

# Equal Liberty in Proportion

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## EQUAL LIBERTY IN PROPORTION

JOSHUA E. WEISHART\*

### ABSTRACT

*As federal law continues to devolve more education policy making to states, state courts will remain a primary forum for settling education rights. State fora do not inspire confidence, however, because their doctrine is so uncertain. A majority of state supreme courts do not specify a level of scrutiny and at times seem to be improvising judicial review. The resulting decisions can exhibit a troubling lack of foresight. Most notably, while federal doctrine increasingly reveals the interrelation of liberty and equality claims, state courts have failed to capitalize on that point—even though their decisions were among the first to concede it. Too often, instead, they pigeonhole education claims into one category or the other when the claims should fit in both.*

*This Article proposes that courts analyze the state constitutional right to education as a claim for “equal liberty” and subject it to a new standard of review. State court adjudication of the right to education over the past five decades reflects ambivalence with heightened scrutiny in favor of an ad hoc means-ends review. That review confers substantial deference to legislative judgment and has excused persistent educational disparities based on the “reasonableness” of legislative efforts. To overcome these shortcomings and lingering justiciability concerns, courts need a principled methodology for reconciling liberty and equality interests.*

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*Against tradition calling for these interests to be “balanced,” I contend that equality and liberty can yet maintain a positive, directly proportional relationship in the law. Applying direct-proportionality review, the judicial lens should focus on whether the state’s actions advance both equality and liberty interests in tandem and whether the margin between these ends is proportional so as to protect children from the harms of educational disparities. Reviewing the proportionality of these constitutional interests is urgently needed as public schooling endures chronic inequitable and inadequate funding while our highest elected officials question its value.*

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## INTRODUCTION

Chief Justice John Roberts is not feeling the “synergy” between equal protection and due process conveyed in *Obergefell v. Hodges*.<sup>1</sup> The Chief Justice “quite frankly” finds such talk “difficult to follow.”<sup>2</sup> He is not alone. Even among those who agree with the judgment, there is a sense of wonder as to how exactly these two doctrines are supposed to coincide.<sup>3</sup> As Roberts observed, Justice Anthony Kennedy seemed averse to the “means-ends methodology” built into the tiers of scrutiny—that is, the “usual framework,” the “casebook doctrine.”<sup>4</sup> Echoing themes from his opinions in *Lawrence v. Texas*<sup>5</sup> and *United States v. Windsor*,<sup>6</sup> Kennedy instead posited that equal protection and due process were somehow “instructive as to the meaning and reach of the other” such that either one might “capture the essence of the right in a more accurate and comprehensive way, even as [both] may converge in the identification and definition of the right.”<sup>7</sup> To which an exasperated Justice Antonin Scalia replied in dissent, “Huh?” and “What say?”<sup>8</sup>

In fairness, trying to fuse equal protection and due process is a tall order. Wrapped in this doctrinal riddle is an ancient, Aristotelian enigma: how to reconcile equality and liberty.<sup>9</sup> Renewed in modern times by the works of John Rawls and Ronald Dworkin, the reconciliation of equality and liberty has been a hallmark endeavor

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1. 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting).

2. *Id.*

3. See, e.g., Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 303 (2015) (proposing irrationality as the test for equal protection and due process emerging from the line of precedent leading to *Obergefell*); Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 949-51 (2016) (suggesting that “we can better understand the somewhat opaque statements in *Obergefell*” by considering whether discrimination is perceived as a comparative or noncomparative wrong).

4. *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting) (quoting G. STONE ET AL., CONSTITUTIONAL LAW 453 (7th ed. 2013)).

5. 539 U.S. 558, 564 (2003).

6. 133 S. Ct. 2675, 2695 (2013).

7. *Obergefell*, 135 S. Ct. at 2603.

8. *Id.* at 2630 (Scalia, J., dissenting).

9. See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 103-04 (2007) (recognizing a “tradition of equal liberty dating to ancient days” of Aristotle).

of contemporary liberalism.<sup>10</sup> For those envisioning a “liberal constitutionalism,” the project of balancing these demands has been no less important.<sup>11</sup> The only consensus to have emerged, however, is the recognition that the two principles can be mutually exclusive or reinforcing, depending on one’s conception of equality and liberty.<sup>12</sup>

Regardless of how they are conceived, there is no question that both belong in our constitutional order—they literally share the same space in the Fourteenth Amendment.<sup>13</sup> The question is do they belong together in the same case and controversy, and if so, how? *Obergefell* punctuated the point, made repeatedly in prior precedent but seldom relied on, that equal protection and due process can be employed together in the same case to resolve certain claims.<sup>14</sup> A substantial body of scholarship has also endorsed the synergy or synthesis of equal protection and due process.<sup>15</sup> Validated by

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10. See generally DAVID HELD, *MODELS OF DEMOCRACY* 262 (3d ed. 2006) (discussing the competing views on how to pursue equality and liberty); Gerald Gaus et al., *Liberalism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2015), <https://plato.stanford.edu/archives/spr2015/entries/liberalism/> [<https://perma.cc/E9BE-BKQG>] (discussing the various theories of liberal justice put forth by Rawls and others).

11. See Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 *TEX. L. REV.* 305, 305-06 (1993); see also JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 146-47 (2013); GOODWIN LIU ET AL., *KEEPING FAITH WITH THE CONSTITUTION* 140, 148-49 (2010).

12. See Ronald Dworkin, *What Is Equality? Part 3: The Place of Liberty*, 73 *IOWA L. REV.* 1, 6, 12 (1987); Michel Rosenfeld, *Metro Broadcasting, Inc. v. FCC: Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 *UCLA L. REV.* 583, 614 (1991); Cass R. Sunstein, *The Anticaste Principle*, 92 *MICH. L. REV.* 2410, 2411 (1994).

13. 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)).

14. In addition to *Lawrence* and *Windsor*, notable prior precedent invoking both equal protection and due process includes *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (claiming “[d]ue process and equal protection principles converge” (quoting *Bearden v. Georgia*, 461 U.S. 660, 665 (1983))), *Loving v. Virginia*, 388 U.S. 1, 2 (1967), *Griffin v. Illinois*, 351 U.S. 12, 17 (1956), and *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

15. See, e.g., RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 73 (1996); MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* 84 (2010); David E. Bernstein, *Bolling, Equal Protection, Due Process, and Lochnerphobia*, 93 *GEO. L.J.* 1253, 1254 (2005); Rebecca L. Brown, *Liberty, the New Equality*, 77 *N.Y.U. L. REV.* 1491, 1505-06 (2002); William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 *UCLA L. REV.* 1183, 1216 (2000); James E. Fleming, *Constructing the Substantive Constitution*, 72 *TEX. L. REV.* 211, 274 (1993); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 *VA. L. REV.* 817, 891 (2014); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 *MCGEORGE L. REV.* 473, 474 (2002);

*Obergefell*, scholars continue to contemplate hybrid equality-liberty claims evolving into claims for “equal dignity” or “antisubordination.”<sup>16</sup>

But while the legal theory is ascendant, it is incomplete—the second part of the question of how to apply equal protection and due process together goes unanswered.<sup>17</sup> The standard of review remains undetermined, and perhaps that is the way the current chief architect, Justice Kennedy, wants it.<sup>18</sup> But for those who look to the law for a modicum of predictability, objectivity, or uniformity, it is disconcerting.<sup>19</sup> In fact, this very problem has persisted for decades in state courts, which were among the first courts to contemplate the interrelation of equality and liberty interests, yet have likewise struggled with the doctrine and the applicable standard of review.<sup>20</sup>

Over the past five decades, the highest courts in nearly every state have decided constitutional challenges to school finance systems.<sup>21</sup> Initially, plaintiffs asserted equal protection guarantees to demand more equitable funding across school districts.<sup>22</sup> In lockstep with federal doctrine, the early court decisions followed the traditional means-ends methodology for equal protection claims, employing the tiers of scrutiny (strict, intermediate, and rational basis).<sup>23</sup> Later, plaintiffs also invoked the education clauses in state

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Karst, *supra* note 9, at 99-100; Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694, 1696 (2008); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 *HARV. L. REV.* 1893, 1902-03 (2004); Richard B. Wilson, *The Merging Concepts of Liberty and Equality*, 12 *WASH. & LEE L. REV.* 182, 183 (1955); Kenji Yoshino, *The New Equal Protection*, 124 *HARV. L. REV.* 747, 788-89 (2011).

16. See, e.g., Laurence H. Tribe, Response, *The Supreme Court 2014 Term—Forum: Equal Dignity: Speaking Its Name*, 129 *HARV. L. REV. F.* 16, 20, 25 (2015); Kenji Yoshino, *The Supreme Court 2014 Term—Comment: A New Birth of Freedom?: Obergefell v. Hodges*, 129 *HARV. L. REV.* 147, 177 (2015).

17. See Hellman, *supra* note 3, at 941 (“Should we always combine the clauses, or only sometimes? Are there reasons not to? And when they are combined, as they are in Justice Kennedy’s opinion in *Obergefell v. Hodges*, what does it mean?” (footnote omitted)).

18. See *supra* notes 5-7 and accompanying text.

19. Cf. Roy G. Spece, Jr., *Standards of Review and Constitutional Analysis of Health Care Issues*, 21 *HASTINGS CONST. L.Q.* 477, 480 (1994) (“[S]tandards of review are essential to the rule of law.”).

