provided, but concluding that *Bernstein* is the dominant holding in New York case law).

179. 842 P.2d 1240 (Cal. 1992) (en banc).

180. *See id.* at 1251.

181. *See* Serrano v. Priest ("Serrano II"), 557 P.2d 929, 951 (Cal. 1976); Serrano v. Priest ("Serrano I"), 487 P.2d 1241, 1258 (Cal. 1971).

constitution.[182] When a local district's financial problems otherwise would deny students "basic educational equality," the court reasoned, the state is required to step in unless it can demonstrate a compelling reason for not doing so.[183]

In a 1996 case, *Sheff v. O'Neill*,[184] the Connecticut Supreme Court also concluded that state officials could be held liable for failure to act, holding that racial and ethnic isolation in Hartford's schools violated students' fundamental rights to education.[185] The defendants based their defense on traditional constitutional theory, arguing that there had been no state action because the demographic patterns at issue had been caused by housing and other societal factors beyond their control.[186] The Connecticut court rejected this argument, emphasizing its earlier school financing holding that the state constitution created an affirmative duty to provide students with a "substantially equal" educational opportunity.[187] It concluded that "if the legislature fails, for whatever reason, to take action to remedy substantial inequalities in the educational opportunities that such children are being afforded, its actions and its omissions constitute state action" that can be reviewed under equal protection analysis.[188] Ultimately, the court held for the plaintiffs under a modified strict scrutiny test,[189] relying in part on an unusually worded constitutional

182. *See Butt*, 842 P.2d at 1256.

183. *See id.* Although the California courts traditionally have relied on equality arguments in dealing with the right to education, at least one observer has suggested that *Butt* implicitly applied an adequacy standard because it required the state to give the district a disproportionate share of state funds to ensure that students' education would meet certain minimal expectations. *See* Enrich, *supra* note 10, at 114.

184. 678 A.2d 1267 (Conn. 1996).

185. *See id.* at 1270. In 1991–92, 92.4% of Hartford students were members of minority groups, compared to 25.7% of Connecticut students as a whole. *See id.* at 1287. That year, 94% of Hartford sixth graders failed to meet state mathematics goals, 80% failed reading standards, and 97% failed writing goals. *See id.* at 1294 (Berdon, J., concurring).

186. *See id.* at 1276. Except for a brief period in 1868, the State of Connecticut had never deliberately assigned students to schools based on their race. The state had supported plans for increasing interdistrict diversity since the 1970s and had reorganized its state school board in the 1980s to focus "on the needs of urban school children and to promote diversity in public schools." *Id.* at 1274.

187. *Id.* at 1277 (citing Horton v. Meskill ("Horton I"), 376 A.2d 359, 375 (1977)).

188. *Id.*

189. The Connecticut court applied a strict scrutiny test to its original school financing case. *See Horton I*, 376 A.2d at 374. Eight years later, the court ostensibly upheld the "strict scrutiny" standard, but implemented a three-stage balancing test. *See* Horton v. Meskill ("Horton III"), 486 A.2d 1099, 1105–06 (Conn. 1985). Under the test, plaintiffs must prove that the disparities at issue are more than de minimis. The burden then shifts to the state to prove that the disparities were "incident to the advancement of a legitimate state policy." *Id.* at 1106. Even if the state meets this burden, however, it can lose if the disparities are then shown to be so great as to be unconstitutional despite the state's

provision stating that "[n]o person shall be ... subjected to segregation."[190]

While the Connecticut court's unusual anti-segregation provision and modified form of strict scrutiny analysis may make *Sheff*'s specific holding unique,[191] its discussion of the nature of the affirmative duty to educate has much broader implications. Both *Sheff* and *Butt* undercut the assumptions and distinctions that permeate traditional fundamental rights analysis, suggesting that positive fundamental rights do indeed obligate state governments to act affirmatively to ensure that individuals receive the services to which they are entitled.[192] Failure to perform these duties—or failure to perform them to the level needed to provide "substantially" or "basically" equal services to all recipients—can create a constitutional cause of action.[193] State governments may even have a duty to act to ensure that barriers not of their own making do not prevent citizens from receiving the services to which they have a fundamental right.[194]

Notwithstanding the broad language of these opinions, however, the cases were handed down in very narrow contexts. Unlike the West Virginia courts, which have applied strict scrutiny analysis to cases involving individual students who were denied educational services by local school officials,[195] *Sheff* and *Butt* both involved

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justifications. *See id.* The *Sheff* defendants lost in the last stage. 678 A.2d at 1288–89.

190. CONN. CONST. art. I, § 20 ("[N]o person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."). Only New Jersey and Hawaii have similarly worded provisions, and the court found no case law in either state discussing whether the provisions required states to prevent de facto segregation. *See Sheff*, 678 A.2d at 1281–82 & n.29 (quoting HAW. CONST. art. I, § 9; N.J. CONST. art. I, para. 5).

191. *See, e.g.*, Kevin Randall McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867, 1896–1902 (1998) (portraying *Sheff* as a fourth wave of financing reform, but suggesting that it has inherent limitations because of the unique constitutional wording, its focus on non-financial issues, and concerns about the courts' legitimacy and institutional capacity to handle such claims).

192. *Compare supra* notes 147–51 and accompanying text (discussing federal cases concluding that constitutional rights are negative and do not entitle citizens to government assistance in exercising those rights), *with supra* notes 179–90 (discussing cases requiring state governments to act affirmatively to ensure students receive an equal education).

193. Though neither state explicitly had recognized a quality standard in their school financing decisions, the combination of a positive right and equal protection analysis still led the courts to conclude that the education in the challenged districts had become too disparate to pass constitutional muster. *See* Butt v. State, 842 P.2d 1240, 1256 (Cal. 1992); *Sheff*, 678 A.2d at 1289.

194. *See Butt*, 842 P.2d at 1253; *Sheff*, 678 A.2d at 1280.

195. *See supra* notes 169–71 and accompanying text.

lawsuits against state officials over large-scale problems affecting an entire school district.[196] Neither the Connecticut nor California courts appear to have enforced these broad affirmative rights theories in cases brought by individual students.[197] Thus, while these decisions have taken the first tentative steps toward outlining the scope of positive fundamental rights, they do not provide a systematic framework for evaluating individual claims by students against local educators.

3. Tying It All Together: The Right to an Adequate Education

States that have recognized a constitutional right to an *adequate* education in school financing cases[198] have set themselves apart even from California, Connecticut, and other states that have declared

196. *See Butt*, 842 P.2d at 1243; *Sheff*, 678 A.2d at 1270.

197. For example, the Connecticut Supreme Court in 1984 rejected a claim by a student whose excessive absences prompted school officials to reduce his grades to the point that he failed three classes. *See* Campbell v. Board of Educ., 475 A.2d 289, 291 (Conn. 1984). The court held that the school board policy was neither disciplinary nor an infringement upon equal education opportunity and did not jeopardize the student's fundamental rights. *See id.* at 295–96. The Connecticut Supreme Court also has rejected a claim that state statutes governing special education gave talented and gifted students a constitutional right to individualized educational programs. *See* Broadley v. Board of Educ. of Meriden, 639 A.2d 502, 504–05 (Conn. 1994); Roseann G. Padula, Comment, *The Plight of Connecticut's Brightest Students:* Broadley v. Meriden Board of Education, 29 CONN. L. REV. 1319, 1350–52 (1997) (suggesting that Connecticut courts are reluctant to apply their version of strict scrutiny to intradistrict claims and claims by plaintiffs who are not low-level achievers). The California courts also have been wary of extending strict scrutiny analysis in the school context. *See, e.g.*, Steffes v. California Interscholastic Fed'n, 222 Cal. Rptr. 355, 361 (Cal. Ct. App. 1986) (holding that the fundamental right to education does not include the right to participate in interscholastic athletics).

198. *See, e.g.*, Alabama Coalition for Equity, Inc. v. Hunt, No. CV-90-883-R (Ala. Cir. Ct. 1993), *reprinted in* Opinion of the Justices No. 338, 624 So. 2d 107, 159 (Ala. 1993) (holding that Alabama schools must provide "substantially equitable and adequate educational opportunities"); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 211 (Ky. 1989) (holding that the Kentucky Constitution requires that each child be provided an equal opportunity to obtain an adequate education); McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993) (holding that the quality of education in poor school districts did not meet constitutional standards); Claremont Sch. Dist. v. Governor ("Claremont II") 703 A.2d 1353, 1359 (N.H. 1997) (holding that an adequate public education is a fundamental right); Board of Educ. v. Nyquist, 439 N.E.2d 359, 368–69 (N.Y. 1982) (holding that the New York Constitution requires the provision of a "sound basic education"); Leandro v. State, 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997) (holding that a "sound basic education" is a fundamental right); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94–95 (Wash. 1978) (holding that the Washington Constitution requires the provision of a "basic" education); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979) (holding that the West Virginia Constitution requires "high quality" educational standards); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1263–64 (Wyo. 1995) (holding that the constitutional right to receive a "quality" education is judicially enforceable); *supra* notes 15, 91 (discussing these and other adequacy cases).

education to be a fundamental right.[199] The adequacy precedents have held that states have a constitutional obligation to provide a service and that the service provided must meet a certain substantive level of quality. Because educational quality depends not just on school financing, but also on curricula, teaching skills, and general policies, courts may be asked to extend substantive due process and equal protection analyses far beyond existing case law focusing on formal government actions that deny students access to educational programs.[200] The unique nature of the right to an adequate education, however, makes it difficult to apply the traditional rational relation and strict scrutiny tests to constitutional claims. Under either test, school officials likely would have little problem proving that their "ends" are either "legitimate" or "compelling" because the school financing precedents already have established that districts have an affirmative constitutional duty to provide educational services.[201] Traditional formulations of the "means" analyses, however, would be problematic in adjudicating education cases.

The rational relation test most likely would be applied in states that have recognized a constitutional, but not fundamental, right to an adequate education. The traditional rationality standard would require that educators' actions be a rational or reasonable means of providing educational services or achieving other legitimate government interests.[202] Courts often accept any plausible explanation for state action under this test,[203] upholding actions that

199. *See supra* Part III.A.2.

200. *See Claremont II*, 703 A.2d at 1359 (stating that any government action or inaction leading to a failure to provide students with an adequate education should be strictly scrutinized by the courts); *cf. Butt*, 842 P.2d at 1256 (analyzing a violation of the right to education caused by a state omission in the face of local mismanagement); *Sheff*, 678 A.2d at 1276–77 (analyzing a violation of the right to education caused by a government omission in the face of societal factors); *supra* Part III.A.2 (discussing cases involving the denial of access to education programs).

201. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., concurring) (stating that states have a compelling government interest in providing education); Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 914 (W. Va. 1996) (deriving a compelling government interest to provide safe schools from a constitutional provision requiring a "thorough and efficient" system of education); Gottlieb, *supra* note 144, at 939 (suggesting that federal and state governments may have a compelling interest in protecting constitutional rights); *supra* note 198 (listing adequacy precedents).

202. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7 (1981) (declaring that the courts will assume under the rational relation standard that the specified objectives of a statute are the actual purposes unless the circumstances show that those objectives could not have been one of the legislature's goals); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 178 (1980) (indicating that the courts will accept any plausible reason for legislative action under the rational relation standard).

203. *See, e.g., Clover Leaf Creamery Co.*, 449 U.S. at 463 n.7.

are "at least debatable."[204] Alternately, under the federal courts' test for cases involving the provision of professional services, courts would intervene only if an educator's action violated professional norms to such an extent that it indicated the educator had not used professional judgment.[205] Extreme judicial deference, however, seems inconsistent with the original school financing cases, in which the courts conducted independent examinations of educational quality and even developed their own substantive standards.[206] The traditional rational relation test also appears at odds with the fact that providing adequate educational services is not merely a legitimate exercise of the political branches' power, but is actually a constitutional mandate under the school financing precedents.[207]

Yet while the traditional rational relation test would provide too little relief, the traditional strict scrutiny test would provide too much. In addition to requiring courts to conduct an independent evaluation of state actions rather than to defer to the judgment of the other branches,[208] the traditional standard would require educators to show that their actions were narrowly tailored to provide an adequate education or to meet some other compelling government interest.[209] Defining narrowly tailored means in the education context likely would be difficult for the courts,[210] but the traditional test would

204. United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938).

205. *See* Youngberg v. Romeo, 457 U.S. 307, 316–17 (1982); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985); *supra* note 146 (discussing federal cases involving the provision of professional services to university students and prisoners).

206. *See supra* Part I.B.

207. *See supra* notes 198–200 and accompanying text (discussing adequacy cases and the nature of states' obligations under the holdings); *see also* Hershkoff, *supra* note 136, at 1138 ("[P]ositive rights not only restrain the government's exercise of power, but also compel its exercise ... to carry out a specific constitutional purpose. Judicial review ... must serve to ensure that the government is ... moving policy closer to the constitutionally prescribed end."). Professor Hershkoff, in an article focusing on state welfare rights, suggests that government officials should bear the burden in positive rights cases to show that their "means" are likely to achieve the constitutional goal at issue. *See* Hershkoff, *supra* note 136, at 1137. She argues that this standard is justified by the nature of positive constitutional rights, by the fact that state judges are more accountable to the electorate than their federal counterparts, by the fact that state constitutions are easily amended, and by the lack of federalism concerns in state courts. *See id.* at 1155–69.

208. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 630–32 (1969); NOWAK & ROTUNDA, *supra* note 135, § 14.3.

209. *See Shapiro*, 394 U.S. at 630–32; Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 914 (W. Va. 1996) (recognizing a compelling government interest in providing safe schools, but requiring narrowly tailored disciplinary measures to minimize infringement upon students' fundamental rights to education).

210. *Cf.* Peter W. v. San Francisco United Sch. Dist., 131 Cal. Rptr. 854, 860 (Cal. Ct. App. 1976) (concluding under a reasonable person standard in an educational malpractice case that "classroom methodology affords no readily acceptable standards of care").

create even larger problems on a theoretical level. The justification for requiring state actors to use narrowly tailored means is to ensure that the government minimizes its intrusions on independently existing private rights.[211] If some other means would address the government's interests without burdening individuals' fundamental rights, the state actor must use that alternative.[212] In the education context, however, students' private rights can be exercised only through state action.[213] The question for the courts would be whether school officials have done enough to meet their obligation to provide an adequate education, not whether they could have chosen some other means of fulfilling their duty. It would make little sense to punish educators for making reasonable attempts to provide students with an adequate education simply because their methodology was not "narrowly tailored" to achieve that goal.[214] A similar concern would arise in applying the narrowly tailored means standard to define how far schools must go to overcome societal factors, student misconduct, and other problems that are not of the schools' making, but that may prevent students from receiving the educational services to which they are entitled.[215] Again, reasonable efforts to overcome such problems would fall short of the constitutional standard.[216]

In facing such a scenario, courts might be tempted to take the route outlined in *Bernstein v. Toia*[217] and avoid the problem by

211. *See, e.g.*, *Shapiro*, 394 U.S. at 629–30; Harper v. Virginia Bd. of Elections, 383 U.S. 663, 664–66 (1966); *supra* notes 144–47.

212. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 343 (1972) ("[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activities, a State may not choose the way of greater interference.").

213. *See, e.g.*, Neuborne, *supra* note 161, at 883 n.12 (describing the difference between negative and positive rights).

214. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37–39 (1973) (suggesting that the strict scrutiny test is not "sensitive" to the nature of "affirmative and reformatory" government services).

215. *See* Butt v. State, 842 P.2d 1240, 1251 (Cal. 1992) (requiring state officials to take affirmative action to overcome local school mismanagement); Sheff v. O'Neill, 678 A.2d 1267, 1270–71 (Conn. 1996) (requiring state officials to take affirmative action to overcome demographic patterns creating racially isolated schools); Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 916 (W. Va. 1996) (holding that schools must provide educational services even when students have been suspended for misconduct); *supra* Part III.A.2 (discussing these cases).

216. *See supra* notes 207, 212.

217. 373 N.E.2d 238 (N.Y. 1977). As discussed *supra* in the text accompanying notes 175–78, the *Bernstein* court cast a previously recognized affirmative constitutional duty to aid the needy as a traditional, negative right. The court held that the constitutional duty did not restrict the legislature's discretion in determining the amount of aid, but instead only forbid the legislature from impermissibly excluding the needy from state programs. *See Bernstein*, 373 N.E.2d at 244.

recasting the right to an adequate education in more traditional, negative terms. In Mississippi, which is one of only two states to recognize a right to adequate education in a case that did not focus on school financing,[218] a supreme court justice has begun to advocate for such an interpretation.[219] Justice Michael P. Mills argues that the right to educate oneself is inherent, but that the right to receive a free public education from the state is of a lesser quality.[220] He concludes that the right to public education can be used as a "shield" to prevent government interference, but not as a positive right to force the government to teach.[221]

Justice Mills's argument may make sense in the Mississippi context because that state's cases have focused on when the government may interfere with students' education by suspending them from school.[222] The theory appears seriously at odds, however, with the school financing cases recognizing a cause of action for failure to provide an adequate education.[223] In effect, these cases already have recognized an affirmative duty on the part of state officials to provide for public schools and have used language that describes students' rights as entitling them not to a certain level of

218. *See* Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985); *see also* Exira Community Sch. Dist. v. State, 512 N.W.2d 787, 789, 796 (Iowa 1994) (recognizing a right to adequate education in a case challenging Iowa's open enrollment law, which allows families to enroll their children in schools outside the districts in which they live). *Byrd*, which involved a due process challenge to a student suspension, was particularly unusual because it recognized a fundamental right to an adequate education based on statutory rather than constitutional grounds. 477 So. 2d at 240. The opinion did not apply a strict scrutiny analysis, however. *See id.* at 241 (requiring that school punishments further substantial legitimate interests); *see also In re* T.H., 681 So. 2d 110, 115–16 (Miss. 1996) (same). The odd posture of the case may have been due to the fact that the Mississippi Constitution had been modified in 1960 in an attempt to avoid desegregation by making the establishment of public schools a discretionary function of the state legislature rather than a "duty." *See* Michael P. Mills & William Quin II, *Perspective: The Right to a 'Minimally Adequate Education' as Guaranteed by the Mississippi Constitution*, 61 ALB. L. REV. 1521, 1526–27 (1998). In 1987, the constitution was again amended to require that the legislature "shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe." MISS. CONST. art. 8, § 201. School financing commentators are divided over the meaning of the new language. *Compare* Thro, *supra* note 23, at 229 (arguing no constitutional right to education has been created), *with* McUsic, *supra* note 29, at 311 n.5 (interpreting the provision as creating an obligation), *and* Mills and Quin, *supra*, at 1527 n.35 (same).

219. *See* Mills & Quin, *supra* note 218, at 1527 n.35.

220. *See id.* at 1527–28.

221. *See id.* at 1527.

222. *See supra* note 218 and accompanying text.

223. *See supra* notes 91, 198.

funding but to a certain level of *substantive education*.[224] The school financing holdings establish that students' right to an adequate education can be denied not just when they are barred from educational programs, but also when ongoing services do not meet constitutional quality standards.[225] Thus, it would seem anomalous for these courts to reinterpret the right to an adequate education to bar future challenges to the quality of educational services.

If courts remain consistent to the school financing cases and recognize an affirmative duty to provide students with an adequate education, however, it is clear that using the traditional hierarchy of means-ends tests would be inappropriate. One option would be to adopt a general interest-balancing test that would weigh the interests of school officials against the interests of students to determine whether particular education programs or policies must be provided in order to meet constitutional adequacy standards.[226] Interest-

224. *See id.*; *see also* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989) (striking down not just Kentucky's school financing method, but its entire system of education as failing to meet constitutional adequacy standards).

225. *See supra* notes 168–71 (discussing educational access claims), 91, 198 (discussing adequacy precedents).

226. *Cf., e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987) (defining balancing tests as involving a head-to-head comparison between competing interests); Gottlieb, *supra* note 144, at 918 n.9 (defining balancing tests as "comparing the importance of constitutional requirements and governmental interests, perhaps discounted by the availability of alternative means").

Many commentators see the hierarchy of means-ends tests used in substantive due process and equal protection analysis as a form of interest balancing. *See, e.g.*, Stephen E. Gottlieb, *Introduction: Overriding Public Values*, *in* PUBLIC VALUES IN CONSTITUTIONAL LAW 1, 4 (Stephen E. Gottlieb ed., 1993) (describing strict scrutiny analysis as a "form of balancing with a rigorous burden of proof placed on the government"); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 805–10 (1995) (discussing heightened and strict scrutiny analyses as balancing tests). Others argue that the means-ends hierarchy was intended to limit or eliminate judicial balancing but has evolved to allow the courts to weigh the parties' interests. *See* Kathleen M. Sullivan, *Categorization, Balancing, and Government Interests*, *in* PUBLIC VALUES IN CONSTITUTIONAL LAW, *supra*, at 241, 242–43 (arguing that traditional strict scrutiny and rational relation analyses use balancing rhetoric, but are actually categorical approaches because the classification of the government interest is outcome determinative); *id.* at 243–46 (arguing that interest balancing occurs in intermediate scrutiny cases, strict scrutiny decisions upholding infringements upon fundamental rights, and rational relation analyses striking down government actions); Aleinikoff, *supra*, at 969–71 (analyzing the adoption of intermediate scrutiny in rights cases as a step toward an "overall balancing approach"). The two analyses clearly overlap, but some balancing cases focus exclusively on the parties' interests without conducting a separate analysis of the government's means of achieving its goals. They simply weigh the parties' interests against each other and hold that the most important interest wins. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 763–64 (1982) (upholding a child pornography criminal statute because the State's interests in restricting pornographic activities "overwhelmingly outweighs" any expressive interests involved in

balancing tests have become increasingly common in constitutional analyses—particularly at the federal level—and are often appealing to courts because they facilitate consideration of all litigants' interests and allow a case-by-case analysis of new doctrinal developments.[227] However, the tests also have come under considerable criticism as being driven by judges' subjective preferences and for failing to provide clear constitutional doctrines.[228]

Another alternative would be to modify the traditional substantive due process and equal protection analyses to make them more sensitive to the nature of positive constitutional rights. By combining the independent review performed under the strict scrutiny test[229] with the reasonable or rational means standard,[230] an "affirmative rational relation test" would avoid many of the pitfalls of the traditional strict scrutiny and rational relations analyses. The test would acknowledge the constitutional status and positive nature of education rights and provide some level of meaningful relief because courts would be required to make an independent determination of whether school officials' actions were a reasonable means of fulfilling their constitutional duty to provide an adequate education.[231] However, the test would avoid holding schools liable for providing services that are reasonably, but not narrowly, tailored to provide an adequate education. It would also provide a more workable standard

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such activities); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (holding that the State must either show that its actions did not deny the free exercise of religion or that it had a sufficient interest in compulsory education to outweigh the religious interests of Amish families in having their children stop attending public schools in the eighth grade); Aleinikoff, *supra*, at 946 (noting that some balancing test cases are determined simply by which party's interest outweighs the other, while other cases attempt to give both parties' interests their due). In contrast, many cases decided under means-ends tests have analyzed governmental means in great detail without examining proffered governmental interests. *See, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 306–19 (1997) (suggesting that the federal courts have relied heavily on means analyses to strike down government actions in the last 25 years and arguing that balancing is often present but unstated in such cases).

227. *See* Aleinikoff, *supra* note 226, at 960–61 (discussing the advantages of balancing tests). For a discussion of the spread of interest-balancing tests at the federal level, see *id.* at 965–68 (cataloging federal First Amendment, Fourth Amendment, procedural due process, and dormant Commerce Clause jurisprudence).

228. *See, e.g.*, *id.* at 972–95 (cataloging criticisms of interest-balancing tests). *But see* Gottlieb, *supra* note 144, at 973–74 (acknowledging that balancing is "impossible to define" but arguing that alternative forms of analysis use similar methods).

229. *See supra* note 208 and accompanying text.

230. *See supra* note 202 and accompanying text.

231. *Cf.* Hershkoff, *supra* note 136, at 1137 (arguing that state courts should determine whether the state action at issue is likely to achieve the goal of the constitutional provision).

for determining how far school officials must go to overcome barriers to education that they have not created, requiring them simply to take reasonable steps to ensure that budget shortfalls, employee and student misconduct, and societal factors do not prevent students from receiving an adequate education.

B. *Constitutional Torts Claims*

The second option for parents seeking redress against inadequate schools would be to bring a lawsuit based directly on their state constitution's education article rather than on substantive due process or equal protection theories.[232] So-called "constitutional tort" claims are private causes of action brought against government employees for constitutional violations.[233] These claims were rare until the 1960s, but have become more popular in recent decades because they often allow plaintiffs to recover monetary damages in addition to or in lieu of injunctions and other traditional constitutional remedies.[234]

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232. *See supra* notes 15 (listing cases acknowledging substantive education requirements), 47 (listing constitutional education provisions for all 50 states); *see also supra* Part III.A. (discussing traditional substantive due process and equal protection litigation options).

233. *See* Gail Donoghue & Jonathan I. Edelstein, *Life After* Brown: *The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447, 447 (1998). The term "constitutional tort" first appeared in the 1960s. Professor Marshall S. Shapo coined the phrase in discussing civil actions brought under 42 U.S.C. § 1983, which allows plaintiffs to recover damages for violations of their federal constitutional rights by state or local government officials. *See* 42 U.S.C. § 1983 (Supp. III 1997); Donoghue & Edelstein, *supra*, at 450 n.10; Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 277 (1965). The term has since been used to refer both to § 1983 actions and to causes of action implied directly from state and federal constitutional provisions. *See, e.g.*, Monell v. Department of Soc. Servs., 436 U.S. 658, 691 (1978) (referring to a § 1983 claim); Bagg v. University of Tex. Med. Branch, 726 S.W.2d 582, 584 n.1 (Tex. Ct. App. 1987) (referring to a claim brought directly under that state's constitution).

234. *See* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES §§ 7-1 to -2 (2d ed. 1995 & Cum. Supp. 1998) (calling civil actions the "[m]issing [r]emedial [l]ink" in state constitutional law). Most constitutional tort claims are brought under 42 U.S.C. § 1983, which was passed as part of the 1871 Civil Rights Act, but remained largely unused for its first 90 years. *See* Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (Supp. III 1997)); Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 5 (1980). *See generally* Susan Bandes, Monell, Parratt, Daniels, *and* Davidson: *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101 (1986) (discussing United States Supreme Court cases attempting to redefine the difference between constitutional torts and state common law claims); William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 526–27 (1989) (discussing the distinction between constitutional and common law torts). The number of constitutional

Although most constitutional tort litigation occurs at the federal level,[235] at least twenty states have recognized constitutional causes of action for damages,[236] and courts in another five have indicated that

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tort claims began to skyrocket after the United States Supreme Court held in *Monroe v. Pape* that plaintiffs could bring § 1983 claims even when states provided adequate common law remedies. 365 U.S. 167, 184 (1961), *overruled on other grounds by* Monell v. Department of Soc. Servs., 436 U.S. 658, 659 (1978); *see also* Whitman, *supra*, at 6 (reporting that petitions rose from a few hundred in 1961 to almost 25,000 in 1979). Because the Burger and Rehnquist Courts created new procedural and substantive obstacles to § 1983 cases, the focus has begun to shift to state courts. *See* FRIESEN, *supra*, § 7-2.

235. *See supra* note 234.

236. Eight states have passed statutes that either create direct causes of action or that remove sovereign immunity as a bar to such claims. *See* ARK. CODE. ANN. § 16-123-105 (Michie Supp. 1999) (echoing 42 U.S.C. § 1983); CAL. CIV. CODE § 52.1 (West Supp. 1999) (allowing claims when threats, intimidation, or coercion infringe upon constitutional rights); ME. REV. STAT. ANN. tit. 5, § 4681 (West Supp. 1998) (using language similar to the California statute); MASS. GEN. LAWS ANN. ch. 12 §§ 11H–11I (West 1988) (same); NEB. REV. STAT. § 20-148 (1997) (allowing claims against individuals and corporations, but not political subdivisions); N.M. STAT. ANN. §§ 41-4-4 to -12 (Michie 1996) (removing immunity for violations by law enforcement officers); S.C. CODE ANN. § 16-5-60 (Law Co-op. 1985) (allowing claims against counties); TEX. CIV. PRAC. & REM. CODE ANN. §§ 104.001–.002 (West 1988) (allowing state indemnification for violations by public officials under certain circumstances).

Courts in at least 12 other states have recognized such claims on their own authority. *See* Bull v. Armstrong, 48 So. 2d 467, 470 (Ala. 1950) (search and seizure); Binette v. Sabo, 710 A.2d 688, 689 (Conn. 1998) (search and seizure); Walinski v. Morrison & Morrison, 377 N.E.2d 242, 245 (Ill. Ct. App. 1978) (right to be free from gender discrimination); Moresi v. State, 567 So. 2d 1081, 1093 (La. 1990) (privacy and search and seizure); Widgeon v. Eastern Shore Hosp. Ctr., 479 A.2d 921, 930 (Md. 1984) (due process and search and seizure); Smith v. Department of Pub. Health, 410 N.W.2d 749, 751 (Mich. 1987) (mem.) (stating generally that damages claims should be allowed in appropriate cases); Burdette v. State, 421 N.W.2d 185, 186–87 (Mich. Ct. App. 1988) (due process); Mayes v. Till, 266 So. 2d 578, 580–81 (Miss. 1972) (search and seizure); Lloyd v. Stone Harbor, 432 A.2d 572, 580 (N.J. 1981) (right to be free from employment discrimination); Independent Dairy Workers Union v. Milk Drivers & Dairy Employees Local No. 680, 152 A.2d 331, 336 (N.J. 1959) (stating generally that damages are an appropriate remedy for violations of a constitutional provision on collective bargaining); Brown v. State, 674 N.E.2d 1129, 1137–39 (N.Y. 1996) (equal protection and search and seizure); Corum v. University of N.C., 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992) (free speech); Bott v. DeLand, 922 P.2d 732, 739 (Utah 1996) (freedom from unnecessarily rigorous treatment by prison officials); Old Tuckaway Assocs. v. City of Greenfield, 509 N.W.2d 323, 328 n.4 (Wis. Ct. App. 1993) (due process). Federal courts have interpreted two other state constitutions as supporting damages claims for rights violations. *See* Jones v. Rhode Island, 724 F. Supp. 25, 30 (D.R.I. 1989) (due process under the Rhode Island Constitution); Barlow v. AVCO Corp., 527 F. Supp. 269, 273 (E.D. Va. 1981) (right to be free from gender discrimination under the Virginia Constitution).

In addition, California courts have recognized constitutional claims for damages independently of that state's civil rights statute. *See, e.g.*, Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592, 602 (Cal. 1979) (equal protection). The Massachusetts courts have indicated that they might do the same. *See* Phillips v. Youth Dev. Prog., 459 N.E.2d 453, 457 (Mass. 1983) ("We would grant, however, that a person

they would or might recognize such claims under certain circumstances.[237] Only four states appear to have categorically rejected constitutional torts.[238]

Predicting the outcome of a constitutional tort claim based on the right to an adequate education is difficult because analyses differ widely from jurisdiction to jurisdiction. Even among states that have recognized such claims, courts generally examine each constitutional provision separately to determine whether it supports a direct cause of action and whether damages are an appropriate remedy for violations.[239] To make matters more confusing, courts often blur the

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whose constitutional rights have been interfered with may be entitled to judicial relief even in the absence of a statute providing a procedural vehicle for obtaining relief."). Texas courts, however, have held that plaintiffs may bring suits only for injunctive relief in the absence of statutory authority to seek damages for constitutional violations. *See* Beaumont v. Bouillion, 896 S.W.2d 143, 149–50 (Tex. 1995).

237. *See* Dick Fischer Dev. No. 2, Inc. v. Department of Admin., 838 P.2d 263, 268 (Alaska 1992) ("[W]e will not allow a claim for damages except in cases of flagrant constitutional violations where little or no alternative remedies are available."); Board of County Comm'rs v. Sundheim, 926 P.2d 545, 553 (Colo. 1996) (en banc) ("[I]t may be appropriate to recognize an implied state constitutional cause of action where there is no other adequate remedy . . . ."); Marquay v. Eno, 662 A.2d 272, 282 (N.H. 1995) ("Where no established remedy exists or the established remedies would be meaningless . . . we will not hesitate to exercise our authority to create an appropriate remedy."); Provens v. Stark County Bd. of Mental Retardation & Developmental Disabilities, 594 N.E.2d 959, 961–62 (Ohio 1992) ("Even though this court is empowered to grant relief . . . by creating a new remedy, we shall refrain from doing so where other statutory provisions and administrative procedures provide meaningful remedies."); Shields v. Gerhart, 658 A.2d 924, 934 (Vt. 1995) ("We agree that it may be appropriate to imply a monetary damages remedy to enforce constitutional rights where the Legislature has fashioned no other adequate remedial scheme.").

238. *See* State Bd. of Educ. v. Drury, 437 S.E.2d 290, 293 (Ga. 1993) (holding that the state had waived its sovereign immunity on constitutional issues only as to declaratory judgments, not damages claims); Hunter v. City of Eugene, 787 P.2d 881, 884 (Or. 1990) (holding that constitutional rights plaintiffs are limited to existing common law, equitable, and statutory remedies unless the legislature acts to create a private right of action for damages); Lee v. Ladd, 834 S.W.2d 323, 325 (Tenn. Ct. App. 1992) (finding no authority to imply a private cause of action for damages); Systems Amusement, Inc. v. State, 500 P.2d 1253, 1254–55 (Wash. Ct. App. 1972) (holding that the state's due process clause does not provide authority to create a new cause of action for damages). The supreme courts of Hawaii and North Dakota have faced only constitutional torts claims brought against state agencies, rather than individual government employees; both courts rejected the claims on sovereign immunity grounds. *See* Figueroa v. State, 604 P.2d 1198, 1206–07 (Haw. 1980) (holding that the state had not waived its sovereign immunity); Kristensen v. Strinden, 343 N.W.2d 67, 74–75 (N.D. 1983) (holding that the state legislature had not consented to suit). *But see* Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632, 633 (N.D. 1994) (abolishing sovereign immunity 10 years after the *Kristensen* decision).

239. *Compare* Fenton v. Groveland Community Servs. Dist., 185 Cal. Rptr. 758, 762–64 (Cal. Ct. App. 1982) (recognizing a damages claim based on the right to vote), *with* Bonner v. City of Santa Ana, 53 Cal. Rptr. 2d 671, 678 (Cal. Ct. App. 1996) (declining to recognize claims for due process and equal protection). *Compare also* Binette v. Sabo, 710

distinction between right and remedy, so that they bar constitutional tort claims entirely where damages are inappropriate.[240] This Section outlines the most common models of analysis used by state courts, concluding that education claims are more likely to succeed in states that do not follow federal constitutional precedents.[241]

1. The Federal Model: *Bivens*

Much as with substantive due process and equal protection theories, many state courts and plaintiffs look to the example set by the United States Supreme Court in discussing constitutional tort claims.[242] The Court first recognized a direct cause of action under

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A.2d 688, 693–700 (Conn. 1998) (recognizing a damages claim based on Connecticut's provisions against unlawful search and seizure), *with* Kelley Property Dev., Inc. v. Town of Lebanon, 627 A.2d 909, 919–24 (Conn. 1993) (declining to recognize a due process claim).

240. *See, e.g.*, *infra* notes 254–55. Sovereign immunity also has limited constitutional tort litigation in many states. *See generally* FRIESEN, *supra* note 234, §§ 8-1 to -8 (discussing government immunity); T. Hunter Jefferson, Note, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions Against State Governments*, 50 VAND. L. REV. 1525, 1541–43 (1997) (same). While some state courts have held that sovereign immunity is a bar to constitutional tort claims, *see, e.g.*, *Drury*, 437 S.E.2d at 293 (basing its decision on Georgia constitutional provisions regarding sovereign immunity), others have reached the opposite conclusion, *see, e.g.*, *Brown*, 674 N.E.2d at 1137 (holding that the New York immunity statute exempts constitutional violations); *Corum*, 330 N.C. at 785–86, 413 S.E.2d at 291–92 (holding that a common law sovereign immunity doctrine does not apply to constitutional violations). Even when sovereign immunity does not apply, however, the doctrine of qualified immunity based on a defendant's good faith may be available. *See, e.g.*, *Moresi*, 567 So. 2d at 1093. *But see* Clea v. Mayor of Baltimore, 541 A.2d 1303, 1312–13 (Md. 1988) (holding that public officials are not entitled to qualified immunity for constitutional violations, but that punitive damages cannot be recovered in the absence of actual malice).

241. In addition to the two analyses outlined in the text, courts frequently look to framers' intent in deciding whether to recognize a cause of action. *See, e.g.*, *Jones*, 724 F. Supp. at 34–35; Gates v. Superior Court, 38 Cal. Rptr. 2d 489, 512–14 (Cal. Ct. App. 1995); *Binette*, 710 A.2d at 693; *Walinski*, 377 N.E.2d at 244–45; *Beaumont*, 896 S.W.2d at 148. A few courts also have cited to the *Restatement (Second) of Torts*, which includes a comment in its section dealing with implied statutory causes of action indicating that the same analysis can apply to constitutional provisions. *See* 4 RESTATEMENT (SECOND) TORTS § 874A & cmt. a (1979) (stating that when a provision is silent as to remedies, a court may recognize a right of action if the court concludes that the remedy is appropriate in furtherance of the provision's purpose, the remedy is needed to assure the effectiveness of the provision, and the plaintiff is a member of the class that the provision was intended to protect); *see also Binette*, 710 A.2d at 693 (citing section 874A cmt. a); *Shields*, 658 A.2d at 932 (same). Some courts also have relied upon the existence of similar common law causes of action prior to the ratification of state constitutional provisions and the fact that English common law allowed actions for trespass to redress violations of rights protected by the Magna Carta and similar fundamental documents. *See Moresi*, 567 So. 2d at 1092; *Widgeon*, 479 A.2d at 923–24.

242. *See, e.g.*, King v. Alaska State Housing Auth., 633 P.2d 256, 259–61 (Alaska 1981) (analyzing damages claim under the framework established in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)); *Sundheim*, 926 P.2d at

the Constitution in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[243] which involved a Fourth Amendment challenge by a plaintiff who claimed that federal agents had used unreasonable force in conducting a warrantless search of his apartment and arresting him in front of his family.[244] The Court reasoned that a claim must exist directly under the Constitution because citizens often have no other legal means of protecting their homes from invasion by government officials.[245] Because states cannot limit the exercise of federal authority, the Court held, an independent claim under the Federal Constitution was "both necessary and sufficient to make out the plaintiff's cause of action."[246]

The Court then went on to address the question of damages. Although the Fourth Amendment does not explicitly authorize a claim for damages, *Bivens* noted that "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty" and that federal courts generally " 'may use any available remedy to make good the wrong done.' "[247] Nevertheless, the Court indicated that it would reject damages claims in cases where there were "special factors counselling hesitation in the absence of affirmative action by Congress" or when Congress had declared explicitly that plaintiffs should be remitted to another, equally effective remedy instead of damages suits.[248] In his concurrence, Justice Harlan observed that the judiciary has a special responsibility

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550–53 (analyzing a Colorado claim using federal framework); *Binette*, 710 A.2d at 690–700 (recognizing a Connecticut claim based on the policy reasons in *Bivens*); Smith v. Department of Pub. Health, 410 N.W.2d 749, 781–87 (Mich. 1987) (Brickley, J. concurring) (mem.) (discussing federal case law at length before analyzing a Michigan claim); *Provens*, 594 N.E.2d at 962–66 (following federal precedent in handling an Ohio claim); Old Tuckaway Assocs. Ltd. Partnership v. Greenfield, 509 N.W.2d 323, 328 n.4 (Wis. Ct. App. 1993) (concluding that damages claims under the Wisconsin Constitution are a "logical extension" of *Bivens*).

243. 403 U.S. 388 (1971).

244. *See id.* at 389. Bivens could not sue the defendants under § 1983 because it applies only to constitutional deprivations under color of state law. *See* 42 U.S.C. § 1983 (Supp. III 1997).

245. *See Bivens*, 403 U.S. at 394–95.

246. *Id.* at 395.

247. *Id.* at 395, 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)); *accord* Moresi v. State, 567 So. 2d 1081, 1093 (La. 1990) ("Historically, damages have been regarded as the appropriate remedy for an invasion of a person's interest in liberty or property.").

248. *Bivens*, 403 U.S. at 396; *cf.* Jones v. Rhode Island, 724 F. Supp. 25, 34–35 (D.R.I. 1989) (noting that the Rhode Island legislature had not prohibited constitutional torts and that there were no special factors counseling hesitation in the case); Binette v. Sabo, 710 A.2d 688, 697–98 (Conn. 1998) (noting that the Connecticut legislature had neither prohibited constitutional torts based on illegal searches and seizures nor created a remedy for such violations).

to protect constitutional interests in the Bill of Rights.[249] Yet, because traditional constitutional remedies are not effective in all situations, he wrote, for some plaintiffs "it is damages or nothing."[250]

In the thirty years since *Bivens*, the Court has recognized damages claims for unreasonable search and seizure, cruel and unusual punishment, and equal protection by way of the Fifth Amendment,[251] while rejecting claims in cases involving free speech and due process.[252] Over time, the Court's analysis appears to have collapsed the two sections of the *Bivens* opinion, so that it now analyzes whether to recognize a direct cause of action for damages rather than looking separately at whether there is a direct cause of action and whether damages are an appropriate remedy.[253] Thus, if the Court has found that there are "special factors counselling hesitation," it has barred plaintiffs not just from damages remedies but from bringing lawsuits at all.[254] At the same time, the Court has expanded its list of "special factors" by giving greater deference to the legislative branch in determining what remedy to afford victims of constitutional rights violations. Although the original *Bivens* analysis looked for explicit declarations by Congress that it had created an "equally effective" alternative remedy,[255] the Court subsequently has

249. *See Bivens*, 403 U.S. at 407 (Harlan, J., concurring).

250. *Id.* at 410 (Harlan, J., concurring). Bivens alleged that federal narcotics agents entered his apartment without a warrant, threatened to arrest his entire family, took him to a federal courthouse, and strip-searched him. *See id.* at 389; *id.* at 410 (Harlan, J., concurring) (noting that injunctive relief is rarely available in such situations and that the exclusionary rule would not help Bivens if he was innocent of the crime charged).

251. *See* Carlson v. Green, 446 U.S. 14, 24 (1980) (cruel and unusual punishment); Davis v. Passman, 442 U.S. 228, 231, 234–35 (1979) (equal protection principles by way of the Fifth Amendment); *Bivens*, 403 U.S. at 395–97 (search and seizure).

252. *See, e.g.*, Schweiker v. Chilicky, 487 U.S. 412, 429 (1988) (due process); United States v. Stanley, 483 U.S. 669, 683–84 (1987) (due process); Bush v. Lucas, 462 U.S. 367, 388–89 (1983) (free speech).

253. *Compare, e.g.*, *Bivens*, 403 U.S. at 394–97 (analyzing separately whether a direct cause of action exists under the Fourth Amendment and whether damages can be awarded in the absence of "special factors counselling hesitation"), *with Stanley*, 483 U.S. at 678 (stating that *Bivens* suggested that inferring a direct cause of action for damages from the Constitution "might not be appropriate when there are 'special factors counselling hesitation in the absence of affirmative action by Congress' " (quoting *Bivens*, 403 U.S. at 396)).

254. *See, e.g.*, Chappell v. Wallace, 462 U.S. 296, 297, 301–05 (1983) (barring a Fifth Amendment claim by military personnel seeking not just damages, but also declaratory judgment and injunctive relief, on the grounds that it would interfere with Congress's system for regulating military life).

255. 403 U.S. at 397; *accord Carlson*, 446 U.S. at 19–23 (noting that Congress had not declared the Federal Tort Claims Act to be an equivalent remedy and concluding that an FTCA claim is not equivalent to a constitutional tort cause of action because the Act does not allow punitive damages or jury trials, has less of a deterrent effect, and denies relief

relaxed this requirement.[256] The Court has also deferred to Congress in areas of special constitutional authority and lawmaking activity.[257] In rejecting damages claims, the Court has also emphasized the effect that allowing direct causes of action for damages would have on discipline and morale in particular settings, specifically the military.[258]

Although some state courts have recognized constitutional tort claims under a *Bivens* analysis,[259] many have followed the Court's recent example by deferring to existing remedies even when they are not equivalent to constitutional torts[260] and by deferring to the legislative branch in areas in which it is particularly active or has specific constitutional authority.[261] State courts have also identified

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where state law would not permit a cause of action).