20. See *infra* Part II.A.

21. See *infra* Part II.B.

22. See *infra* note 37 and accompanying text; see also *infra* Part II.A.

23. See *infra* Part II.

constitutions to support their assertion that states had a positive, affirmative duty to ensure children access to a level of funding sufficient to meet qualitative educational thresholds.<sup>24</sup> With this shift in focus from equity to “adequacy,” several courts quietly abandoned the tiers of scrutiny altogether or ceased to actually apply them, paying only lip service to their guidance.<sup>25</sup> Instead, many of these courts now, without bothering to specify a standard, couch their analysis in the form of a bare bones means-ends review.<sup>26</sup>

On further examination, however, the means are hardly ever scrutinized. In yet another departure from federal convention, these state courts have perceived deference to the legislative means as more in line with separation of powers—a concern courts have been especially sensitive to in adjudicating the right to education.<sup>27</sup> Consequently, courts are more inclined simply to determine whether the state has achieved “the constitutionally prescribed end”—that is, equity and adequacy (as fonts of equality and liberty).<sup>28</sup> Alternatively, courts assess the “reasonableness” of the fit between the means and ends,<sup>29</sup> that is, whether the legislative means are at least “reasonably calculated” to meet the ends.<sup>30</sup>

All told, the lesson from state court jurisprudence of the right to education is that a traditional means-ends review is ill-suited to the task of adjudicating equal liberty claims when the right implicated imposes affirmative obligations on the state to protect the right-holder from discernable harms.<sup>31</sup> Although the emergent ends-to-fit review might better accommodate positive rights enforcement, it does not provide a principled method for reconciling equality and

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24. See *infra* notes 44-45 and accompanying text.

25. See *infra* Part II.

26. See *infra* Part II.A.

27. See Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 741 (2010).

28. See, e.g., *McCleary v. State*, 269 P.3d 227, 248, 252 (Wash. 2012) (quoting Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999)).

29. See, e.g., *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005).

30. See, e.g., *Gannon v. State (Gannon I)*, 319 P.3d 1196, 1236-37 (Kan. 2014) (per curiam).

31. See *infra* Part II.A.



liberty interests (returning to that age-old dilemma).<sup>32</sup> Indeed, state courts almost always conduct disjointed analyses of equity and adequacy in different portions of the same opinion or in entirely separate opinions.<sup>33</sup> This failure to mutually enforce equity and adequacy impedes progress in addressing educational disparities and furthers doubts about the justiciability of the right to education.<sup>34</sup>

All of this uncertainty pervades against a backdrop of the federal government abandoning its role in education policy making with the recent passage of the Every Student Succeeds Act (ESSA).<sup>35</sup> So much then will continue to depend on state court adjudication of education rights.

At last, the reservation of state courts to analyze equity and adequacy together reflects a more profound ambivalence toward the project of balancing equality and liberty. Rather than continue to

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32. See *infra* Part II.B.

33. See *infra* Part III.

34. See Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 973-74 (2016) [hereinafter Weishart, *Reconstituting*]; Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 532, 542-43 (2014) [hereinafter Weishart, *Transcending*].

35. The ESSA “returns nearly full discretion to the states,” including “on issues of educational equality for disadvantaged students.” See Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. (forthcoming 2017) (manuscript at 103), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2848415](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2848415) [https://perma.cc/LTN5-RXQB]. Meanwhile, President Donald Trump has called for expanding “school choice to help free children from failing government schools.” Mercedes Schneider, *Donald J. Trump’s ‘Vision’ for Education*, HUFFINGTON POST (Nov. 14, 2016, 10:40 PM), [http://www.huffingtonpost.com/entry/donald-j-trumps-vision-for-education\\_us\\_58292df6e4b02b1f5257a5a8](http://www.huffingtonpost.com/entry/donald-j-trumps-vision-for-education_us_58292df6e4b02b1f5257a5a8) [https://perma.cc/5LPP-EBUK]. Education Secretary Betsy DeVos, a philanthropic supporter of charter schools and voucher programs, has warned states that it would be a “terrible mistake” to reject this “most ambitious expansion of education choice in our nation’s history.” Andrew Ujifusa, *DeVos: It Would Be a ‘Terrible Mistake’ for States Not to Expand School Choice*, EDUC. WEEK: POL. K-12 (May 22, 2017, 9:32 PM), [http://blogs.edweek.org/edweek/campaign-k-12/2017/05/betsy\\_devos\\_school\\_choice\\_plan\\_speech.html](http://blogs.edweek.org/edweek/campaign-k-12/2017/05/betsy_devos_school_choice_plan_speech.html) [https://perma.cc/FXV5-JTH6]. President Trump also claims that America’s “education system [is] flush with cash,” Inaugural Address, 2017 DAILY COMP. PRES. DOC. 58, at 1 (Jan. 20, 2017), but in fact “public school funding in most states continues to be unfair and inequitable, depriving millions of U.S. students of the opportunity for success in school.” Press Release, Educ. Law Ctr., *School Funding Remains Unfair for Most Students Across the Nation* (Jan. 25, 2017), <https://drive.google.com/file/d/0BxtYmwrYVI00LWdhZjRXTTM5WUk/view> [https://perma.cc/7CW7-RMNA]; see also BRUCE BAKER ET AL., *IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 1* (6th ed. 2017), <https://drive.google.com/file/d/0BxtYmwrYVI00VDhjRGIDOUh3VE0/view> [https://perma.cc/K97H-GJB4].

ignore this doubt or mask it with the type of opaque language in *Obergefell*,<sup>36</sup> it is time to stop laboring under the misapprehension that equality and liberty must realize constitutional equilibrium. Even when balance cannot (or should not) be achieved, equality and liberty can maintain a positive, directly proportional relationship. Translated into the right to education context, this entails a two-part inquiry: (1) whether the state's actions improve both equity and adequacy in tandem, and (2) whether the margin between equity and adequacy remains proportional so as to protect children from the harms of educational disparities.

The first inquiry provides a mechanism for assessing the mutually reinforcing, upward trajectory of equity and adequacy. It is meant to enforce the notion, well-established in precedent, that all children of different needs should have access to a high-quality education and enjoy approximately equal chances for educational success. The second inquiry assessing the space between equity and adequacy is, in turn, meant to enforce the ultimate vision of equal liberty—one in which all children are endowed with the capabilities to function as equal citizens and to compete favorably for admission to higher education and high-quality jobs. This direct-proportionality review is at once more and less deferential to legislative prerogatives but delineates the judiciary's indispensable role in mutually enforcing children's equality and liberty interests.

For similar equal liberty claims in other contexts, direct-proportionality review could also facilitate a synergy between equal protection and due process that even Chief Justice Roberts could follow.

## I. EQUAL LIBERTY UNDER THE RIGHT TO EDUCATION

Before *Lawrence*, *Windsor*, and *Obergefell*, courts construing state constitutional rights to education unwittingly developed a prototype equal liberty claim. According to this revisionist account of the three “waves” of school finance litigation, state courts first conceived of equality and liberty as mutually exclusive concepts but eventually demonstrated their potential as mutually reinforcing demands,

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36. See *supra* notes 1-8 and accompanying text.

inhering in the right to education.<sup>37</sup> In the process, courts cast aside stale versions of equality (treating all children *identically*) and liberty (respecting *negative* freedoms from state interference with education). In their place, courts have begun to operationalize a more robust, integral equal liberty that demands treating differently situated children as equals *according to their needs*, so as to cultivate, through state action, children's *positive* freedoms to become equal citizens.

*A. Liberty-Conducive "Equality of Educational Opportunity"*

*Brown v. Board of Education* declared that "the opportunity of an education ... is a right which must be made available to all on *equal terms*."<sup>38</sup> Equal terms meant not only an end to state-sponsored segregation but, advocates urged, an end to school funding disparities, a form of wealth discrimination engendered by the overreliance on local property taxes to finance public education.<sup>39</sup> Thus, the first

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37. According to the standard narrative, school finance litigation has occurred in three waves, with each wave representing a different constitutional theory of liability: first wave equality under the Fourteenth Amendment's Equal Protection Clause; second wave equity under state constitution equal protection and education clauses; and third wave adequacy, also under state constitution education clauses. See generally 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, 222-32, 238-49 (1990) (discussing the history of public school finance reform litigation and the impact of the *Helena*, *Rose*, and *Edgewood* decisions). Some scholars have questioned the wave metaphor because "the supposed demarcation between 'second wave' equity cases and 'third wave' adequacy cases is not so distinct." William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1188 (2003). For instance, in some of the early equity cases, courts "awarded victories to plaintiffs on what could be called adequacy grounds." Richard Briffault, *Adding Adequacy to Equity*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 25, 26 (Martin R. West & Paul E. Peterson eds., 2007). And plaintiffs continued to assert, and courts continued to rely on, equity-based arguments "deep into the third wave." See James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL'Y REV. 463, 467-68, 468 n.35 (2004) (citing cases); see also Julie K. Underwood, *School Finance Litigation: Legal Theories, Judicial Activism, and Social Neglect*, 20 J. EDUC. FIN. 143, 150 (1994). Still, scholars tend to find the wave metaphor more helpful than not, and thus it "remains the dominant shorthand utilized in describing the history of this litigation." Scott R. Bauries, *Foreword: Rights, Remedies, and Rose*, 98 KY. L.J. 703, 703 n.3 (2010).

38. 347 U.S. 483, 493 (1954) (emphasis added).