256. *See, e.g., Chilicky*, 487 U.S. at 429 (deferring to existing remedies because "[w]hether or not we believe that [Congress's] response was the best response, Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program"); *Bush*, 462 U.S. at 388 (stating that the decision to recognize constitutional torts cannot be made "simply by noting that existing remedies do not provide complete relief").

257. *See, e.g., Chilicky*, 487 U.S. at 429 (barring a claim involving Social Security benefits because Congress is charged with designing social welfare programs); *Bush*, 462 U.S. at 380–89 (barring a claim involving "federal personnel policy" because Congress has more expertise in determining remedies); *Chappell*, 462 U.S. at 301–05 (barring a claim by military personnel because the Constitution assigns Congress special responsibilities regarding the armed forces and because Congress is active in setting rules for the military). For criticisms of the Court's growing deference to the legislative branch, see, for example, Susan Bandes, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995); George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the* Bivens *Dissenters Prevailed?*, 64 IND. L.J. 263 (1989); Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117 (1989).

258. *See, e.g., Stanley*, 483 U.S. at 683.

259. *See, e.g.*, Binette v. Sabo, 710 A.2d 688, 690 (Conn. 1998) (recognizing a claim based on a warrantless search); Old Tuckaway Assocs. v. City of Greenfield, 509 N.W.2d 323, 328–29 n.4 (Wis. Ct. App. 1993) (holding that a trial court had not erred in allowing plaintiffs to bring a damages claim based on state due process rights).

260. *See* Bonner v. City of Santa Anna, 53 Cal. Rptr. 2d 671, 678, (Cal. Ct. App. 1996) (rejecting a constitutional claim when a common law tort could provide relief but no punitive damages); Board of County Comm'rs v. Sundheim, 926 P.2d 545 (Colo. 1996) (en banc) (concluding that judicial review of administrative decisions and claims under 42 U.S.C. § 1983 provided an adequate remedy); Provens v. Stark County Bd. of Mental Retardation & Developmental Disabilities, 594 N.E.2d 959, 965 (Ohio 1992) (barring a claim because administrative appeals and arbitration could provide some relief). *But see* Widgeon v. Eastern Shore Hosp. Ctr., 479 A.2d 921, 928–29 (Md. 1984) ("[T]he existence of other available remedies, or a lack thereof, is not a persuasive basis for resolution of the issue before us.").

261. *See* Kelley Property Dev., Inc. v. Town of Lebanon, 627 A.2d 909, 924 (Conn. 1993) (barring a constitutional tort claim and deferring to town government in the handling of political disputes about zoning issues); Smith v. Department of Pub. Health, 410 N.W.2d 749, 789 (Mich. 1987) (Brickley, J., concurring) (suggesting that a cause of action should be barred because a subsequent constitutional amendment assigned responsibility for the provisions at issue to the legislature); *Provens*, 594 N.E.2d at 965

additional "special factors counselling hesitation," including the risk of creating a flood of litigation, incurring significant costs to government defendants, and burdening the court system.[262]

Under the *Bivens* framework as it has been developed by federal and state courts, there appear to be two significant barriers to constitutional torts based on the right to an adequate education. The first is the nature of the right itself. Constitutional tort cases to date have focused on traditional negative liberties based in state and federal bills of rights.[263] The right to an adequate education, in contrast, is based in separate education articles and is positive in nature.[264] While some state courts have declared broadly that damages claims are appropriate to protect affirmative and fundamental constitutional rights,[265] others have been reluctant to recognize claims for "amorphous" rights such as equal protection and due process because of uncertainty about the implications.[266] Thus, despite the affirmative nature of the right to an adequate education[267] and the school financing precedents declaring the right to be

(deferring to the legislative process for providing remedies to public employees).

262. *See* King v. Alaska State Hous. Auth., 633 P.2d 256, 260–01 (Alaska 1981) (declining to recognize a constitutional tort claim because doing so would "subject public agencies to endless lawsuits by disappointed bidders" on public projects); *Kelley Property Dev., Inc.*, 627 A.2d at 924 (barring a constitutional tort claim because the potential for monetary awards "would encourage its pursuit by any disappointed zoning applicant whenever a zoning agency denies the sought after permit or application").

263. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) (suggesting that interests in the Bill of Rights are the most worthy of protection through causes of action for damages); *supra* notes 236 and 242 (listing cases that have recognized state constitutional tort claims for various types of rights). Claims based on unconstitutional searches and seizures and on cruel and unusual punishments appear to be particularly successful. *See supra* notes 236 and 242.

264. *See supra* notes 15, 47, 198–200 and accompanying text.

265. *See, e.g.*, Moresi v. Department of Wildlife and Fisheries, 567 So. 2d 1081, 1092 (La. 1990) (emphasizing the affirmative nature of Louisiana's right to privacy); Cooper v. Nutley Sun Printing Co., 175 A.2d 639, 643 (N.J. 1961) (concluding that New Jersey residents' right to collective bargaining "should be accorded the same stature as other fundamental rights" and enforced through a direct cause of action); *cf.* Jones v. Memorial Hosp. Sys., 746 S.W.2d 891, 893 (Tex. Ct. App. 1988) (recognizing a cause of action for equitable relief because the Texas Constitution contains a positive guarantee of free expression rather than simply a negative restriction on government interference).

266. *See* Bonner v. City of Santa Ana, 53 Cal. Rptr. 2d 671, 678 (Cal. Ct. App. 1996) (suggesting that a common law tort provides a better remedy than a claim under the "relatively amorphous" state due process clause); *Smith*, 410 N.W.2d at 788 (Brickley, J., concurring) (suggesting that equal protection rights may not be appropriate for damages claims); 77th District Judge v. State, 438 N.W.2d 333, 340 (Mich. Ct. App. 1989) (holding that damages are an inappropriate remedy for a "broad and amorphous" concept such as equal protection).

267. *See supra* notes 15, 198–200 and accompanying text.

fundamental in some states,[268] there is support in some jurisdictions for acting cautiously when rights are not clearly defined.[269]

The second, more obvious barrier is the case law barring constitutional tort claims when there are "special factors counselling hesitation."[270] Like many of the topics addressed in "special factors" cases, education is an area in which legislatures are particularly active and often have special constitutional authority.[271] Public schools also have unique discipline and morale issues, raising concerns that litigation would disrupt student-teacher relations.[272] Finally, courts have worried since the first educational malpractice cases in the 1970s that awarding damages for adequacy claims could produce a flood of lawsuits that would strain the judicial system and school budgets.[273]

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268. *See supra* note 91 and accompanying text.

269. *See, e.g.*, *Bonner*, 53 Cal. Rptr. 2d at 678; *Smith*, 410 N.W.2d at 788 (Brickley, J., concurring); *supra* note 266 and accompanying text (discussing amorphous rights).

270. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

271. *See* Hubsch, *supra* note 29, at 1329 (reporting that all but eight state constitutions appear to grant the legislature plenary power over education); *supra* note 5 (discussing legislative reforms to increase public school accountability); *cf.* Schweiker v. Chilicky, 487 U.S. 412, 429 (1988) (deferring to existing remedies because Congress is charged with designing social welfare programs); Bush v. Lucas, 462 U.S. 367, 380–89 (1983) (deferring to Congressional expertise over "federal personnel policy"); Chappell v. Wallace, 462 U.S. 296, 301–05 (1983) (noting Congress's constitutional duties regarding the military in declining to recognize a claim from enlisted military personnel); *supra* note 260 (discussing similar state cases).

272. *See, e.g.*, Duross v. Freeman, No. 04-91-00333-CV, 1992 Tex. App. LEXIS 1608, at *5 (Tex. Ct. App. June 17, 1992) (Peebles, J., concurring) (arguing that allowing lawsuits against local schools would undermine the authority of all educators); John Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 NW. U. L. REV. 641, 648 (1978) (discussing the argument that the adversarial nature of litigation would disrupt the collaborative educational process); Funston, *supra* note 131, at 804–06 (discussing the risk that educational lawsuits will lead to "defensive education" practices and will discourage experimentation in education); *cf.* United States v. Stanley, 483 U.S. 669, 683 (1987) (concluding that the "mere process of arriving at correct conclusions would disrupt the military regime"); *Chappell*, 462 U.S. at 304 (concluding that the "special nature of military life" would be undermined if officers were personally liable to the people they command).

273. *See, e.g.*, Ross v. Creighton Univ., 740 F. Supp. 1319, 1329 (N.D. Ill. 1990) (predicting that "the courts could be deluged and schools shut down" if students were allowed to bring damages claims against any school or school employee), *aff'd in part, rev'd in part on other grounds*, 957 F.2d 410 (7th Cir. 1992); Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976) (predicting that the financial burden on schools and society from individual damages claims would be "beyond calculation"); *cf.* King v. Alaska State Hous. Auth., 633 P.2d 256, 260–61 (Alaska 1981) (declining to recognize a constitutional tort claim for fear that public agencies would be subjected "to endless lawsuits by disappointed bidders"); Kelley Property Dev., Inc. v. Town of Lebanon, 627 A.2d 909, 924 (Conn. 1993) (declining to recognize a constitutional tort because doing so would encourage disappointed zoning applicants to file suit). *But*

Consequently, plaintiffs would probably be unable to convince courts to grant them relief under the modern *Bivens* analysis.

2. The Two-Pronged Approach

The second commonly used analysis for constitutional torts deals with many of the same issues that arise under *Bivens*, but more clearly distinguishes between right and remedy.[274] The first prong of this analysis determines whether the constitutional provision is "self-executing" and therefore will support a direct cause of action. The second prong determines whether damages are an appropriate remedy for violations of the constitutional right at issue.[275] Because the two questions are distinct, therefore, courts using this form of analysis are more likely to recognize constitutional tort claims for violations of the right to an adequate education even if they decide that damages are an inappropriate remedy for such claims.

a. Self-Executing Provisions

The analysis of whether constitutional and treaty provisions are "self-executing" dates back to the early days of the United States.[276] Definitions of what makes a provision self-executing are often vague,[277] but courts generally look at whether a particular provision

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see Elson, *supra* note 272, at 762 (noting a number of advantages to monetary damages over affirmative relief, including the fact that plaintiffs can choose their own remedial services and that damages require less judicial entanglement in daily school operations).

274. *See* Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 355 (1993) (stating that the *Bivens* doctrine presupposed the existence of an enforceable right, while courts that engage in self-execution analysis do not make such a presupposition).

275. *See, e.g.*, Rockhouse Mountain Property Owners Ass'n v. Town of Conway, 503 A.2d 1385, 1388 (N.H. 1986) (describing and applying a two-step process); Brown v. State, 674 N.E.2d 1129, 1137–38 (N.Y. 1996) (same); Corum v. University of N.C., 330 N.C. 761, 782, 413 S.E.2d 276, 289–90 (1992) (noting that a constitutional provision is self-executing and discussing criteria to determine what remedy is appropriate without specifically identifying a two-step analysis); Bott v. DeLand, 922 P.2d 732, 737–40 (Utah 1996) (describing and applying a two-step analysis); Shields v. Gerhart, 658 A.2d 924, 927–34 (Vt. 1995) (same).

276. *See* Fernandez, *supra* note 274, at 335–39 (describing cases from the 1790s through the late 1800s at the state and federal level). In constitutional law, much recent commentary on this subject has focused on state environmental provisions. *See, e.g.*, *id.*; Cusack, *supra* note 161, *passim*.

277. *See* John M. Baker, *The Minnesota Constitution as a Sword: The Evolving Private Cause of Action*, 20 WM. MITCHELL L. REV. 313, 322 (1994) ("[T]he 'tests' for self-executing provisions are frequently difficult to apply and are somewhat circular."); Donoghue & Edelstein, *supra* note 233, at 471 & n.120 ("[A]n exact definition of self-execution has proved elusive.").

provides sufficient detail to be judicially enforceable.[278] While state acts that violate a constitutional provision will be struck down as void, not all provisions in themselves create a direct cause of action.[279] Provisions in bills of rights generally are considered self-executing,[280] but courts have held other constitutional sections to be non-self-executing when they contain only general statements of principles[281] or when they require the legislative branch to define the right in further detail or provide for enforcement through ancillary legislation.[282]

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278. *See* BLACK'S LAW DICTIONARY 1360 (6th ed. 1990) (defining "self-executing constitutional provisions" as "provisions which are immediately effective without the necessity of ancillary legislation"); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 167 (Walter Carrington ed., 8th ed. 1927) ("A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced."); *see also* Davis v. Burke, 179 U.S. 399, 403 (1900) (quoting Cooley); FRIESEN, *supra* note 234, § 7-5 ("[T]his argument truly concerns whether a clause is *judicially* enforceable at all . . . ."); Donoghue & Edelstein, *supra* note 233, at 471 & n.120 ("[T]he term 'self-executing' is essentially another means of stating that a provision is enforceable."); Fernandez, *supra* note 274, at 333 ("For a constitutional provision to be self-executing, the provision must provide the court with a complete and enforceable rule."); Richard A. Goldberg & Robert F. Williams, *Farmworkers' Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 RUTGERS L.J. 729, 734 (1987) ("This standard of construction obviously refers to *judicial* enforcement. The question of whether a state constitutional provision is self-executing is, therefore, made by the courts based on their assessment of the manageability of enforcing the right at issue."); *see also* Part IV (discussing concerns about the manageability of educational adequacy claims).

279. *See, e.g.*, Leger v. Stockton Unified Sch. Dist., 249 Cal. Rptr. 688, 690–91 (Cal. Ct. App. 1988) (noting that state agencies are prohibited from taking official actions that contravene constitutional provisions, but that provisions can be mandatory without being self-executing); Beaumont v. Bouillion, 896 S.W.2d 143, 148–49 (Tex. 1995) (noting that the Texas Bill of Rights provides that anything done in violation of a provision is void, but does not authorize damages for such violations); COOLEY, *supra* note 278, at 166 n.2; Donoghue & Edelstein, *supra* note 233, at 473–75 (noting that all constitutional provisions are prohibitory because they limit certain government actions, but do not necessarily support an action for damages).

280. *See, e.g.*, Robb v. Shockoe Slip Found., 324 S.E.2d 674, 674 (Va. 1985); Donoghue & Edelstein, *supra* note 233, at 472.

281. *See, e.g.*, Shields v. Gerhart, 658 A.2d 924, 928–30 (Vt. 1995) (recognizing a constitutional tort based on the right to free speech, but declining to recognize one based on a provision guaranteeing an inalienable right to pursue and obtain happiness and safety); FRIESEN, *supra* note 234, § 7-5(a) (discussing state constitutional provisions that echo the Declaration of Independence as important for determining framers' intent but as problematic as a source of discrete, judicially enforceable rights).