39. See William S. Koski & Jesse Hahnel, *The Past, Present, and Possible Futures of Educational Finance Reform Litigation*, in *HANDBOOK OF RESEARCH IN EDUCATION FINANCE*

legal challenges to school finance systems pressed federal courts to recognize a right to education implicit in the U.S. Constitution that would necessitate equal funding.<sup>40</sup> But the Supreme Court swiftly extinguished that claim in *San Antonio Independent School District v. Rodriguez*, holding that education was not a fundamental right under the Equal Protection Clause and, because wealth was not a suspect class, that funding disparities could be rationally related to the preservation of “[l]ocal control” over school districts—a “vital” interest worth “some *inequality*.”<sup>41</sup>

Undeterred from the sudden crash of this first wave of school finance litigation,<sup>42</sup> advocates rode a second wave into state courts.<sup>43</sup> There, plaintiffs asserted state, rather than federal, equal protection guarantees, relied on the education clauses in state constitutions, or utilized both constitutional provisions to mount their equality-based challenges.<sup>44</sup> This initial state court strategy achieved modest success—plaintiffs prevailed in eight of twenty-one second-wave cases.<sup>45</sup> Among the eight, four courts explicitly eschewed *Rodriguez* to recognize a fundamental state right to education and applied equal protection analysis.<sup>46</sup> The other four held funding disparities based on the wealth of school districts unconstitutional, without applying fundamental-rights-type equal protection analysis.<sup>47</sup>

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AND POLICY 42, 43 (Helen F. Ladd & Edward B. Fiske eds., 2007).

40. *See id.*

41. 411 U.S. 1, 35, 49-51 (1973) (emphasis added) (first quoting *Wright v. Council of the City of Emporia*, 407 U.S. 451, 469 (1972) (Rehnquist, C.J., dissenting) (alteration in original); and then quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) (emphasis added)).

42. *See* 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, 601-02 (1994).

43. Just as Justice Thurgood Marshall subtly suggested they do in the last footnote of his *Rodriguez* dissent. *See Rodriguez*, 411 U.S. at 133 n.100 (Marshall, J., dissenting) (“Of course, nothing in the Court’s decision today should inhibit further review of state educational funding schemes under state constitutional provisions.”).

44. *See* Thro, *supra* note 42, at 601-03.

45. With the caveat that we cannot draw a sharp distinction between some second- and third-wave cases, *see supra* note 37 and accompanying text, these decisions of the highest courts in twenty states are detailed *infra* in Table B.

46. *See* *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 951-52 (Cal. 1976); *Horton v. Meskill (Horton I)*, 376 A.2d 359, 373-75 (Conn. 1977); *Pauley v. Kelley*, 255 S.E.2d 859, 878 (W. Va. 1979); *Washakie Cty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 332-33 (Wyo. 1980).

47. *See* *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93-95 (Ark. 1983); *Helena Elementary Sch. Dist. No. 1 v. State (Helena I)*, 769 P.2d 684, 690-91 (Mont. 1989); *Robinson v. Cahill (Robinson I)*, 303 A.2d 273, 295-96 (N.J. 1973); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 91 (Wash. 1978). I have included the Montana decision in the second wave even

Nevertheless, the tide that brought in the second wave receded as plaintiffs' losses outnumbered their wins. Various explanations have been offered for the ebb of the second wave, but essentially all share the perception that courts struggled with adopting a version of equality they would be willing and able to enforce.<sup>48</sup>

The remedy for unequal spending seemed deceptively simple at first: formal equality through "either *horizontal equity* among school districts, such that per-pupil revenues were roughly equalized by the state, or at least *fiscal neutrality*, such that the revenues available to a school district would not depend solely on the property wealth of the school district."<sup>49</sup> To achieve absolute fiscal equalization, however, would require (1) leveling down educational spending overall by capping expenditures in wealthy districts while recapturing and redistributing tax revenues to poorer districts, and/or (2) leveling up through continual state tax increases to support guaranteed tax bases and supplemental aid to poorer districts to match the spending in wealthy districts.<sup>50</sup> Neither form of leveling was sustainable politically,<sup>51</sup> and leveling down is undesirable from

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though others have classified it as a third-wave adequacy case. *See, e.g.,* Thro, *supra* note 37, at 233-34. I do so because the gravamen of the plaintiffs' complaint emphasized the wealth disparities among school districts, and the court's reasoning was based in substantial part on those disparities being violative of the state constitution education clause which includes an equal-protection-type guarantee: "[e]quality of educational opportunity." *Helena I*, 769 P.2d at 686 (citing MONT. CONST. art. X, § 1); *see* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1163 (1995) ("Reasonable disagreement over the proper classification of *Helena I* exists, although it probably does not justify a full-blown dispute ... [given] the opinion's confluence of equity and adequacy.").

48. *See, e.g.,* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 143-66 (1995) (suggesting that the education context robs equity of its appealing simplicity); Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 579-85 (1998) (analyzing factors contributing to equality theory's demise); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 266-68 (1999) (noting the limited relief even successful plaintiffs obtained); 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, 1873-74 (1998) (citing "political realities" and the difficulty in narrowly tailoring equality mandates for the second wave's failure).

49. Koski & Hahnel, *supra* note 39, at 47 (emphasis added).

50. *See* Enrich, *supra* note 48, at 156; *see also* Erin E. Buzuvis, "A" for Effort: *Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy*, 86 CORNELL L. REV. 644, 664-65 (2001).

51. *See* Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*,

almost every perspective.<sup>52</sup> Most relevant here, leveling down constrains liberty by preventing parents from deciding collectively to spend more on their children's education,<sup>53</sup> and by arresting the development of talents and abilities "to the lowest common denominator," thereby denying all children their full potential.<sup>54</sup>

As the second wave crested circa 1982, courts could not ignore the mounting public opposition and legislative resistance to equalizing tax capacity or expenditures and the leveling down of educational spending in some states pursuing horizontal equity or fiscal neutrality.<sup>55</sup> Before 1983, plaintiffs prevailed in six of fifteen states.<sup>56</sup> Thereafter, until the end of the second wave in 1989, they secured wins in just two of six challenges.<sup>57</sup> Courts supplied various justifications for upholding funding disparities or for deeming the right to education nonjusticiable.<sup>58</sup> Notably, however, the increasing

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*in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 136, 138 (Helen F. Ladd et al. eds., 1999) ("No proposal to equalize education funding throughout a state by decreasing expenditures down to the lowest level has ever been considered politically feasible."); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 61 (1990) ("Limited state fiscal capacities and resistance to increased state taxes constrain the scope of equalization programs, so that most equalization assistance serves not to equalize but to raise the level of spending in poorer districts to some target amount—usually at or below the median spending level in the state, and certainly not up to the spending of the more affluent districts. The 'levelling up' component of state school aid thus tends to level to the middle.").

52. See William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 591 (2006) ("Leveling down might increase equality of educational resources, but in the process it will significantly impact the absolute quality of education provided, worsening the better off and failing to improve the worse off.").

53. "For many decades, Americans have regarded as a component of their political liberty that they may participate as part of a local community in shaping that community's educational system." Aaron J. Saiger, *Legislating Accountability: Standards, Sanctions, and School District Reform*, 46 WM. & MARY L. REV. 1655, 1730 (2005) (citing KATHRYN A. MCDERMOTT, CONTROLLING PUBLIC EDUCATION: LOCALISM VERSUS EQUITY 13-14 (1999)); see also Briffault, *supra* note 51, at 37-38 (observing that several state courts have rejected school finance challenges "because of a concern that mandating greater interlocal equalization of fiscal capacity would threaten local autonomy").

54. Elizabeth Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 ETHICS 595, 615 (2007).

55. See Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1362-63 (2010).

56. See *infra* Table B.

57. See *infra* Table B.

58. For instance, they echoed *Rodriguez's* reverence for local control, doubted the basic



reluctance to accept equality-based challenges had little to do with differences in the language of education clauses among the states, or whether the state had a textual commitment to separation of powers in its constitution.<sup>59</sup> Nor did state courts diverge much from federal doctrine or each other in how they interpreted state equal protection guarantees.<sup>60</sup>

Rather, courts reversed field, because if they were to entertain the merits of these cases and give effect to the right to education as an “immunity against unequal treatment,”<sup>61</sup> then that would compel them to enforce politically infeasible and undesirable equalization remedies that might conflict with individual liberties.

Political realities aside, the formal equality endorsed in the early first- and second-wave cases was also inherently flawed for two reasons. First, equalizing per pupil funding does not in itself improve the quality of education; it “does not protect against inadequate funding, provided that inadequacy is equally shared.”<sup>62</sup> Second, formal equality fails to address the needs of disadvantaged children, who enter “the schoolhouse door already on unequal footing.”<sup>63</sup> Equalizing per-pupil funding without directly addressing those needs perpetuated inequalities.<sup>64</sup> Disadvantaged children “required not equal but more spending to even approximate the educational opportunities and attainment of their peers.”<sup>65</sup> Hence,

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premise that money matters to educational outcomes, or invoked separation of powers and political questions entailed by observing the legislature’s plenary power over education policy. See Koski, *supra* note 37, at 1252-53; see also McMillan, *supra* note 48, at 1879-80 (concluding as well that “state courts were hesitant to rely on their state constitutions’ equal protection clauses for fear that the decision would open the door to massive amounts of equal protection litigation from the broad spectrum of social institutions”).

59. See Bauries, *supra* note 27, at 713-15, 745 (discussing prior studies that failed to establish a strong link between education clause language and school finance case outcomes and conducting own study of explicit separation of powers provisions in state constitutions before concluding that they too were not predictive).

60. See Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 302-03 (2011) (discussing scholarship noting “doctrinal convergence is the overwhelming majority approach among state courts” construing equal protection guarantees).

61. *Id.* at 317.

62. Derrick Darby & Richard E. Levy, *Slaying the Inequality Villain in School Finance: Is the Right to Education the Silver Bullet?*, 20 KAN. J.L. & PUB. POL’Y 351, 360 (2011).

63. Weishart, *Transcending*, *supra* note 34, at 503 & n.141.

64. See *id.*

65. Weishart, *Reconstituting*, *supra* note 34, at 966.

formal equality was not just practically unenforceable, it subverted the goal it was meant to achieve: equal educational opportunity.