282. *See, e.g.*, *Leger*, 249 Cal. Rptr. at 688 (declining to recognize a constitutional tort based on a provision guaranteeing safe schools because it declares a general right without specifying any rules for enforcement); State v. Rodrigues, 629 P.2d 1111, 1113–14 (Haw. 1981) (holding that a constitutional provision creating the position of independent grand

State courts initially presumed that most constitutional provisions would require enabling legislation, but that presumption has been reversed in modern times as state constitutions have been amended to grant rights and impose specific duties on government officials.[283] Despite the new presumption, however, some courts and commentators continue to use language from older versions of the self-execution test, suggesting categorically that provisions assigning responsibility for a topic to the legislature cannot be enforced by the judiciary.[284] This use of the old language is seldom problematic when dealing with provisions in states' bills of rights because of the way traditional negative liberties are phrased, but it raises significant issues in dealing with claims based on the right to an adequate education.

The problem is that all but a handful of state constitutions assign primary responsibility for education to the legislative branch.[285] Thus, if courts in these jurisdictions mechanically apply the older versions of the self-executing test,[286] they would conclude that the right to an adequate education is not self-executing because education is

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jury counsel is not self-executing in part because it fails to specify appointment procedures and other details); COOLEY, *supra* note 278, at 165, 168–69 (discussing constitutional provisions dealing with the incorporation of cities and other topics that do not provide "proper machinery" for enforcement without more specific legislation); Fernandez, *supra* note 270, at 338 n.23 (suggesting that the United States Supreme Court held that a particular provision was not self-executing because it would have needed the power to appropriate funds and enforce rules to implement the provision).

283. *Compare* AM. JUR. 2D *Constitutional Law* § 142 (1993) (listing cases recognizing the new presumption and arguing that to hold otherwise would give legislatures "the power to ignore and practically nullify the directions of the fundamental law"), Donoghue & Edelstein, *supra* note 233, at 476 n.143 (discussing New York cases creating a presumption that twentieth-century constitutional provisions are self-executing), *and* Fernandez, *supra* note 274, at 339–41 (suggesting that continuing the original presumption would have discounted the people's authority to limit their grant of power to the legislature through the constitutional amendment process), *with* COOLEY, *supra* note 278, at 165 (stating that constitutional provisions may be mandatory in their nature to the legislature to enact related legislation, yet may provide no authority to enforce the command).

284. *See Leger*, 249 Cal. Rptr. at 691 (stating that self-executing provisions must have " 'no language indicating that the subject is referred to the Legislature for action' " (quoting Taylor v. Madigan, 126 Cal. Rptr. 376, 381 (Cal. Ct. App. 1975))); *Shields*, 658 A.2d at 928 ("Ordinarily a self-executing provision does not contain a directive to the legislature for further action."); FRIESEN, *supra* note 234, § 7-5(a) (contrasting self-executing clauses with those "that are merely precatory or that contemplate further action by the legislature"); Donoghue & Edelstein, *supra* note 233, at 476–77 & n.145 (discussing Vermont and New York decisions focusing on whether the constitutional provisions at issue contain directives to the legislature).

285. *See* Hubsch, *supra* note 29, at 1329 (reporting that 42 state constitutions appear to grant the legislature plenary power over education).

286. *See supra* note 280–82.

assigned to state legislatures. It is difficult to reconcile such a conclusion, however, with the school financing cases holding that the right to an adequate education is judicially enforceable.[287] Although the adequacy precedents did not use a formal "self-executing" analysis, they weighed concerns about judicially manageable standards and separation of powers in holding that students have an enforceable right to education under their states' constitutions.[288] Those precedents should be determinative in deciding whether state education clauses are self-executing.

b. Damages as Appropriate Relief

In moving to the second prong of the two-step analysis, state courts have used a variety of criteria to determine whether damages are appropriate relief for self-executing clauses.[289] Much like the courts that engage in "special factors" *Bivens* analyses,[290] their remedy decisions often depend on the availability of existing remedies[291] and concern over the impact that damages claims would have on other branches of government.[292] As discussed earlier, educational malpractice precedents have raised concerns that damages claims would have a severely negative impact on both the schools and the courts.[293] Educational malpractice cases also have

287. *See supra* note 15. Such a result would not be inconsistent in states that have not recognized a right to education in school financing cases, however. *See, e.g.*, Agostine v. School Dist., 527 A.2d 193, 195 (Pa. Commw. 1987) (holding in a special education claim that the state constitution did not confer an individual right on each student to a particular level or quality of education); *see also* Marrero v. Commonwealth, 739 A.2d 110 (Pa. 1999) (holding that students had not presented a cause of action in a school financing case); Danson v. Casey, 399 A.2d 360, 365 (Pa. 1979) (same).

288. *See supra* Part I.

289. At least one state court has indicated that all self-executing provisions are enforceable by a claim for damages, but this is a minority rule. *See* Bott v. DeLand, 922 P.2d 732 (Utah 1996); FRIESEN, *supra* note 234, § 7.5(a) (noting cases suggesting that meeting the self-executing test is sufficient to entitle plaintiffs to a claim for damages, but concluding that it does not necessarily follow that a court must provide monetary relief).

290. *See supra* notes 256–57.

291. *See, e.g.*, Marquay v. Eno, 662 A.2d 272, 282 (N.H. 1995) (concluding that existing common law remedies were adequate, even though they were not as complete as a constitutional tort claim); Rousselo v. Starling, 128 N.C. App. 439, 449, 495 S.E.2d 725, 732 (barring a constitutional tort claim when a common law remedy was available but would require additional elements of proof), *disc. rev. denied*, 348 N.C. 74, 505 S.E.2d 876 (1998); Shields v. Gerhart, 658 A.2d 924, 934 (Vt. 1995) (indicating that the court would normally defer to legislative remedies even if they are not as effective as constitutional tort claims).

292. *See, e.g.*, Corum v. University of N.C., 330 N.C. 761, 784, 413 S.E.2d 276, 291 (1992) (instructing the lower court to choose a remedy that would minimize the intrusion on the political branches); *Shields*, 658 A.2d at 936 (declining to recognize a constitutional tort for fear that it would "eviscerate" the legislature's scheme for licensing child cares).

293. *See supra* notes 273.

suggested that damages are an inappropriate remedy because they are not a substitute for an education and are inherently speculative in nature.[294] Given these concerns, plaintiffs probably will have a difficult time at this stage of the analysis even if they convince courts that their states' education articles are self-executing.

Yet while chances appear slim that state courts would allow damages as a remedy for violations of the right to an adequate education, this fact does not necessarily preclude the recognition of a cause of action directly under state constitutions' education provisions.[295] Many court decisions recognizing constitutional tort claims have hinged upon the inadequacy or non-existence of other remedies.[296] These decisions provide a strong argument in the education context because existing remedies are particularly poor. Although a few educational malpractice cases have pointed to non-judicial avenues for parents to seek relief,[297] the malpractice cases

294. *See* D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 628 P.2d 554, 556–57 (Alaska 1981) (suggesting corrective tutorial programs are more appropriate than money damages); Hunter v. Board of Educ., 439 A.2d 582, 585 (Md. 1982) (concluding that "an award of money damages ... represents a singularly inappropriate remedy for asserted errors in the educational process"); Eschweiler, *supra* note 131, at 110 (noting that lost opportunity costs would vary widely depending on whether a student would have obtained a minimum wage job or become a professional if she had received an adequate education).

295. The Texas courts, for instance, have recognized a direct cause of action for equitable relief of violations of the right to free speech, *see* Jones v. Memorial Hospital, Sys., 746 S.W.2d 891, 893–94 (Tex. App. 1988), but have barred claims seeking damages for such violations, *see* Beaumont v. Bouillion, 896 S.W.2d 143, 149–50 (Tex. 1995) (distinguishing between claims for injunctive and monetary relief).

296. *See, e.g.*, Barlow v. AVCO Corp., 527 F. Supp. 269, 272–73 (E.D. Va. 1981) ("There is no Virginia statute which gives the citizens of Virginia the protection that [this anti-discrimination] clause of the Constitution provides. Therefore, it would have been senseless to include it in the Constitution unless a private right of action was also available."); Smith v. Department of Pub. Health, 410 N.W.2d 749, 796 (Mich. 1987) (Boyle, J., concurring in part and dissenting in part) ("[T]here are circumstances in which a constitutional right can only be vindicated by a damage remedy and where the right itself calls out for such a remedy."); *Marquay*, 662 A.2d at 282 ("Where no established remedy exists or the established remedies would be meaningless, however, we will not hesitate to exercise our authority to create an appropriate remedy."); Cooper v. Nutley Sun Printing Co., 175 A.2d 639, 643 (N.J. 1961) (recognizing a direct cause of action because to hold otherwise "would be to say that our Constitution embodies rights in a vacuum, existing only on paper"); *Corum*, 330 N.C. at 782, 413 S.E.2d at 289 ("[When neither the state constitution nor statutes afford] an adequate remedy under a particular fact situation, the common law will furnish the appropriate action .... A direct action against the State for its violations of free speech is essential to the preservation of free speech."); *id.* at 783, 413 S.E.2d at 290 ("It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State."); Bott v. DeLand, 922 P.2d 732, 739 (Utah 1996) (recognizing a claim for damages for unnecessarily vigorous treatment by prison officials because injunctive relief might not be adequate to remedy prisoners' injuries).

297. *See D.S.W.*, 628 P.2d at 557 (discussing recourse for parents of special education

themselves establish generally that no judicial remedies are available to children who receive an inadequate education from public schools.[298] Given this lack of remedy and the positive nature of the right to an adequate education,[299] plaintiffs have a strong argument that the fact that damages are not appropriate for education claims should not preclude them from bringing claims seeking other types of judicial relief.[300] Part IV discusses what types of remedies might be most appropriate and addresses other litigation issues that are likely to arise in adjudicating individual adequacy claims.

IV. ARE ADEQUACY CLAIMS JUDICIALLY MANAGEABLE?

Adapting traditional constitutional theories to fit the right to an adequate education is only one of the challenges that state courts would face in adjudicating students' claims against local schools. As state courts recognized when they encountered educational malpractice cases in the 1970s and 1980s, adequacy claims raise difficult issues regarding educational standards, injury, causation, and remedy in addition to fears of a flood of litigation.[301] Although the

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students); *Hunter*, 439 A.2d at 585–86 (listing grievance procedures for special education students as well as for general complaints about public schools); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1355 (N.Y. 1979) (noting that families could appeal to New York's Commissioner of Education for assistance with education problems); Funston, *supra* note 131, at 799–801 (suggesting that accountability programs developed by legislators, state administrators, and local officials are sufficient to address the concerns raised by educational malpractice claims).

298. *See supra* notes 4, 6, 8 and accompanying text. The situation is somewhat different in cases involving claims based on a failure to diagnose and place special education students in appropriate settings because federal laws have created an extensive system of administrative and judicial remedies, including restitution for certain educational expenses but not damages claims. *See, e.g.*, Hall v. Vance County Bd. of Educ., 774 F.2d 629, 633 n.3 (4th Cir. 1985); Sellers v. School Bd. of Manassas, 960 F. Supp. 1006, 1009–10 (E.D. Va. 1997). State laws also provide extensive rules and remedies. *See supra* note 295.

299. *See supra* notes 198–200.

300. *See* Ratner, *supra* note 59, at 810–11 (arguing that equitable remedies would be more effective in the public school context and less of a threat to the public treasury).

301. *See, e.g.*, Ross v. Creighton Univ., 740 F. Supp. 1319, 1329 (N.D. Ill. 1990) (predicting a deluge of litigation if families are allowed to seek damages for an inadequate education), *aff'd in part, rev'd in part on other grounds*, 957 F.2d 410 (7th Cir. 1992); Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 860 (Cal. Ct. App. 1976) (finding no readily acceptable standards of care, cause, or injury in the education context); *Donohue*, 391 N.E.2d at 1355 (Wachtler, J., concurring) (noting causation issues arising from the fact that a student's home environment, self-motivation, and personality play an "immeasurable role" in academic learning). For detailed discussions of educational malpractice litigation, see generally JOHN COLLIS, EDUCATIONAL MALPRACTICE: LIABILITY OF EDUCATORS, SCHOOL ADMINISTRATORS, AND SCHOOL OFFICIALS (1990); SHARON L. LOCKHART, EDUCATIONAL MALPRACTICE: A PATHFINDER (1995); YUDOF ET AL., *supra* note 23, at 458–67.

educational malpractice courts avoided these problems by holding that educators owed no duty to their pupils,[302] state courts may have little choice but to confront these issues now that the school financing cases have held that state government is constitutionally required to provide an education that meets substantive quality standards.[303]

This Part suggests a framework for analyzing adequacy claims and identifies several ways in which state courts could make litigation more manageable without barring all constitutional claims. While difficult issues would have to be worked out along the way, state courts are in a significantly better position to adjudicate adequacy claims than they were twenty-five years ago.

A. Analyzing Educational Adequacy

If courts recognize a cause of action for violations of the right to an adequate education outside the school financing context, the central focus of individual lawsuits would be to determine whether plaintiffs have received educational services that do not meet constitutional standards. The educational malpractice courts began their analysis of educational adequacy by trying to determine whether teachers' conduct met reasonable or professional standards,[304] but the school financing precedents start from a different point. Many of the latter cases define an adequate education primarily in terms of educational "outcomes"—what skills and knowledge students should gain from the education process—instead of relying exclusively on "inputs" such as classroom resources and curriculum.[305] Under such

302. *See supra* notes 3–8, 301 (citing educational malpractice cases).

303. *See supra* Part I.B (discussing the cases recognizing constitutional requirements of a substantive level of education).

304. *See, e.g., Peter W.*, 131 Cal. Rptr. at 860 ("Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury."). The court went on to note that educational experts disagree as to how and what to teach children and that "any layman might—and commonly does—have his own emphatic views on the subject." *Id.* at 860–61.

305. The original school financing cases focusing on equal protection and equity arguments placed heavy emphasis on educational inputs, but ran into conceptual difficulties because of research indicating that increased spending on education did not always have a significant impact on student achievement. *See supra* notes 53, 83–85 and accompanying text. The third wave of school financing cases focused on outcomes because that approach allowed them to sidestep the debate over spending levels and focus on the "fundamental" issue of student achievement. Enrich, *supra* note 10, at 152 (noting that attempts to redistribute resources or to change the quality of educational programs are of "questionable value" if they do not improve student achievement). As commentators have pointed out, the outcome approach also may have enhanced the legitimacy of the school financing decisions because the courts were able both to set broad standards for the public school system and to allow the political branches broad latitude in

precedents, therefore, courts would have to determine whether plaintiffs' skills and knowledge meet the constitutional standards in order to determine the larger question of whether school officials have failed in their duty to provide an adequate education.

1. Measuring Educational Outcomes

Evaluating students' academic skills is not easy for the judiciary, but state courts are in a far better position to do so than they were when the first educational malpractice cases were filed in the 1970s. Rather than having to develop ad hoc standards for student achievement, courts can start their analysis by looking to the definitions of adequacy provided in the school financing cases.[306]

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determining how to meet those goals. *See supra* notes 83–85 and accompanying text.