That goal was not abandoned when courts turned to adequacy as the predominant theory during the third wave.<sup>66</sup> Yet rather than persist with formal equality, “courts gradually began to articulate a substantive brand of equal educational opportunity, conferring an immunity against inequitable (as opposed to unequal) spending.”<sup>67</sup> The aim was to direct more compensatory resources and services to the neediest students to mitigate their disadvantages and progress *vertical equity*.<sup>68</sup> Such remedial measures are most often implemented through weighted student funding formulas, which assign weights to all students (for example, 1.0) but apportion additional weights to certain student demographic categories that have more expensive educational needs—for example, students participating in federal free or reduced-lunch program (+0.4), students with disabilities (+0.9), English-language learners (+0.5)—which is supposed to result in schools with higher populations of these student categories receiving more state funding.<sup>69</sup> Through these more equitable inputs, vertical equity measures attempt to achieve more equitable outputs.<sup>70</sup>

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66. See Koski & Hahnel, *supra* note 39, at 47.

67. Weishart, *Reconstituting*, *supra* note 34, at 966.

68. See ROBERT BERNE & LEANNA STIEFEL, THE MEASUREMENT OF EQUITY IN SCHOOL FINANCE: CONCEPTUAL, METHODOLOGICAL, AND EMPIRICAL DIMENSIONS 2-3, 35-40 (1984) (conceptualizing “vertical equity” in school finance context as treating differently situated students differently, that is, adjusting funding to the educational needs of students rather than treating all students as if they are similarly situated, an implicit assumption of horizontal equity).

69. See THOMAS B. FORDHAM INST., FUND THE CHILD: TACKLING INEQUITY & ANTIQUITY IN SCHOOL FINANCE 23-24 (2006), [http://www.edexcellencemedia.net/publications/2006/200606\\_fundthechild/FundtheChild062706.pdf](http://www.edexcellencemedia.net/publications/2006/200606_fundthechild/FundtheChild062706.pdf) [<https://perma.cc/W6G6-NLPJ>] (explaining the incentive for schools to use weights based on student demographics to attract challenging student populations and receive the related increases in funding); Karen Hawley Miles & Marguerite Roza, *Understanding Student-Weighted Allocation as a Means to Greater School Resource Equity*, 81 PEABODY J. EDUCATION 39, 53, 57 (2006) (explaining the use of weights based on certain demographics for distribution of funding, and finding that “student-weighted allocation resulted in more schools receiving allocations near the district’s weighted average expenditure and increased equity”). See generally Deborah A. Verstegen & Robert C. Knoepfel, *From Statehouse to Schoolhouse: Education Finance Apportionment Systems in the United States*, 38 J. EDUC. FIN. 145 (2012) (surveying information on states’ use of weights to distribute funding according to different demographics of students).

70. See Robert Berne & Leanna Stiefel, *Concepts of School Finance Equity: 1970 to the Present*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 7, 20



Improving vertical equity, then, serves to level the playing field and give all children, in spite of their natural and social disadvantages, an *equal chance* to succeed—which should not be confused with a demand for *equal success*.<sup>71</sup> Equal chance is itself a laudable goal insofar as it is tempered by the reality that it cannot be fully realized.<sup>72</sup> That is, the goal “is not literally equal chances but approximately equal chances.”<sup>73</sup> Nevertheless, to those who contend that disadvantaged students “simply cannot make it, the constitutional answer is, give them a chance.”<sup>74</sup> Indeed, the notion that we should at least mitigate disadvantages to give children a fairer chance to succeed carries moral force and resonates politically, and thus has enjoyed staying power.

So conceived, vertical equity is also conducive to the demands of liberty, both negative (freedom from) and positive (freedom to).<sup>75</sup> Allocating resources in a way that advances vertical equity does not impinge negative liberty, namely the privilege of parents to control

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(Helen F. Ladd et al. eds., 1999).

71. See Weishart, *Transcending*, *supra* note 34, at 485-86 & nn.33-35, 488-89, 495, 532 (discussing views on “equality of opportunity”).

72. *Id.* at 532-33 (explaining that equal chances “cannot be attained without completely neutralizing all of the differential effects of social circumstances ... and natural endowments ... on every child’s chances for educational achievement”—an insatiable demand that cannot be achieved completely without suppressing parental liberty and, because this guiding moral principle is, in fact, infeasible, one that “violate[s] the maxim ‘ought implies can’”).

73. *Id.* at 534.

74. *Abbott v. Burke* (*Abbott II*), 575 A.2d 359, 403 (N.J. 1990).

75. See ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 121-22 (1969). Negative liberty refers to “the degree to which no man or body of men interferes with my activity,” a *freedom from* external interference or obstruction. *Id.* at 122. Positive liberty “consists in being one’s own master,” an internal *freedom to* be and do, that is, to self-direct one’s life. *Id.* at 131. Scholars have contested this distinction, among them Gerald MacCallum, who proposed that there is only one concept of liberty that involves a

triadic relation—that is, a relation between *three things*: an agent, certain preventing conditions, and certain doings or becomings of the agent. Any statement about freedom or unfreedom can be translated into a statement of the above form by specifying *what* is free or unfree, *from* what it is free or unfree, and what it is free or unfree *to do or become*.

Ian Carter, *Positive and Negative Liberty*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2016), <https://plato.stanford.edu/entries/liberty-positive-negative/> [<https://perma.cc/AFQ5-8BRC>]. Although MacCallum’s critique has been influential, “Berlin’s distinction continues to dominate mainstream discussions about the meaning of political and social freedom.” *Id.* For that reason, I employ the distinction here, with some reservations about its usefulness.

their children's education.<sup>76</sup> Both individually and collectively, through participation in local decision-making, parents retain certain *freedoms from* external interference, including "the freedom to devote more money to the education of [their] children."<sup>77</sup> School districts are free to exert such local control provided that the state meets the needs of disadvantaged children through compensatory resources and services.<sup>78</sup> Whereas horizontal equity threatened to encroach on local control by leveling down educational spending, vertical equity requires leveling up to a certain threshold—not to the very top but to the point that disadvantages below the threshold are mitigated while positional advantages held by children above the threshold are diminished. This is a more practical and politically viable goal.

In furthering that goal, vertical equity also facilitates positive liberty by providing disadvantaged children with the compensatory resources needed to develop their capabilities, their internal *freedom to* be equal citizens and productive members of the economy.<sup>79</sup> The importance of this positive sense of freedom, of possessing the capabilities to actually achieve certain desired ends, has in fact been the impulse behind the adequacy court decisions during the third wave.

### *B. Equality-Enhancing Liberty Through "Educational Adequacy"*

"Each child, every child, ... must be provided with an equal opportunity to have an *adequate* education."<sup>80</sup> So declared the Kentucky Supreme Court in *Rose v. Council for Better Education, Inc.*, a tide-shifting decision that refocused school finance challenges on the quality of education children should receive.<sup>81</sup> The U.S. Supreme Court punted on that question in *Rodriguez*, although it reserved

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76. Weishart, *Reconstituting*, *supra* note 34, at 930-31 (analyzing right to education as a "qualified 'privilege'" held by parents "subject to the exercise of state powers that bear 'reasonable' regulations").

77. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973).

78. *See* Enrich, *supra* note 48, at 112.

79. *See* Weishart, *Transcending*, *supra* note 34, at 529, 539-40.

80. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211 (Ky. 1989) (emphasis omitted and added).

81. *Id.*

the possibility that there exists a right to “some identifiable quantum of education” implicit in the U.S. Constitution.<sup>82</sup> Kentucky’s highest court, however, did not flinch, issuing a sweeping decision that invalidated that state’s entire statutory school system (not merely the financing but every statute relating to public schools) on the grounds that it failed to deliver access to an adequate education for all children as mandated by the state constitution’s education clause.<sup>83</sup>

The court did not just insist on adequacy but broadly outlined what it would entail: an education that instills “seven ... capacities” enabling children to, inter alia, “make informed choices” as responsible citizens and “compete favorably” in higher education and in the job market.<sup>84</sup> *Rose* was arguably the first decision to firmly construe the right to education as obligating the state to develop certain capacities or capabilities in children.<sup>85</sup> However, the link between education and children’s capabilities (positive freedoms) long predated the storied 1989 decision. Indeed, in some instances, that link was established at the dawn of the nation’s history, appearing in the text of eighteenth- and early-nineteenth-century state constitutions that conveyed the import of public education to democracy, a view later endorsed by state courts even absent explicit language in the text.<sup>86</sup>

The idea is that education allows children to acquire the capabilities needed to meet the demands of citizenship, which is “essential to the preservation of [their] rights and liberties,”<sup>87</sup> and, in turn,

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82. *Rodriguez*, 411 U.S. at 36-37.

83. *See Rose*, 790 S.W.2d at 213.

84. *Id.* at 212.

85. *See Bauries*, *supra* note 37, at 709-11, 709 n.39 (contending that, although *Rose* cited favorably an earlier opinion by the West Virginia Supreme Court, *see Rose* 790 S.W. 2d at 209-10 (citing *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979)), *Rose* was first to conceive of fundamental right to adequate education as a positive right, apart from equal protection analysis, resulting in a “paradigm shift in conceptions of education rights”). *But see* Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 355 (1991) (describing *Pauley* as finding a “positive mandate” in education provision of West Virginia Constitution “sufficient to establish fundamentality”).

86. *See Weishart*, *Reconstituting*, *supra* note 34, at 962 (citing relevant authorities).

87. *E.g.*, CAL. CONST. art. IX, § 1; ME. CONST. art. VIII, pt. 1, § 1; MO. CONST. art. IX, § 1(a); R.I. CONST. art. XII, § 1; *accord* MASS. CONST. pt. 2, ch. V, § 2; TEX. CONST. art. VII, § 1.

“essential to self-government”<sup>88</sup> and “a free society.”<sup>89</sup> The state is thereby “dependent for its survival on citizens who are able to participate intelligently in the political, economic, and social functions of our system.”<sup>90</sup> In this way, the state’s duty to inculcate certain capabilities “is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government.”<sup>91</sup>

State constitutions and courts likewise express that public education is vital to meeting the state’s economic needs.<sup>92</sup> Education equips children with the capabilities “to attain productive employment and otherwise contribute to the state’s economy.”<sup>93</sup> Enabling children to “lead economically productive lives” therefore works “to the benefit of us all.”<sup>94</sup> In addition to “maintaining a citizenry capable of furthering the economic, political, and social viability of the State,”<sup>95</sup> courts have underscored education’s role in “nurturing children’s capabilities *to be* autonomous generally—through personal and moral development, mutual understanding, self-knowledge, and the capacity to flourish in society.”<sup>96</sup>

Again and again, the theme running through state constitutions and court interpretations thereof is that education is necessary because it “imparts those ‘critically important’ skills needed to compete in the labor market, and that bestows the *capacity to function* as a citizen—as a contributing and participating member of society

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88. *Brigham v. State (Brigham I)*, 692 A.2d 384, 393 (Vt. 1997) (per curiam).

89. *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 812 (Ariz. 1994).

90. *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1381 (N.H. 1993).

91. *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 548 (Mass. 1993).

92. See Weishart, *Reconstituting*, *supra* note 34, at 962-63 (citing relevant authorities).

93. *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 253 (Conn. 2010).

94. *Op. of the Justices*, 624 So. 2d 107, 159 (Ala. 1993) (quoting favorably *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

95. *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1356 (N.H. 1997).

96. See Weishart, *Reconstituting*, *supra* note 34, at 963 & n.291 (citing relevant authorities). This connotes a rather thick conception of positive liberty. See Nomi Maya Stolzenberg, “*He Drew a Circle That Shut Me Out*: Assimilation, Indoctrination, and the Paradox of a Liberal Education,” 106 HARV. L. REV. 581, 652 (1993) (“Positive liberty ... necessitates a certain kind of education ... [that can] extricate the individual from the judgment-clouding appetites and exigencies to which she is otherwise enslaved. Only by acquiring the capacity to make intelligent choices does the individual become truly free.” (footnote omitted)).

and one's community."<sup>97</sup> This is reflective of the view that to be free does not mean "merely to be left alone," to have negative liberty; one "must also have the capacity to realize the goals" one chooses for one's life (positive liberty).<sup>98</sup>

To be sure, no court has even so much as mentioned the term positive liberty or freedom in relation to adequacy. At most, courts have explicitly or implicitly acknowledged that, unlike the U.S. Constitution, which is often described as "a charter of negative rather than positive liberties,"<sup>99</sup> nearly all "state constitutions contain the textual basis for affirmative rights."<sup>100</sup> But courts have not elaborated much on the affirmative nature of the right to education, undoubtedly because they are sympathetic to the criticism that positive rights are difficult to enforce or are otherwise reluctant to venture beyond the reassuringly familiar terrain of negative rights.<sup>101</sup> Moreover, state courts had a less controversial, more textual foundation on which to ground adequacy—their state

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97. *Abbott v. Burke* (*Abbott IV*), 693 A.2d 417, 428 (N.J. 1997) (emphasis added) (quoting *Abbott II*, 575 A.2d 359, 363 (N.J. 1990)).

98. See ALAN WOLFE, *THE FUTURE OF LIBERALISM* 13 (2009); see also JEDEDIAH PURDY, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1263 (2005) ("Promoting a capabilities-oriented conception of freedom involves both securing persons against interference and helping them toward the resources, institutional context, and psychologically significant experiences that undergird 'positive' self-direction."); WEISHART, *Reconstituting*, *supra* note 34, at 964 (observing that positive liberty or freedom has been central to the "capability approach advanced by Amartya Sen and Martha Nussbaum").

99. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (citing *Harris v. McRae*, 448 U.S. 297, 318 (1980)).

100. *Lobato v. State*, 218 P.3d 358, 370-71, 374 (Colo. 2009) (concluding that adequacy challenge to school financing system was justiciable and subject to rational-basis review); see also *McCleary v. State*, 269 P.3d 227, 231 (Wash. 2012) (reaffirming that state constitution "confers on children ... a positive constitutional right to an amply funded education"); MARGARET H. MARSHALL, *Wise Parents Do Not Hesitate to Learn from Their Children: Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1643 (2004) (former Chief Justice of the Massachusetts Supreme Court describing state constitutions "[a]s charters of 'positive liberty'").

101. See RUTH BADER GINSBURG, *An Overview of Court Review for Constitutionality in the United States*, 57 LA. L. REV. 1019, 1026 (1997) ("Our courts, through judicial review, are accustomed to telling government what it may not do; they are not, by tradition or staffing, well-equipped to map out elaborate programs detailing what government must do."). See generally FRANK B. CROSS, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001) (discussing the economic and political factors contributing to the ineffectiveness of positive rights).

constitutions' education clauses, the very same clauses that had previously underpinned equity claims in some states.<sup>102</sup>

Nearly all courts have construed these once-dormant clauses to confer on children a claim-right to education, imposing on states a correlative duty to educate.<sup>103</sup> The positive dimension of this right compelling affirmative state action is so discernable that state courts conveniently did not have to elaborate further.<sup>104</sup> Yet when tasked to justify adequacy as the qualitative standard that the state has to meet to discharge its duty, courts repeatedly returned to the notion that education fortifies children's positive liberties, though again without utilizing the term positive liberty.<sup>105</sup> In truth, courts did not need to risk invoking "any fancy philosophical or newfangled positive liberty"<sup>106</sup> because the political winds had shifted decidedly toward adequacy, which became synonymous not with liberty but with educational quality.<sup>107</sup>

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102. See Koski & Reich, *supra* note 52, at 559. Differences in the language of education clauses among the states have not precluded courts from concluding that adequacy is constitutionally mandated. See Regina R. Umpstead, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 BYU EDUC. & L.J. 281, 291 (noting considerable variation in language of education clauses but observing that "courts have held that whenever a state is required to establish and maintain a public education system, regardless of the particular language used to describe it, it must meet basic quality standards"); see also Koski & Hahnel, *supra* note 39, at 47; Thro, *supra* note 37, at 225-32.

103. See Weishart, *Reconstituting*, *supra* note 34, at 948-49, 949 nn.207, 209-12 (citing cases).

104. The highest courts in just two states briefly noted the Hohfeldian claim-right nature of the right to education. See *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 527 n.23 (Mass. 1993); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 91 (Wash. 1978). Otherwise, the references to a positive or affirmative right to education have been scant or fleeting. See *Lobato*, 218 P.3d at 370-71; *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 272 (Conn. 2010) (Schaller, J., concurring) ("It has long been established, based on the express language of our constitution, that the education clause guarantees to citizens of this state an affirmative right to a free public education."); *Sheff v. O'Neill*, 678 A.2d 1267, 1282-83 (Conn. 1996) ("The issue before us, therefore, is what specific meaning to attach to the protection ... contained in article first, § 20, in a case in which that protection is invoked as part of the plaintiff schoolchildren's fundamental affirmative right.").

105. See *supra* notes 80-92.

106. Jeremy Waldron, *Community and Property—For Those Who Have Neither*, 10 THEORETICAL INQUIRIES LAW 161, 180 (2009).

107. See Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 133 (1989) (asserting that certain state case law is concerned with "education quality rather than equality" and "provides a mechanism for implementation of the republican precept of education for self-government"); Thro, *supra* note



Anticipating the crash of the second wave seven years before *Rose*, the U.S. Department of Education tasked its School Finance Project experts “to explore the concept of educational adequacy.”<sup>108</sup> Around the same time, several comparative studies, including the influential 1983 publication of *A Nation at Risk*, sounded an ominous warning of a “rising tide of mediocrity” in public schools.<sup>109</sup> They highlight “a perceived crisis in the quality of education” in both impoverished and wealthy school districts.<sup>110</sup> By decade’s end, President George H.W. Bush convened an education summit of the nation’s governors to address the problem.<sup>111</sup> Governors and legislatures, then contending with second-wave equity suits and the prospect of having to raise taxes or cap, recapture, or redistribute revenue, were all too willing to instead divert attention to raising academic standards and devising accountability schemes to improve the quality of education.<sup>112</sup> Courts and advocates were likewise anxious “to tether reforms to educational expertise ... [which] began to appear in visible form through the emergence of state educational standards, usually accompanied by statewide performance tests.”<sup>113</sup> Thus, a perfect storm of political expediency and urgency precipitated the third wave of school finance litigation.

Adequacy was then billed as “the more achievable, but more modest” alternative to equity.<sup>114</sup> Rather than demand equalization of tax capacity or expenditures across school districts, adequacy only required that each school district have enough funding so that all of

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42, at 609 (characterizing the first set of adequacy cases, meaning third-wave cases, as “quality suits”).

108. ESTHER TRON, U.S. DEP’T OF EDUC., OFFICE OF EDUC. RESEARCH & IMPROVEMENT, ED226489, ADEQUATE EDUCATION: ISSUES IN ITS DEFINITION AND IMPLEMENTATION 3 (1982); see also Arthur E. Wise, *Educational Adequacy: A Concept in Search of Meaning*, 8 J. EDUC. FIN. 300, 313 (1983).

109. Nat’l Comm’n on Excellence in Educ., *A Nation at Risk: The Imperative for Educational Reform*, 84 ELEMENTARY SCH. J. 113, 113 (1983).