306. *See supra* notes 73, 79 and accompanying text (quoting and discussing the standards set forth in *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979), and *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)). Two states have adopted the *Rose* standards. *See* McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516 554 (Mass. 1993); Claremont Sch. Dist. v. Governor ("Claremont II"), 703 A.2d 1353, 1359 (N.H. 1997). Two others have developed similar lists of their own. An Alabama court, for instance, relied on existing state standards in finding that Alabama public schools were inadequate, but used its own standards in ordering relief that would provide students with

> (i) sufficient oral and written communication skills to function in Alabama, and at the national and international levels, in the coming years;
>
> (ii) sufficient mathematic and scientific skills to function in Alabama, and at the national and international levels, in the coming years;
>
> (iii) sufficient knowledge of economic, social, and political systems generally, and of the history, politics, and social structure of Alabama and the United States, specifically, to enable the student to make informed choices;
>
> (iv) sufficient understanding of governmental processes and of basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation;
>
> (v) sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being;
>
> (vi) sufficient understanding of the arts to enable each student to appreciate his or her cultural heritage and the cultural heritages of others;
>
> (vii) sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life work intelligently;
>
> (viii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market; and
>
> (ix) sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential.

Alabama Coalition for Equity, Inc. v. Hunt, No. CV-90-883-R (Ala. Cir. Ct. 1993), *reprinted in* Opinion of the Justices No. 338, 624 So. 2d 107, 166 (Ala. 1993).

Some of the standards—particularly those focusing on mental health, social ethics, cultural appreciation, and self worth[307]—are probably too difficult for the courts to apply and measure, but others could provide substantive guidance to judges in evaluating certain types of adequacy claims. For instance, standards requiring that schools prepare students to compete in the job market, to vote and perform other civic duties, and to seek higher education or advanced job training[308] could be applied to high school graduates to determine whether their skills and knowledge meet constitutional standards.[309]

Similarly, the North Carolina Supreme Court held that the sound basic education required by its state constitution will provide students with at least

> (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 with regard to issues that affect the student personally or affect the student's community, state, and nation; (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.

Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997).

Two other states have used more cautious wording in defining constitutionally required educational outcomes. The New York Court of Appeals has defined a "sound basic education" under its constitution as consisting of "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury" and of "minimally adequate" physical facilities, equipment, textbooks, and teaching. Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995). The South Carolina Supreme Court has defined a "minimally adequate education" under its constitution as providing students with "safe and adequate facilities" in which they have the opportunity to acquire communication skills, vocational training, an unspecified level of knowledge of science and mathematics, and a "fundamental" knowledge of economics, history, and government. Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999).

The other states that have recognized a right to a minimum quality of education have either adopted legislative and administrative standards to define that quality or have not provided a definition of adequacy. *See supra* notes 88–89 and accompanying text.

307. *See, e.g., Alabama Coalition for Equity, Inc.*, 624 So. 2d at 166 (requiring support and guidance to provide each student with "a sense of self-worth and ability to achieve" and to encourage them "to live up to his or her full human potential"); *Rose*, 790 S.W.2d at 212 (requiring "sufficient self-knowledge and knowledge of his or her mental and physical wellness"); *Pauley*, 255 S.E.2d at 877 (requiring the development of social ethics).

308. *See, e.g., Alabama Coalition for Equity, Inc.*, 624 So. 2d at 166 (requiring a system of education that will prepare students to compete in academics and the job market in Alabama, surrounding states, and beyond); *Rose*, 790 S.W.2d at 212 (requiring sufficient academic and vocational skills to "compete favorably" in Kentucky and surrounding states); *Campaign for Fiscal Equity, Inc.*, 655 N.E.2d at 666 (defining a sound basic education as equipping New York students to vote and serve on juries).

309. To borrow a common fact pattern from early educational malpractice cases, a

Other elements of the adequacy definitions could provide enforceable standards if they were supplemented with standards set by the political branches in recent education reform efforts.[310] For instance, requirements that students be taught sufficient reading and writing skills to function "in a complex and rapidly changing civilization"[311] or "at the national and international levels, in the

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court faced with a suit by a student who had graduated from high school despite reading at only an elementary-school level could look at the requirements for local entry-level jobs and for application to technical and higher education programs to determine whether the student's skills meet constitutional standards. *Compare, e.g., Peter W.*, 131 Cal. Rptr. at 856 (involving a student who graduated from a California high school despite reading at a fifth-grade level and complained that he could not compete in the job market), *and* Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1353 (N.Y. 1979) (involving a single plaintiff whose literacy skills were so low that he could not fill out job applications), *with Leandro*, 346 N.C. at 347, 488 S.E.2d at 255 (defining a sound basic education as one that prepares students to "compete on an equal basis with others in further formal education or gainful employment"). For district-wide claims, courts could look at how many graduates are required to take remedial courses upon entrance to college and at whether local employers will hire them. *See, e.g.*, Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J.L. REF. 559, 585–86 (1995) (discussing evidence presented in Alabama's school financing litigation about the high percentage of students required to take college remedial courses and about a corporation that refused to hire local graduates because of their poor skills).

Of course, applying such criteria to elementary school students would be highly problematic because they have not yet engaged in the adult activities identified in the adequacy definitions. One option would be simply to bar such claims and to define an adequate education solely in terms of the outcomes that should be achieved after twelve grades of public schooling. This approach would allow the courts to rely on the most concrete of the judicial adequacy criteria and would reduce the risk of a flood of litigation by limiting the pool of potential plaintiffs. Such a policy, however, would also deny relief to students in early grades when an intervention by the courts might do the most good. Education research shows that students who are several years behind their peers academically by the end of elementary school are far more likely to drop out in middle and high school. *See* Elson, *supra* note 272, at 753 (discussing the cumulative effect of early academic failures and the risk of creating self-fulfilling prophecies in the minds of students). Even if such students complete a high school program, it seems probable that they may require far more remedial services as 18-year-olds than they would have needed in order to catch up to their peers while still in elementary school. Thus, a twelve-year standard would raise both fairness and efficiency issues. For a discussion of a way to measure adequacy that would be more applicable to younger students, see *infra* notes 310–13 and accompanying text.

310. *See supra* note 5 (discussing complaints about American schools and a sharp rise in the number of states using standardized testing, school report cards, and teacher pay penalties in an effort to increase accountability). Other potential sources of supplementary standards include state accreditation standards, which tend to be quite low, and statutory lists of aspirational educational goals. *See* Dietz, *supra* note 23, at 1212.

311. *Rose*, 790 S.W.2d at 212. Although this standard is not as explicit as the ones focusing on students' preparation for the job market, *see supra* notes 308–09 and accompanying text, it too may be intended to measure students' skills at the end of a 12-year education. The Kentucky Supreme Court appears to have based its adequacy definition in *Rose* on national performance standards for high schools published in 1918.

coming years"[312] might be difficult for courts to apply to individual plaintiffs because the criteria are so broad. As discussed earlier, however, a number of states and national organizations have developed detailed grade-by-grade benchmarks for student achievement and standardized testing programs in an effort to hold schools more accountable for their pupils' progress.[313] Courts could use these standards and test results to help assess plaintiffs' academic progress, track their performance against other students, and determine whether the constitutional requirements have been satisfied.

This is not to say that standardized testing and accountability programs are a panacea. The extent of educational reforms varies widely from state to state.[314] Moreover, allowing students to sue any time they fail a state test would risk creating a flood of litigation[315]

See Patricia F. First & Louis F. Miron, *The Social Construction of Adequacy*, 20 J.L. & EDUC. 421, 437 (1991).

312. *Alabama Coalition for Equity, Inc.*, 624 So. 2d at 166.

313. *See supra* notes 5, 83–85. The reform efforts were spurred by the release of A NATION AT RISK, *supra* note 5, and a number of other reports in the early 1980s showing an increase in illiteracy, declining test scores, and other educational problems. *See* Liebman, *supra* note 131, at 371–74 (cataloging the 1980s reports and the reaction among law- and policy-makers). As of 1999, *Education Week* reported that 48 states tested their students, 40 have adopted standards in all core subjects, and 34 had gone beyond multiple-choice tests to include "performance questions" in their assessment programs. *See Quality Counts: State of the States*, *supra* note 5. Nevertheless, the report warned that some accountability programs were more advanced than others, with Texas and North Carolina having the most complete systems. *See id.* The federal government has also attempted to promote educational standards through its voluntary Goals 2000 initiative. *See* Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (codified as amended at 20 U.S.C. §§ 5801–6084 (1994 & Supp. III 1997)); Lisa Kelly, *Yearning for Lake Wobegon: The Quest for the Best Test at the Expense of the Best Education*, 7 S. CAL. INTERDISC. L.J. 41, 51–54 (1998) (discussing government spending under Goals 2000).

314. *See supra* note 313.

315. In many states, failure rates are 30% or higher. *See, e.g.*, Norman Draper, *Basic-Skills Test Results*, STAR TRIB. (Minneapolis, Minn.), Apr. 29, 1999, at A1 (reporting that 70% of Minnesota eighth-graders passed state math tests and 75% passed reading exams); Tim Simmons, *Scores Show Schools Making Grade*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 6, 1999, at A1 (reporting that 69% of students scored at grade-level on tests in reading and math, up from 53% six years ago); Brian Weber et al., *State Test Results Disappoint Rome, Educators Promise Action After Disappointing Results*, ROCKY MTN. NEWS (Denver, Colo.), Nov. 13, 1997, at. A4 (reporting that 57% of students passed statewide reading exams and 31% writing tests). Given that many states test students on multiple subjects every year, allowing a cause of action based on each exam could create thousands of claims per state. Moreover, given the delays of the litigation process, courts might not be able to adjudicate a claim and provide meaningful relief before the commencement of the next round of testing.

Courts have several means at their disposal to make the litigation load more manageable. One commentator, for instance, has argued that schools should be held liable only if more than 20% of their students in any grade from two to six fall at least one

and would raise serious legal[316] and policy[317] issues. Nevertheless,

year below their grade level on basic skills tests or if more than 10% of their students fall two years or more below grade level. *See* Ratner, *supra* note 59, at 859 (basing the standard on results from schools in New York, Houston, and Philadelphia that have proven most effective in educating large numbers of poor and minority students). While this standard assumes that lawsuits would be brought on a class action basis, courts could adopt a similar strategy in cases involving individual students by choosing a benchmark that would allow a claim to proceed only if the plaintiff is several years behind his peers academically. Another option that could be used alone or in conjunction with requiring a showing of substantial educational failure would be to assess the quality of education not on an annual basis, but rather at set intervals—such as in the fourth, eighth, and twelfth grades—or when a student moves from one level of education to another—such as from elementary to middle school. In addition to reducing the number of potential plaintiffs, such a system would also allow the courts to assess several years' worth of academic progress and to avoid making decisions based on a single test score. *See infra* note 316 (discussing testing accuracy issues). This option could also help to ensure that students are prepared before they move on to the next stage of the education process.

316. Concerns about standardized tests' statistical accuracy and cultural biases, for example, would complicate their use as evidence in a courtroom setting. For example, in North Carolina, school officials have based their state accountability program on end-of-grade tests that were developed originally to measure how well the state curriculum was delivered to large groups of students rather than to assess individual students. *See* Kelly Thompson & Susan Kauffman, *Educators Question Dependence on State Exams: Tests Virtually Dictate Decisions to Flunk*, NEWS & OBSERVER (Raleigh, N.C.), Jun. 25, 1995, at B1. As a result of their design, the tests have a relatively large margin of error. All students are ranked on a developmental scale ranging from 100 to 200 points, so that their scores rise about five points with each year of education. However, for a 95% confidence level on individual students' scores, the margin of error is four to six points—potentially an entire grade level. *See id.*; *see also* Arthur L. Coleman, *Excellence and Equity in Education: High Standards for High-Stakes Tests*, 6 VA. J. SOC. POL'Y & L. 81, 102–06, 108–09 & n.81 (1998) (discussing the importance of assessing standardized tests' validity and ensuring that tests are not used for purposes for which they were not designed); Kelly, *supra* note 313, at 43–46, 54–57 (discussing flaws in various types of standardized test formats and the tradeoffs that states have made between cost and accuracy in individual testing results); Liebman, *supra* note 131, at 374–77 (cataloging legal and policy objections to the increase in standardized testing nationwide); James P. Durling, Note, *Testing the Tests: The Due Process Implications of Minimum Competency Testing*, 59 N.Y.U. L. REV. 577, 616–17 (1984) (discussing the frequency of scoring, coding, and computer errors as well as structural flaws in standardized tests). *But see* Liebman, *supra* note 131, at 391 (arguing that school officials should not be able to raise testing accuracy concerns to the extent that legislators have validated those tests for measuring student performance).

317. Standardized testing critics argue it is only fair to hold school officials accountable by the same measures that they are using to determine graduation, state takeovers, and teacher pay. *See, e.g.*, Chambers, *supra* note 45, at 60–65 (arguing that states using outcomes measurements to make decisions about promotion to higher grades and graduation are legally "responsible for providing students with the means to pass"); Liebman, *supra* note 131, at 377 (arguing that poor and minority communities can either mobilize against the educational standards movement because it is often used to exclude poor and minority children from programs or attempt to enforce educational standards on behalf of those children); *cf.* Nicole Bondi, *Pressure Mounts to Raise Scores on State School Tests*, DET. NEWS, Jan. 27, 1999, at A1, *available in* 1999 WL 3914093 (discussing increasing stakes in standardized testing); Jolayne Houtz, *State to Put Schools Themselves to the Test—Cash or Shutdown? Accountability Will Tell*, SEATTLE TIMES, July 6, 1998, at

state accountability programs clearly give courts a tool for defining educational adequacy and measuring student achievement that the early educational malpractice courts did not have.[318] As judges and commentators have noted, adopting these accountability standards has an added benefit in that they enhance courts' legitimacy because the benchmarks have been set by the political branches and are not simply a subjective value judgment.[319] Thus, it may be possible for courts to use the standards developed in the school financing cases and in educational accountability programs to restrict the flow of litigation, while still allowing plaintiffs who have experienced extreme academic failures to proceed to the next step of the analysis.[320]

A1, *available in* 1998 WL 3160931 (same); Jack Sullivan, *True Test: Ready or Not, Students Face Tough Test*, BOSTON HERALD, May 3, 1998, at A16, *available in* 1998 WL 7344220 (same); *supra* note 5 (same). Nevertheless, deciding individual lawsuits based solely on standardized testing and benchmarks from state accountability programs could have a detrimental effect on political efforts to reform education. The risk of litigation could create a disincentive for elected leaders to keep pushing for additional educational reforms and higher standards. *But see* Dietz, *supra* note 23, at 1218–19 n.188 (acknowledging that allowing the political branches to define their own constitutional duties is a "weak point" of adopting legislative and administrative standards to measure constitutional adequacy, but expressing hope that political pressure would prevent the lowering of academic standards).