110. See Carr & Fuhrman, *supra* note 51, at 147.

111. MARIS A. VINOVSIS, THE ROAD TO CHARLOTTESVILLE: THE 1989 EDUCATION SUMMIT 1 (1999).

112. See Carr & Fuhrman, *supra* note 51, at 147, 150.

113. Martha Minow, *Just Education: An Essay for Frank Michelman*, 39 TULSA L. REV. 547, 559-60 (2004).

114. Enrich, *supra* note 48, at 182; see also Heise, *supra* note 47, at 1168-76 (discussing the factors prompting the shift from equity to adequacy).

its students could achieve a minimum qualitative threshold.<sup>115</sup> Hence, adequacy posed no threat of leveling down educational spending. Indeed, the wealthy and politically powerful school districts would remain free to spend more to provide a greater-than-adequate education to their students.<sup>116</sup> While preserving such forms of local control, adequacy was supposed to address many of the same concerns of fairness and opportunity that had motivated the equality-based challenges.<sup>117</sup> Yet unlike the first- and second-wave suits, which compared funding between districts to judge the distribution of educational opportunities, the third-wave adequacy suit was supposed to compare funding against standards to judge the quality of educational opportunities in each district.<sup>118</sup>

Rebranding the school finance lawsuit worked, for a time. From 1989 to 2006, plaintiffs prevailed in approximately 75 percent of adequacy cases.<sup>119</sup> “The hidden pitfall” of the adequacy suit, however, has been delineating the quality standards.<sup>120</sup> In this, adequacy cannot claim a distinct advantage over equality. For just as first- and second-wave courts struggled with adopting a version of equality they could enforce,<sup>121</sup> third-wave courts have grappled with defining adequacy vis-à-vis standards that are judicially manageable. Confronted with such a “conceptually difficult” task threatening to

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115. Enrich, *supra* note 48, at 112.

116. *See id.* at 168-69 (noting that adequacy arguments avoid “concerns about negative impacts on the better off”). “More cynically stated, the political and economic elite would not have to fear that their privileged status would be challenged.” Koski, *supra* note 37, at 1233.

117. *See* Enrich, *supra* note 48, at 167; *see also* Weishart, *Transcending*, *supra* note 34, at 520.

118. *See* Weishart, *Transcending*, *supra* note 34, at 527 (“[I]n deciding whether students X and Y have adequate educational resources, we do not judge how much of the resource X has compared to Y but rather simply ask: do X and Y each have a sufficient amount of the resource to satisfy some threshold?”).

119. Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1483 n.73 (2007) [hereinafter Rebell, *Poverty*]. By some estimates, the overall win ratio has reduced to roughly 67 percent in recent years, given increasing resistance of state courts to adjudicate such claims. *See* Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 80-81 (2012). “The post-recession data set is much smaller, but between 2008 and 2012, plaintiffs lost about two-thirds of the time in high courts.” Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 451 (2017).

120. Koski & Reich, *supra* note 52, at 561; *accord* Enrich, *supra* note 48, at 170-72.

121. *See supra* Part I.A.



“strain the institutional capacity” of the judiciary, some expected that state courts would simply define a constitutionally adequate education by reference to legislatively crafted academic standards developed during the standards and testing movements of the late 1980s and 1990s.<sup>122</sup> But courts defied those expectations. In nearly all states where adequacy cases have been successful, courts have ultimately taken it upon themselves to define adequacy and set the constitutional standard.<sup>123</sup>

Two points to note here. First, the standards expressed in court definitions of adequacy reinforce the notion that a quality education is necessary to develop children’s capabilities, their positive liberties.<sup>124</sup> In this regard, some states either adopted the seven capabilities from *Rose*<sup>125</sup> or have specified others.<sup>126</sup> Even in states where courts have declined to list a particular set of capabilities, courts have defined the standard broadly to emphasize that an adequate education must enable children *to be* responsible citizens, productive members of the economy, or autonomous individuals.<sup>127</sup> Hence, whether courts want to acknowledge it or not, children’s positive liberty interests are underwriting educational adequacy standards.

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122. See James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1223-24 (2008).

123. See *id.* at 1232-33. Nevertheless, courts have assessed “state academic standards as a point of departure in determining the meaning of a constitutional education.” Black, *supra* note 55, at 1364-65, 1365 n.97 (citing cases).

124. See *supra* notes 97-98 and accompanying text.

125. *E.g.*, *Gannon I*, 319 P.3d 1196, 1236 (Kan. 2014) (per curiam); *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993); *Claremont II*, 703 A.2d 1353, 1359 (N.H. 1997); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997).

126. See, *e.g.*, *Abbeville Cty. Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) (defining “minimally adequate education” as “the opportunity to acquire: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills”).

127. See, *e.g.*, *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 227 (Conn. 2010) (defining a constitutionally adequate education as one that gives children “the opportunity to be responsible citizens” and “prepare[s] them to progress to institutions of higher education, or to attain productive employment and otherwise contribute to the state’s economy”); *Tenn. Small Sch. Sys. v. McWhorter (McWhorter I)*, 851 S.W.2d 139, 150-51 (Tenn. 1993) (requiring “a system of free public schools” to provide “the opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life”); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978) (concluding that education must prepare children, *inter alia*, “to be able to inquire, to study, to evaluate and to gain maturity and understanding”).

Second, while progressing children's positive liberty interests, the adequacy standards also augment their equality interests. For "if adequacy requires getting all students above a certain threshold, it will tend to focus disproportionate resources on [disadvantaged] students" so that they can actually meet that threshold.<sup>128</sup> In this regard, adequacy is vertical equity by a different name.<sup>129</sup> In fact, several adequacy court decisions have approved of vertical-equity-type funding "to compensate for differences in regional costs and student needs that translate into higher costs to supply the same quality of education throughout the state."<sup>130</sup> Moreover, courts and legislatures have imported vertical-equity principles in utilizing the methods for "costing-out an adequate education, that is, attaching a price tag to the resources necessary for all children to reach specified educational outcomes."<sup>131</sup>

Adequacy is also meant to be equality enhancing in its promotion of "democratic equality"<sup>132</sup> or "equal citizenship."<sup>133</sup> On this view, inequality is objectionable not necessarily because disparities in resources or opportunities exist but because of the potential for the better-off to use such disparities to subjugate the worst off politically, economically, and socially.<sup>134</sup> For adequacy theorists, then, the egalitarian aim is relational equality: to assure not that children have the *same* educational resources and opportunities, but that all children have *enough* to avoid oppression and function as equal

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128. Kenneth A. Strike, *Equality of Opportunity and School Finance: A Commentary on Ladd, Satz, and Brighthouse and Swift*, 3 EDUC. FIN. & POL'Y 467, 476 (2008); see Ryan & Saunders, *supra* note 37, at 469 ("The line between adequacy and equity becomes especially hazy when a court acknowledges that underprivileged children may need more resources to succeed than other children.").

129. See generally Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493 (1995) (discussing the convergence of adequacy and vertical equity).

130. Umpstead, *supra* note 102, at 298; see also Briffault, *supra* note 37, at 38 (describing this version of adequacy as "equity plus" which "focuse[s] on the need for school financing systems to provide more than equal funding to certain groups of schoolchildren ... in order for those children to receive a truly adequate education").

131. See William S. Koski, *Achieving "Adequacy" in the Classroom*, 27 B.C. THIRD WORLD L.J. 13, 21-23 (2007).

132. See Elizabeth Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 ETHICS 595, 596 (2007).

133. See Debra Satz, *Equality, Adequacy, and Education for Citizenship*, 117 ETHICS 623, 635-36 (2007).

134. See Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 312 (1999).

citizens.<sup>135</sup> To be sure, equal citizenship requires political and civil equality, traditional negative liberties. But social equality—made possible through the exercise of positive liberties—is also “essential to being regarded by oneself and by others as a full member of one’s society.”<sup>136</sup> Consequently, the adequacy threshold “must be sufficiently high to ensure not bare subsistence, but the achievement of the full range of human capabilities that constitute the societal norm.”<sup>137</sup> This means the adequacy threshold also “must be dynamic, evolving as societal norms evolve.”<sup>138</sup> And it must be relational “because what it takes to be an equal citizen—that is, where to set the adequacy threshold—invariably turns on what educational resources others have.”<sup>139</sup>

That adequacy standards must be dynamic and relational helps explain why courts have made comparative assessments of the educational resources between districts, just as they did in their first- and second-wave decisions.<sup>140</sup> Indeed, courts do not “enforce some absolute notion of adequacy, where disparities in resources are ignored.”<sup>141</sup> Rather, disparities between districts are tolerable until “they undermine the ability of students to function as equal citizens and compete for admission to higher education and high-quality jobs on comparable terms—that is, undermine democratic equality.”<sup>142</sup>

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135. *See id.* at 320.

136. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 *YALE L.J.* 330, 342 (2006).

137. *Id.* at 347; *see also* R.H. TAWNEY, *EQUALITY* 168 (George Allen & Unwind Ltd. 1964) (“[W]hen liberty is construed, realistically, or implying, not merely a minimum of civil and political rights, but securities that the economically weak will not be at the mercy of the economically strong, ... a large measure of equality, so far from being inimical to liberty, is essential to it.”); Wilson, *supra* note 15, at 194 (“In its positive aspect liberty has much in common with equality. Both are oriented toward the positive promotion of those conditions necessary for full and equal enjoyment of the fruits of social organization.”).

138. Liu, *supra* note 136, at 347; *accord Claremont II*, 703 A.2d 1353, 1359 (N.H. 1997) (“A constitutionally adequate public education is not a static concept removed from the demands of an evolving world.... A broad exposure to the social, economic, scientific, technological, and political realities of today’s society is essential for our students to compete, contribute, and flourish in the twenty-first century.”).