On a more philosophical level, holding schools liable in court based solely on students' test performance might significantly increase the already substantial pressure to "teach to the test" rather than to provide a comprehensive curriculum that prepares students to function in a larger society. *See, e.g.*, Bondi, *supra*, at A1 (reporting that Michigan schools spend more than two months per year preparing for a battery of statewide tests and that some teachers suspend regular homework and class assignments in order to concentrate on test materials); Tim Simmons, *Schools Find Value, Vexation in ABCs Program*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 26, 1997, at A1 (reporting concerns from teachers that academic subjects that are not included in North Carolina's testing program will begin to receive less emphasis in classrooms); *see also* Abby Goodnough, *Investigator Says Teachers in City Aided in Cheating*, N.Y. TIMES, Dec. 8, 1999, at A1 (reporting charges that two principals and 43 of teachers in New York City schools had helped students cheat on standardized tests in order to improve their schools' results). Such a result seems inconsistent with the spirit of the education adequacy cases' focus on preparing students to function as workers, learners, and citizens. *See supra* notes 86–89, 305–09 and accompanying text (discussing the standards set in the school financing cases recognizing a right to an adequate education).

318. The educational malpractice litigation began in the mid-1970s, approximately 10 years before states began to implement standards-based reforms. *See supra* notes 4–5. By the mid-1980s, precedents rejecting malpractice theories were firmly established in New York, California, and several other states. *See id.*

319. *See supra* notes 83–85 and accompanying text.

320. *See, e.g., supra* note 315 (discussing a fact pattern presented in an earlier educational malpractice case that could be evaluated under standards requiring that students be prepared to compete in the job market and advanced education); *cf.* Enrich, *supra* note 10, at 173 (noting in the school financing context that conditions in some schools are so poor that courts can find a violation of the state's duty without the need "to articulate or apply a determinate standard of adequacy").

2. Establishing Causation and Fault

Once a court has determined that a plaintiff's skills and academic knowledge do not meet constitutional standards, causation would become a critical issue. After all, the fact that a student does not pass a standardized test or is unprepared to compete in the workplace may not be due to school officials' actions, but rather to the student's intellectual ability, lack of self-discipline, lack of parental support, or other social or environmental factors.[321] Particularly in cases involving a single student who has fallen several years behind other classmates in the same educational program, courts have struggled with how to determine causation and fault.[322]

In building upon the school financing precedents, courts' analyses of adequacy claims would almost certainly have to shift from educational outcomes to educational inputs—such as curriculum,

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321. The educational malpractice cases emphasized this point repeatedly to distinguish teaching from practicing medicine and other professions. *See* Ross v. Creighton, 740 F. Supp. 1319, 1328 (N.D. Ill. 1990) ("Without effort by a student, he cannot be educated.... In other professions, by contrast, client cooperation is far less important; given a modicum of cooperation, a competent professional in other fields can control the results obtained."), *aff'd in part, rev'd in part on other grounds*, 957 F.2d 410 (7th Cir. 1992); Peter W. v. San Francisco Unified Sch. Dist., 131 Cal. Rptr. 854, 861 (Cal. Ct. App. 1976) ("[T]he achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, [or] environmental ...."); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1355 (N.Y. 1979) (Wachtler, J., concurring) ("Factors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning."). *But see* Cheryl L. Wade, *When Judges Are Gatekeepers: Democracy, Morality, Status, and Empathy in Duty Decisions (Help from Ordinary Citizens)*, 80 MARQ. L. REV. 1, 31–34 (1996) (concluding that educational malpractice cases have improperly blamed plaintiffs and their cultural backgrounds for their lack of academic skills).

322. *See, e.g.*, *Peter W.*, 131 Cal. Rptr. at 856 (involving a single plaintiff who had graduated from high school even though he could read at only a fifth-grade level); *Donohue*, 391 N.E.2d at 1353 (involving a single plaintiff whose literacy skills were so low that he could not fill out job applications); Eschweiler, *supra* note 131, at 109 (noting that judges often feel uncomfortable holding educators responsible when one student graduates without being able to read while those who sat next to her in class received an adequate education). This is not to say that causation would be impossible to prove in all cases, however. When school officials have misdiagnosed students' disabilities and placed them in inappropriate education programs, for instance, plaintiffs could show that they had no access to the curriculum needed for them to gain constitutionally required skills and knowledge. *See* Aquila, *supra* note 131, at 331, 345–51 (arguing that cases special education cases do not present the same concerns about establishing duty, manageable standards, and causation as general inadequacy claims); *see also* Hoffman v. Board of Educ., 400 N.E.2d 317, 318–19 (N.Y. 1979) (involving a speech-impaired student who was misdiagnosed and placed in a classroom for students with mental handicaps for 13 years); *supra* note 8 (citing misdiagnosis and misplacement cases from other jurisdictions).

teacher-student ratios, remediation programs, and other resources—in order to determine whether the defendants had fulfilled their constitutional duty to provide an adequate education program or whether their breach of duty caused the plaintiff's poor academic performance.[323] Given the affirmative nature of the constitutional obligation,[324] an argument can be made for shifting the burden of proof as well as the focus of the analysis.[325] School officials not only have a duty to provide adequate educational services, but also have greater expertise in analyzing academic problems and access to information about their own educational programs than does any potential plaintiff. Thus, it may make sense to require the defendants to counter the plaintiff's charges of inadequacy by showing that they had used reasonable means of providing an adequate education or had complied with other constitutional requirements.[326] The burden

323. Much as they can in measuring educational outputs, courts may be able to enhance their legitimacy by measuring inputs based on standards set by the other branches. *See* Morgan et al., *supra* note 309, at 568–571, 589–90 (discussing how the Alabama school financing case used standards from state statutes and regulations to evaluate school facilities, curriculum, supplies, staff ratios, and other inputs). However, because the other branches may set their standards based on the availability of funds rather than on an independent judgment of what inputs are required to provide an adequate education, some commentators have cautioned against undue judicial deference. *See id.* at 591–92 (advocating using national input standards as a supplement to avoid this problem); *id.* at 547–81 (discussing evidence presented in the Alabama school financing litigation comparing input levels to standards set by federal statutes, private accreditation organizations, expert testimony, and other non-state sources).

324. *See supra* Part III.A.3 (discussing the unique and affirmative nature of the adequacy right recognized in the school financing cases).

325. *Cf.* Sheff v. O'Neill, 678 A.2d 1267, 1288–89 (applying a burden-shifting scheme to analyze infringements on students' fundamental right to education); Horton v. Meskill ("Horton III"), 486 A.2d 1099, 1105–06 (Conn. 1985) (same); Hershkoff, *supra* note 136, at 1137–38 (suggesting that the government should bear the burden of proof under the rational relation analysis in positive rights cases); Liebman, *supra* note 131, at 391 (arguing that the adoption of educational accountability standards that assume all students can achieve specified outcomes creates a reasonable presumption against state officials "whenever many or most of the students in a school or district are initially, or at least successively, unable to achieve state-mandated benchmarks on state-mandated exams").

326. The reasonable means standard is derived from the "affirmative rational relation" test discussed in Part III. *See supra* notes 229–31 and accompanying text. If a court adopted an interest-balancing test, in contrast, the defendants might attempt to show that their interests outweigh those of the plaintiffs or that they had provided educational services up to the point that would create an undue burden on the government. *See supra* notes 226–28 and accompanying text. Constitutional tort claims, *see supra* Part III.B, do not have a formulaic analysis, but it seems unlikely that courts would apply something more rigorous than a reasonable efforts standard. *Cf. supra* notes 208–16 (discussing why requiring narrowly tailored means instead of reasonable means would be inappropriate in the context of substantive due process and equal protection analysis).

The educational malpractice cases suggest that schools should also be able to defend themselves by offering evidence that students' home environments or other

could then shift back to the plaintiff to provide further evidence of causation or to prove that the defendants had a constitutional duty to take steps to ensure that outside problems did not interfere with the student's education.[327]

Even if a court found the burden-shifting argument unpersuasive, educational malpractice commentators have suggested other steps that might make the causation issue more manageable. For example, some commentators have argued that an analysis focusing on whether school officials' behavior was a "substantial factor" in a student's poor academic performance is a more appropriate test for determining complex student achievement issues than traditional "but for" causation analyses.[328] Courts could also draw upon expert witnesses, statutory and regulatory education provisions, and various types of circumstantial evidence to supplement a common-sense determination of cause and effect.[329]

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outside causes are responsible for poor academic performance. *See supra* note 322. However, in the context of a constitutional requirement that state government provide students with an adequate education, it is not clear that the presence of outside factors should excuse defendants from having to show that their educational programs are generally adequate. The school financing cases that recognized a right to an adequate education did not condition that right—or state officials' corresponding duty—on the individual characteristics of students. Thus, the precedents do not suggest that states owe any less of a duty to provide adequate educational inputs to a student who is undisciplined than to one who is self-motivated. While educational obstacles that are not of the schools' making clearly would be relevant to determining why plaintiffs did not meet constitutional performance standards, the presence of such factors alone arguably are not a complete defense for state officials.

327. *See, e.g.*, Butt v. State, 842 P.2d 1240, 1251 (Cal. 1992) (en banc) (requiring state officials to take affirmative steps to prevent infringements upon students' fundamental right to education when local mismanagement threatened to end school six weeks early); *Sheff*, 678 A.2d at 1270 (requiring state officials to take affirmative steps to prevent infringements upon students' fundamental right to education when changing demographic patterns had created racial and ethnic segregation); Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 916 (W. Va. 1996) (requiring school officials to take affirmative steps to prevent infringements upon students' fundamental right to education even when the students had been suspended for misconduct); *see also supra* Part III.A.2 (discussing these cases).

328. *See, e.g.*, Ratner, *supra* note 59, at 856–57; Wade, *supra* note 321, at 31 n. 127; Joan Blackburn, Note, *Educational Malpractice: When Can Johnny Sue?*, 7 FORDHAM URB. L.J. 117, 131–32 (1978). A "but for" analysis concludes that the defendant's conduct is the cause of an event only if the event would not have occurred without the conduct, while "substantial factor" analysis finds causation when the conduct was a substantial factor leading to the event. *See, e.g.*, Landers v. East Tex. Salt Water Disposal Co., 248 S.W.2d 731, 732–34 (Tex. 1952). Advocates argue that the "substantial factor" analysis is preferable in education cases because it does not require the courts to determine the precise relationship between multiple factors affecting student achievement and because it avoids excusing schools from liability simply because other causes have contributed to the result. *See* Wade, *supra* note 321, at 31 n.127; Blackburn, *supra*, at 131–32.

329. *See* Elson, *supra* note 272, at 746–50 (suggesting that circumstantial evidence

No matter what measures courts adopt, causation is likely to remain a major hurdle in adequacy cases. However, the fact that many plaintiffs may be unable to establish causation does not necessarily suggest that courts should bar such claims entirely. Instead, the difficulty of causation issues could allow courts to develop adequacy case law slowly, starting with only clear-cut cases.[330]

B. Remedies

The issue of what remedies to provide for violations of the right to an adequate education is both an important issue in its own right and a major factor in determining the amount of adequacy litigation. As discussed in Part III, there are very strong policy reasons for denying plaintiffs the right to recover monetary damages for adequacy claims: such damages would not only take money away from schools that are already providing an inadequate education, but also would greatly enhance the attractiveness of education lawsuits to potential plaintiffs.[331] While damages awards would allow families to choose among public and private tutoring programs and would help to deter educator misconduct, on balance it seems unlikely that courts would be willing to provide monetary relief.[332]

Thus, injunctive relief ordering tutoring programs or other remedial measures appears to be the most practical remedy in education cases. Such measures would be less expensive than monetary damages and would allow courts to address educational harms directly without having to speculate regarding proper compensation for poor academic skills.[333] Courts could use the procedures developed in desegregation cases, requiring the parties to submit plans for relief and using expert testimony to help evaluate the reasonableness of the proposals.[334] Even if a court did not adopt a

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would include contrasting students' previous academic history to their current performance and looking at results from other classrooms or groups of students who are similar demographically to the plaintiffs); *supra* note 323.

330. *Cf.* Elson, *supra* note 272, at 750 (concluding that proving causation in educational malpractice cases will be considerably more difficult than in most physical negligence cases, but is "not so inherently speculative" as to require automatic dismissal).

331. *See supra* notes 273, 291–94 and accompanying text.

332. *See id.*

333. *See* Elson, *supra* note 272, at 762–63.

334. *See* Ratner, *supra* note 59, at 859–60; *see also* Liebman, *supra* note 131, at 394 (suggesting that ordering desegregation would be an appropriate remedy in some inadequacy cases). For cases involving individual plaintiffs rather than a large class action, the remediation plans might look something like the "individual education programs" (IEPs) used in the special education context. IEPs are developed by a committee of teachers and other school professionals in conjunction with parents to plan the education

balancing test to determine whether the defendants had fulfilled their constitutional duty, such a test could help determine at this stage of analysis whether the proposed remedies would create an undue burden on any of the parties.[335]

If courts are wary of ordering complex institutional reform measures that may interfere with daily school operations and the separation of powers,[336] some commentators have suggested that providing vouchers to allow plaintiffs to attend schools of their choosing would be a more straightforward remedy.[337] Vouchers

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program for each special education student and are updated periodically as the student ages. *See generally* Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 WASH. L. REV. 775, 785–90 (1997) (discussing the use and development of IEPs within the framework of federal special education law). Courts may want to avoid the paperwork and procedural burdens of the special education system, but the general idea of an individualized plan that is monitored and updated periodically might help provide relief for individual students.

335. *See supra* notes 226–28 and accompanying text.

336. Although court-ordered institutional reforms have become increasingly common particularly at the federal level, scholars have hotly debated whether courts are competent to make such broad bureaucratic reforms and whether such measures are consistent with separation of powers and federalism. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978). In the education arena, *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986), is often held up as an example of judicial interference with the other branches of government. The federal courts have ordered more than $1 billion in additional spending, supervised the construction of new school facilities, and overseen the rewriting of curriculum in an attempt to desegregate the Kansas City schools, but have made little progress in improving integration or student achievement. *See* Richard A. Epstein, *The Remote Causes of Affirmative Action, or School Desegregation in Kansas City, Missouri*, 84 CAL. L. REV. 1101, 1105–08, 1113–18 (1996) (tracing the history of the "epic lawsuit" and the difficulties courts have faced in achieving lasting results); John Choon Yoh, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1125–27, 1138–39, 1172–74 (1996) (same); Andres, *supra* note 95, at 812 (same); Deborah E. Beck, Note, Jenkins v. Missouri*: School Choice as a Method for Desegregating an Inner-City School District*, 81 CAL. L. REV. 1029, 1033–38 (1993) (same).

337. *See, e.g.*, Andres, *supra* note 95, at 808 (arguing that although vouchers are often perceived as an "innovative and aggressive solution, they are actually in many ways the least intrusive alternative available to remedy the deprivation of education rights"); *cf.* Ramsdell v. North River Sch. Dist. No. 200, 704 P.2d 606, 609 (Wash. 1985) (en banc) (involving plaintiffs who sought release from their local schools based on adequacy theories so that their children could attend public schools in a neighboring district); *supra* notes 98–101 (discussing the *Ramsdell* case). *See generally* CONCEPTS AND ISSUES IN SCHOOL CHOICE 7–170 (Margaret D. Tannebaum ed., 1995) (presenting historical background on the vouchers movement and arguments for and against voucher proposals); Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the*

would offer many of the advantages of monetary damages by allowing families to choose remedial programs for themselves, giving educators an incentive to provide better education to avoid losing students to private or other public schools, and helping courts to avoid supervising complex educational reforms.[338] However, there would be tradeoffs. Schools would not have to pay compensatory or punitive damages, but still would lose a significant amount of funding per plaintiff—a loss that critics worry would undermine already shaky education programs.[339] Moreover, it seems likely that the availability

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Polemic of Legal Problems Be Overcome?, 43 DEPAUL L. REV. 1, *passim* (1993) (discussing legal issues involved in voucher programs and providing a state-by-state survey of school choice initiatives). A discussion of the constitutional issues involved in providing vouchers to religious schools is beyond the scope of this Comment. *See, e.g.*, Daniel, *supra*, at 57–69; Steven K. Green, *The Legal Argument Against Private School Choice*, 62 U. CIN. L. REV. 37, *passim* (1993); Beck, *supra* note 336, at 1051–54.

Other commentators have suggested that ordering state or local city officials to take over inadequate school districts would provide many of the same benefits as vouchers by deterring misconduct and allowing courts to provide meaningful relief without entangling themselves in daily school operations. *See* Aaron Saiger, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 COLUM. L. REV. 1830, 1842–43, 1853–70 (1999) (noting that school choice has generally not been thought of as a judicial remedy and arguing that disestablishing local districts is less disruptive and is already provided for in many state statutes); *see also* Butt v. State, 842 P.2d 1240, 1243 (Cal. 1992) (ordering the state to take over a local school system temporarily to ensure that students could attend classes through the end of the regular academic year).

338. *See* Andres, *supra* note 95, at 808–15; *cf.* Elson, *supra* note 272, at 761 (discussing similar advantages for monetary damages).

339. *See, e.g.*, Andrew B. Sandler & David E. Kapel, *Educational Vouchers: A Viable Option for Urban Settings?*, *in* CONCEPTS AND ISSUES IN SCHOOL CHOICE, *supra* note 337, at 119, 124–25, 132–34 (arguing that public schools' costs would not be reduced "dollar for dollar" by reductions in enrollment); Green, *supra* note 337, at 39 (predicting that voucher programs would impoverish public schools and create a two-tier system of education). *But see* Jerome J. Hanus, *An Argument in Favor of School Vouchers*, *in* JEROME J. HANUS & PETER W. COOKSON, JR., CHOOSING SCHOOLS: VOUCHERS AND AMERICAN EDUCATION 1, 59–62 (Rita J. Simon ed., 1996) (arguing that voucher systems would provide the government with a subsidy because nonpublic schools are more cost effective than public programs); Andres, *supra* note 95, at 814 (arguing that funding for public schools could improve if voucher recipients receive only actual tuition costs because many private schools cost less than public school per-pupil allocations). Part of the difficulty in estimating the financial impact of vouchers is that simply comparing the operating costs of public and private schools does not account for the costs of administering a voucher program. *See* Peter W. Cookson, Jr., *There Is No Escape Clause in the Social Contract: The Case Against School Vouchers*, *in* HANUS & COOKSON, *supra*, at 111, 160–61 (arguing that voucher plans must provide transportation and extensive information about academic programs to allow poor families equal educational choice, but that doing so on a large scale would be extremely expensive); Sandler & Kapel, *supra*, at 132–34 (discussing the "hidden costs" of transportation and administration); *see also supra* note 341 (discussing the bureaucracy needed to run large voucher programs).

One commentator has suggested that damage to public schools by school choice programs could itself provide a basis for constitutional adequacy claims by public school

of vouchers as a remedy might encourage more families to file suit, thereby increasing the amount of educational adequacy litigation and raising fears about judicial manageability.[340] Implementing a large-scale voucher program also could require creating a significant new bureaucracy, which in turn could raise questions about courts' ability and authority to supervise institutional reforms.[341]

Given the high level of controversy over vouchers, the concerns about their implementation, and the risk of increasing litigation, courts should be cautious in adopting such a remedy in educational adequacy cases. Although advocates claim that voucher systems can reform American education and increase the quality of public schools, such assertions are fiercely debated and evidence is mixed.[342] Even if vouchers are not appropriate as a means of court-ordered institutional reform, however, there may be a separate question as to whether vouchers are the best remedy in isolated cases. In situations

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students. *See* Note, *The Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality*, 109 HARV. L. REV. 2002, 2003, 2013–19 (1996).

340. *Cf. supra* notes 301–03 (discussing manageability concerns).

341. *Cf.* CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, SCHOOL CHOICE: A SPECIAL REPORT 23–25, 27–28 (1992) (reporting that school choice programs require significant administrative, financial, and transportation support and are most successful when implemented gradually and voluntarily by local schools); Cookson, *supra* note 339, at 157, 160–61 (arguing that most voucher plans are "bureaucratic nightmares waiting to be born," requiring expensive transportation and information networks to be effective and equitable); Sandler & Kapel, *supra* note 339, at 132–34 (discussing the need for a new bureaucracy to supervise a proposed statewide voucher program in Louisiana); *supra* note 336 (discussing criticism of court-mandated institutional reforms).

342. *Compare, e.g.*, JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 214, 217 (1990) (reporting evidence that private schools produce greater academic gains that public schools and calling vouchers and school choice a "panacea" for educational reform), Hanus, *supra* note 339, at 53–55 (arguing that there is significant evidence suggesting that private schools would improve student achievement), *and* Paul E. Peterson, *School Choice: A Report Card*, 6 VA. J. SOC. POL'Y & L. 47, 67–74 (1998) (discussing evidence that indicating school choice programs and private schools increase student achievement without balkanizing students), *with* CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *supra* note 341, at 20–23, 25–26 (reporting evidence that statewide choice programs tend to widen the gaps between rich and poor districts without improving student achievement), Cookson, *supra* note 339, at 157–60 (summarizing studies from other countries indicating that vouchers lead to greater social stratification and may "intellectually impoverish" schools in low-income neighborhoods), Richard F. Elmore & Bruce Fuller, *Empirical Research on Educational Choice: What Are the Implications for Policy-Makers?*, *in* WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE 187, 189–95 (Bruce Fuller & Richard F. Elmore eds., 1996) (reporting that school choice programs appear to stratify students by social class and ethnicity even when designed to create equity and that they improve student achievement only when coupled with strong educational improvement measures), *and* Daniel, *supra* note 337, at 27 (arguing that "[w]here inadequate education exists, the state's duty is to improve rather than abandon").

when school officials prove unable or unwilling to correct constitutional deficiencies over an extended period of time, for instance, courts might want to reserve vouchers as a remedy of last resort rather than to force plaintiffs to wait additional years for institutional improvements.[343]

C. *Other Ways to Limit Adequacy Claims*

If courts determine that the methods outlined above are not sufficient to address judicial manageability, they could narrow the scope of the constitutional duty to provide an adequate education.[344] The wording of some states' constitutional provisions may support restricting the school financing precedents recognizing adequacy rights to authorize suits only against state legislators for decisions about the statewide funding of education.[345] However, such a result seems inconsistent with the language of other states' constitutions[346] and of the court decisions recognizing a right to an adequate education.[347]

As noted previously, the school financing cases that provide detailed definitions of adequacy speak in broad terms of a right to a certain level of *education* rather than a right just to a certain level of *funding*.[348] This distinction is illustrated most clearly in the *Rose*

343. *Cf.* Beck, *supra* note 336, at 1046, 1056 (arguing that vouchers would be an appropriate remedy in the *Jenkins* case because eight years of court-ordered desegregation efforts had provided little relief for students); Dominick Cirelli, Jr., Comment, *Utilizing School Voucher Programs to Remedy School Financing Problems*, 30 AKRON L. REV. 469, 500 (1997) (arguing that vouchers cannot solve systemic problems in school financing but may be a stronger solution on a "small scale" for students in weak school systems).

344. *Cf. supra* notes 301–02 (discussing the educational malpractice courts' refusal to recognize a duty to provide an adequate education as a response to concerns about the judicial manageability of such claims).

345. *See, e.g.*, KANS. CONST. art. 6, § 6(b) ("The legislature shall make suitable provision for finance of the educational interests of the state."). For analyses of state constitutional language, see McUsic, *supra* note 29, at 309 & n.4, 319–26, 333–39; Ratner, *supra* note 59, at 814–16; Thro, *supra* note 23, at 243–46 & nn.130–41. For a list of the provisions, see *supra* note 47.

346. Many states constitutions' education provisions do not simply require that state officials provide education funding, but instead require a *system* of schools meeting constitutional standards or otherwise require the pursuit of substantive academic standards. *See, e.g.*, MD. CONST. art. VIII, § 1 ("The General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools . . . ."); VA. CONST. art. VIII, § 1 ("The General Assembly shall provide for a system of free public elementary and secondary schools . . . and shall seek to ensure that an educational program of high quality is established and continually maintained.").

347. *See supra* notes 64–93, 306–12 (discussing and quoting the cases at length).

348. *See id.*

decision, which struck down not just Kentucky's method of financing schools but its entire system of educational bureaucracy.[349] The school financing courts' use of outcomes-based measures to define an adequate education also suggests that the constitutional requirements encompass more than simply a given level of financial inputs.[350] The school financing precedents and subsequent cases adjudicating education rights suggest that plaintiffs should be able to seek relief for systemic flaws in educational services—whether those flaws are caused by state legislators, education administrators, or local school district officials.[351] Although the need for judicially manageable standards is powerful, the evolution of the case law to date and the management methods discussed in this Part suggest that courts may be able to manage a case-by-case development of adequacy law.[352] At the very least, the strong language in the school financing cases and courts' traditional role as protectors of constitutional rights suggest that courts should weigh matters carefully before categorically denying plaintiffs redress for violations of the constitutional right to an adequate education.

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349. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989); *supra* notes 76–80 and accompanying text (discussing the opinion).

350. *See supra* notes 64–93, 306–12 (discussing the cases and their emphasis on educational outcomes).

351. *See, e.g.*, Butt v. State, 842 P.2d 1240, 1251 (Cal. 1992) (en banc) (requiring state officials to take affirmative steps to prevent infringements upon students' fundamental right to education caused by local mismanagement); Sheff v. O'Neill, 678 A.2d 1267, 1270 (Conn. 1996) (requiring state officials to take affirmative steps to prevent infringements upon students' fundamental right to education caused by housing patterns and other social factors); Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 916 (W. Va. 1996) (requiring local school districts to take affirmative steps to prevent infringements upon students' fundamental right to education even when the students had been suspended for misconduct); *see also* Claremont Sch. Dist. v. Governor ("Claremont II"), 703 A.2d 1353, 1359 (N.H. 1997) (stating in a school financing case recognizing a fundamental right to an adequate education that strict scrutiny should be used to examine any government action and inaction causing "an individual school or school district [to] offer[] something less than educational adequacy"); *see also* Saiger, *supra* note 337, at 1854 (arguing that courts have the authority to order remedies where state officials have "delegated [their] own constitutional responsibilities to demonstrably incompetent agents with no independent constitutional status").

352. Washington courts, for instance, do not appear to have been inundated with adequacy claims despite the fact that they have left the door open to individual lawsuits by students who believe they have been deprived of their constitutional right to education. *See supra* notes 98–106 (discussing Washington cases). California and Connecticut courts have also been able to distinguish their precedents allowing relief to students in school districts with severe financial and segregation problems from cases brought by individual students seeking to overturn class grades, to recognize entitlements to individualized education programs, and to claim a right to participate in interscholastic athletics. *See supra* notes 179–97 (discussing California and Connecticut cases).

CONCLUSION

Given state courts' historical aversion to educational malpractice claims,[353] they almost certainly will be reluctant to apply students' newly recognized education rights beyond the school financing context.[354] In addition to concerns about courts' ability to define educational adequacy, determine causation, and deal with the potential impact of individual damages claims,[355] the affirmative nature of the right to an adequate education makes it difficult to apply traditional constitutional analyses.[356] While it may be possible to develop new analytical models that are more sensitive to the nature of positive rights,[357] the temptation to try to redefine students' educational rights in more narrow terms or to create other obstacles to constitutional suits will be powerful.[358]

Yet, as state courts have recognized in dealing with the school financing cases, their role in protecting individual constitutional rights sometimes supersedes their traditional deference to the political branches in policy matters.[359] Even when there are no existing remedies for constitutional violations, state courts have ample authority—perhaps even a duty—to provide relief.[360] Traditional constitutional analysis indicates that this duty is particularly strong in protecting against infringements upon fundamental rights.[361] Even if the traditional formulation of fundamental rights scrutiny is inappropriate in the educational context, categorically denying students access to the courts for relief of violations of a fundamental right to an adequate education appears deeply at odds with

353. *See supra* notes 4–9 and accompanying text.

354. *Cf. supra* Part II (discussing early attempts to bring individual claims based on the right to an adequate education first recognized in school financing cases).

355. *See supra* notes 285–310 and accompanying text.

356. *See supra* Part III.A.

357. *See supra* Part III.A.3.

358. *See supra* Part II and notes 217–25 and accompanying text (discussing courts' rejections of individual adequacy claims and attempts to recast positive rights in negative terms).

359. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989) ("This duty must be exercised even ... when the court's view of the constitution is contrary to that of other branches, or even that of the public."); Seattle School Dist. No. 1 v. State, 585 P.2d 71, 87 n.7 (Wash. 1978) (en banc) ("The power of the judiciary to enforce rights recognized by the constitution, even in the absence of implementing legislation, is clear."); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1264 (Wyo. 1995) ("When the legislature's transgression is a failure to act, our duty to protect individual rights includes compelling legislative action required by the constitution."); *see also supra* note 292 (citing courts who used similar language in constitutional tort cases).

360. *See supra* notes 292, 317.

361. *See supra* Part III.A.

traditional constitutional analysis.[362]

As state courts struggle to resolve this dilemma in coming years, constitutional theorists will watch closely. By recognizing a positive right to an adequate education, state judges have begun to explore an area of constitutional law—positive rights—that has been debated for decades without ever being put into practice on a large scale.[363] In this area, at least, state courts have stepped out of the federal shadow.[364] Their decisions defining the scope of the right to a certain quality of public service will guide the way for future generations of jurists, plaintiffs, and scholars.

KELLY THOMPSON COCHRAN

362. *Cf. supra* note 144 (noting that even under federal fundamental rights analysis, cases allowing infringements upon fundamental rights are rare).

363. *See* Part III.A (discussing positive rights).

364. *See supra* notes 135–43, 197–99 and accompanying text.