139. Weishart, *Transcending*, *supra* note 34, at 527.

140. *See* Ryan, *supra* note 122, at 1237-38.

141. *Id.* at 1237 (concluding that adequacy as a dynamic standard compels “the state to achieve greater comparability between wealthy and poor districts” when disparities in opportunities become “intolerable”).

142. Weishart, *Transcending*, *supra* note 34, at 537.

Surveying decades of school finance decisions reveals there is not much space left between equality and adequacy. While mutually exclusive in their theoretical extremes, courts have moderated these demands to account for political and practical feasibility concerns and have thereby construed them to be mutually reinforcing.<sup>143</sup> More and more, claims under state constitutional rights to education have come to demand “an adequately equal and equally adequate education.”<sup>144</sup> This is not a mere play on words.

The claim is for *adequately equal* educational opportunities aimed at ensuring approximately, not strictly, equal chances for educational success—achieved through vertical rather than horizontal equity. This form of equality is conducive to the positive and negative demands of liberty. The claim is also one for an *equally adequate* education in that all children should have access to a quality education—achieved “through high adequacy thresholds sensitive to children’s capabilities [positive liberties] to function as equal citizens and to compete for admission to higher education and for high-quality jobs.”<sup>145</sup> This positive form of liberty is equality enhancing, fostering a relational, democratic equality through equal citizenship.

It is, in short, a claim for equal liberty.<sup>146</sup>

## II. FROM ONE MEANS-ENDS REVIEW TO ANOTHER

As the equal liberty claim under the right to education became more distinct, the standard of review became more elusive. Courts initially applied the means-ends test embodied in the tiers of scrutiny, though often in unconventional ways.<sup>147</sup> Gradually, nearly all abandoned heightened scrutiny and the tiers of scrutiny

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143. *See id.* at 480, 483, 523-24.

144. *Id.* at 483.

145. *Id.* at 543.

146. As used in this Article, a legal claim for “equal liberty” implicates the rightholder’s equality and liberty interests. By employing a term frequently associated with Rawls and his first principle of justice, “equal basic liberties,” I do not mean to imply an ordering of the two interests in the way that Rawls first principle is lexically prior to his second principle of justice, “fair equality of opportunity.” *See* JOHN RAWLS, A THEORY OF JUSTICE 14, 220 (rev. ed. 1999).

147. *See infra* Part II.A.

altogether.<sup>148</sup> Now typically, as in *Obergefell*, no standard of review for constitutionality is even announced.<sup>149</sup> Without saying so explicitly, state courts continue to employ a means-ends test, though one that does not comport with federal doctrine.<sup>150</sup> State courts have instead scrutinized the achievement of the constitutional ends while deferring completely to legislatures regarding the means.<sup>151</sup> Alternatively, courts have decided at minimum on the reasonableness of the fit between the legislative means and the constitutional ends.<sup>152</sup> The resulting ends-to-fit review, while more accommodating to the positive claim-right form of the right to education, has not fully advanced the right's function to protect children from the harms of educational disparities.

#### A. *The Collapse of Tiered Means-Ends Review*

The standard of review did not elude state courts during the first wave of school finance litigation. Supreme Court precedent compelled those courts entertaining claims brought under the Equal Protection Clause of the Fourteenth Amendment to apply the tiers of scrutiny.<sup>153</sup> As shown in Table A below, the highest courts in California and Michigan, and a New Jersey trial court, all deemed the right to education fundamental; thus, strict scrutiny was in order.<sup>154</sup> The California and Michigan courts also applied strict scrutiny because they deemed wealth a suspect class, adhering closely to

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148. See *infra* Part II.A.

149. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

150. See *infra* Part II.B.

151. See *infra* notes 235-37 and accompanying text.

152. See *infra* notes 251-52 and accompanying text.

153. Indeed, these first-wave decisions came on the heels of the Supreme Court having just articulated “the test of strict scrutiny for infringements of fundamental rights.” Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1078 (2011) (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)).

154. I have included the New Jersey trial court decision because there were very few state court decisions during the first wave. Nevertheless, I have omitted state trial court and intermediate appellate court decisions from Tables B and C, *infra*, because there were ample second- and third-wave decisions issued by the highest courts in the various states. Federal courts issued the other notable first-wave decisions. See *Parker v. Mandel*, 344 F. Supp. 1068 (D. Md. 1972); *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968).

language of then-recent Supreme Court precedent.<sup>155</sup> Yet cracks appeared in the tiers of scrutiny when the New Jersey trial court did not specify a standard of review in concluding that the school financing statute was violative of the state constitution's education clause.<sup>156</sup>

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155. See *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1250 (Cal. 1971) (first citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966); and then citing *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 (1969)); *Milliken v. Green* (*Milliken I*), 203 N.W.2d 457, 469-70 (Mich. 1972) (same).

156. See *Robinson v. Cahill*, 287 A.2d 187, 211 (N.J. Super. Ct. Law Div. 1972) ("It is clear from findings made earlier that a 'thorough' education is not being afforded to all pupils in New Jersey.... [T]he minimum support aid and save harmless provisions cannot be reconciled at this time with the command of the Education Clause [to 'provide for the maintenance and support of a thorough and efficient system of free public schools.' N.J. Const. Art. VIII, § 4]"), *modified*, *Robinson I*, 303 A.2d 273 (N.J. 1973).

Table A. Standards of Review in Select “First-Wave” Decisions

Decision	Standard of Review for Equal Protection	Standard of Review for Education Clause	Fundamental Right?	Prevailing Party
Serrano v. Priest ( <i>Serrano I</i> ), 487 P.2d 1241 (Cal. 1971)	Strict Scrutiny	N/A*	Yes	Plaintiffs
Robinson v. Cahill, 287 A.2d 187 (N.J. Super. Ct. Law Div. 1972)	Strict Scrutiny	Unspecified**	Yes	Plaintiffs
Milliken v. Green ( <i>Milliken I</i> ), 203 N.W.2d 457 (Mich. 1972)	Strict Scrutiny	N/A	Yes	Plaintiffs

\* “N/A” (Not Applicable) means that the plaintiffs did not assert the claim, legal theory, or constitutional provision and/or that the court did rely on the claim, legal theory, or constitutional provision in rendering its decision.

\*\* “Unspecified” means that the court apparently relied on the claim, legal theory, or constitutional provision for its decision but failed to specify with sufficient clarity the applicable constitutional standard of review.

On review, the New Jersey Supreme Court decided *Robinson I*, ushering in the second wave and widening the cracks in tiers of scrutiny.<sup>157</sup> Just thirteen days before, the U.S. Supreme Court in *Rodriguez* declined to recognize either a fundamental right to education or wealth as a suspect class under the Fourteenth Amendment’s Equal Protection Clause and, thus, applied rational basis review to uphold funding disparities.<sup>158</sup> Perhaps anticipating the outcome in *Rodriguez*, and with much of the opinion in *Robinson I* already written, the New Jersey Supreme Court took issue with federal equal protection analysis, disapproving as unhelpful “the concept of a ‘fundamental’ right” and a “compelling” state interest.<sup>159</sup> “Mechanical approaches to the delicate problem of judicial intervention,” it contended, “only divert a court from the meritorious issue

157. See *infra* Table B.

158. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 40, 44 (1973).

159. See *Robinson I*, 303 A.2d at 282.

or delay consideration of it.”<sup>160</sup> While rejecting the formalistic nature of the tiers of scrutiny, the court was also plainly concerned that enforcing equal protection as an immunity against unequal treatment would require strict horizontal equity, a remedy it was unwilling to endorse.<sup>161</sup> Hence, the court swore off equal protection analysis entirely, opting instead to consider whether school funding disparities violated the state constitution’s education clause.<sup>162</sup> In so doing, the court crafted its own standard of review:

Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.<sup>163</sup>

It cannot be said, however, that the court rigorously applied this new standard in reaching its decision. Rather, it merely agreed with the trial court’s finding that the education clause “had not been met” based on “discrepancies in dollar input per pupil” and with “no other viable criterion for measuring compliance with the constitutional mandate” having been shown.<sup>164</sup> Significantly, the New Jersey Supreme Court put more focus on “the end product”—that is, whether the facts demonstrated compliance with the constitutional command of “a thorough and efficient system of free public schools.”<sup>165</sup>

The Oregon Supreme Court later adopted the *Robinson I* standard of review, which it characterized as a “balancing test.”<sup>166</sup> “Under this approach the court weighs the detriment to the education of the children of certain districts against the ostensible

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160. *Id.*

161. *See id.* at 284 (“[W]e stress how difficult it would be to find an objective basis to say the equal protection clause selects education and demands inflexible statewide uniformity in expenditure.”); *see also id.* at 297-98 (cautioning not to interpret its decision “to mean that the State may not recognize differences in area costs, or a need for additional dollar input to equip classes of disadvantaged children for the educational opportunity”).

162. *See id.* at 287-88.

163. *Id.* at 282.

164. *Id.* at 295.

165. *Id.* at 294 (quoting N.J. CONST. art. VIII, § 4).

166. *Olsen v. State*, 554 P.2d 139, 145 (Or. 1976).



justification for the scheme of school financing.”<sup>167</sup> But aside from that lone Oregon decision, which actually upheld funding disparities,<sup>168</sup> the *Robinson I* balancing test never caught on. In fact, the New Jersey Supreme Court itself never put the test to actual use in subsequent school finance challenges, referencing it just once more at the beginning of the long-running series of *Abbott* cases.<sup>169</sup>

Still, *Robinson I*, being the first post-*Rodriguez* second-wave decision, provided a template for how other state courts could apply the education clauses in their state constitutions. For example, the Idaho Supreme Court agreed with *Robinson I* in refusing to categorize the right to education as “‘fundamental’ versus ‘nonfundamental.’”<sup>170</sup> And, the majority of second- and third-wave courts, like *Robinson I*, refused to decide whether the right to education is fundamental.<sup>171</sup> Although the balancing test was never fully utilized, *Robinson I* showed enough daylight through the cracks in the tiers of scrutiny to suggest to other courts that they too could alter their standards of review. The Connecticut Supreme Court, for instance, agreed with *Robinson I*'s rejection of the “formalistic reliance on the usual standards of the law of equal protection” and therefore modified its test for strict scrutiny.<sup>172</sup> Conversely, *Robinson I* may have emboldened most second-wave courts simply to decline to specify any standard of review when analyzing education clause claims, as shown in Table B.

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167. *Id.*

168. *Id.* at 149.

169. See *Abbott v. Burke (Abbott I)*, 495 A.2d 376, 390 (N.J. 1985) (observing “a balancing test is employed to determine whether a claimed deprivation of personal rights violates” the equal protection provisions of the New Jersey Constitution and noting that “[i]n striking the balance, a court must consider ‘the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction’” (quoting *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985))).

170. *Thompson v. Engelking*, 537 P.2d 635, 646 (Idaho 1975).

171. See *infra* Tables B and C.

172. See *Horton v. Meskill (Horton II)*, 486 A.2d 1099, 1105-06 (Conn. 1985) (adopting a “three-step process” for strict scrutiny: (1) “a prima facie showing that disparities in educational expenditures are more than de minimis”; (2) if so, “the burden then shifts to the state to justify these disparities as incident to the advancement of a legitimate state policy”; and (3) if so, “the state must further demonstrate that the continuing disparities are nevertheless not so great as to be unconstitutional”).

Table B. Standards of Review in Select “Second-Wave” Decisions

Decision	Standard of Review for State Equal Protection	Standard of Review for Education Clause	Fundamental Right?	Prevailing Party
Robinson v. Cahill ( <i>Robinson I</i> ), 303 A.2d 273 (N.J. 1973)	N/A	<i>Robinson</i> Balancing	Undecided	Plaintiffs
Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973)	Rational Basis	Rational Basis	Yes	Defendants
Milliken v. Green ( <i>Milliken II</i> ), 212 N.W.2d 711 (Mich. 1973)	Unspecified	N/A	Undecided	Defendants
Thompson v. Engelking, 537 P.2d 635 (Idaho 1975)	Rational Basis	Unspecified	No	Defendants
Olsen v. State, 554 P.2d 139 (Or. 1976)	<i>Robinson</i> Balancing	Unspecified	Undecided	Defendants
Serrano v. Priest ( <i>Serrano II</i> ), 557 P.2d 929 (Cal. 1976)	Strict Scrutiny	N/A	Yes	Plaintiffs
Horton v. Meskill ( <i>Horton I</i> ), 376 A.2d 359 (Conn. 1977)	Strict Scrutiny	Strict Scrutiny	Yes	Plaintiffs
Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978)	N/A	Unspecified	Yes	Plaintiffs
Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979)	Strict Scrutiny	Unspecified	Yes	Plaintiffs
Danson v. Casey, 399 A.2d 360 (Pa. 1979)	Unspecified	Reasonable Means-End Relation	Undecided	Defendants
Bd. of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979)	Rational Basis	Abuse of Legislative Discretion	Undecided	Defendants
Washakie Cty. Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980)	Strict Scrutiny	Unspecified	Yes	Plaintiffs

Decision	Standard of Review for State Equal Protection	Standard of Review for Education Clause	Fundamental Right?	Prevailing Party
McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981)	Rational Basis	Unspecified	No	Defendants
Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005 (Colo. 1982)	Rational Basis	Unspecified	No	Defendants
Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982)	Rational Basis	Unspecified	No	Defendants
Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758 (Md. 1983)	Rational Basis	Unspecified	No	Defendants
Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983)	Rational Basis	Rational Basis	Undecided	Plaintiffs
Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988)	Rational Basis	Valid Means	Undecided	Defendants
Helena Elementary Sch. Dist. No. 1 v. State ( <i>Helena I</i> ), 769 P.2d 684 (Mont. 1989)	N/A	Unspecified	Undecided	Plaintiffs
Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989)	Rational Basis	Unspecified	Yes	Defendants

On a separate track, it looked as though *Robinson I* might also affect how courts would approach equal protection claims under state constitutions.<sup>173</sup> Then, the California Supreme Court followed up *Serrano I*, its first-wave decision, with *Serrano II*, its influential

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173. Two of the next four decisions remained undecided on the fundamental rights question, and the other two applied rational basis review regardless of their answer to that question. *See supra* Table B.

second-wave decision. Although no longer bound by federal precedent in considering a claim under the equal protection provisions of the California Constitution, the court emulated federal doctrine anyway in holding that a suspect “classification based upon [school] district wealth which affects the fundamental interest of education, must be subjected to strict judicial scrutiny.”<sup>174</sup>

Following *Serrano II*, several second-wave courts also kept in lockstep with federal equal protection analysis, applying strict scrutiny when deeming the right to education fundamental<sup>175</sup> and rational basis review when deeming the right nonfundamental.<sup>176</sup> *Serrano II* thus seemed to have a modest stabilizing effect on the standard of review, at least for state equal protection claims. Yet the fact that a majority of second-wave courts resorted to rational basis review—even after deciding that the right to education is fundamental or remaining undecided on that question—indicates serious reservations with heightened scrutiny generally.<sup>177</sup> By the early 1970s, courts understood that federal equal protection analysis implicating strict scrutiny “was ‘strict’ in theory and fatal in fact.”<sup>178</sup> In the education context, it was fatal politically and practically because, again, courts initially believed that enforcing equal protection as immunity against unequal treatment meant they had to embrace horizontal equity as the remedy.<sup>179</sup> Courts that applied rational

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174. *Serrano II*, 557 P.2d 929, 952 (Cal. 1976).

175. *See Horton I*, 376 A.2d 359, 373 (Conn. 1977); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979); *Washakie Cty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980).

176. *See Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1022 (Colo. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156, 167 (Ga. 1981); *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 789-90 (Md. 1983); *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 365 (N.Y. 1982).

177. *See Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1153 (1999) (“The prevalent understanding of rationality review—and its most potent criticism—posits that rationality review is not review at all, but rather the withholding of review, indicating a refusal to expend resources on issues that the judiciary locates outside the constitutional domain.”).

178. *See 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). *But see Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 797 (2006) (“While it remains true that the majority of laws subjected to strict scrutiny fall and that the government typically faces an onerous task defending laws under this standard, strict scrutiny is not nearly as deadly as generations of lawyers have been taught.”).

179. *See supra* note 161 and accompanying text.

basis review in upholding funding disparities expressed their unease with horizontal equity differently, yet all perceived equalization as an affront to liberty vis-à-vis local control of school districts.<sup>180</sup>

As advocates and courts turned away from state equal protection claims in the third wave, most courts ditched the tiers of scrutiny altogether.<sup>181</sup> The initial third-wave decision, *Rose*, set the tone.<sup>182</sup> The Kentucky Supreme Court did not specify a standard in concluding that the state's school system was unconstitutional.<sup>183</sup> The court purportedly gave "deference and weight to [legislative] enactments," before finding them "constitutionally deficient."<sup>184</sup> But aside from this perfunctory nod to the legislature, it offered no other benchmarks.<sup>185</sup> The court summarily explained that it was "dutifully"

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180. See *Shofstall v. Hollins*, 515 P.2d 590, 592-93 (Ariz. 1973) ("We perceive no justification for such a severe denegration [sic] of local property taxation and control .... We find no magic in the fact that the school district taxes herein complained of are greater in some districts than others." (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54 (1973))); *Lujan*, 649 P.2d at 1023 ("[W]e find no discrimination, invidious or otherwise, in a system that applies a uniform subsidy formula on a statewide basis, while concurrently promoting community control by means of local taxation."); *McDaniel*, 285 S.E.2d at 167-68 ("[T]he Georgia public school finance system preserves the idea of local [control] .... The fact that the state has not funded a large-scale equalization plan does not render the current public school finance system invidiously discriminatory."); *Thompson v. Engelking*, 537 P.2d 635, 652 (Idaho 1975) ("A general and uniform system ... which, within reasonable constitutional limits of equality, makes ample provision for the education of all children, cannot be based upon exact equality of funding per child because it takes more money in some districts per child to provide about the same level of educational opportunity than it does in others."); *Nyquist*, 439 N.E.2d at 368 ("It is significant that this constitutional language ... makes no reference to any requirement that the education to be made available be equal or substantially equivalent in every district. Nor is there any provision ... that local control of education ... be abolished."); *Bd. of Educ. v. Walter*, 390 N.E.2d 813, 822 (Ohio 1979) ("[A]lthough the Ohio system of school financing is built upon the principle of local control, resulting in unequal expenditures between children who live in different school districts, we cannot say that such disparity is a product of a system that is so irrational as to be an unconstitutional violation of the Equal Protection and Benefit Clause."); see also *Hornbeck*, 458 A.2d at 788-89 (citing with approval the reasoning of *Lujan* and *Nyquist*). But see *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wis. 1989) (upholding the system because it "delineates state distribution of resources on an equal per-pupil basis" and rejecting the argument that equal protection requires "the state to distribute resources unequally among students to respond to the particularized needs of each student").

181. See *infra* Table C.

182. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989).

183. See *id.*

184. *Id.*

185. See *id.*

applying “the constitutional test” of the education clause, but alas, no test or standard of review appears in that one-sentence clause.<sup>186</sup> Yet the court, having considered “the evidence in the record” against the “constitutional requirement” of the education clause, concluded it was “crystal clear” that the legislature had “fallen short of its duty.”<sup>187</sup>

It was also immediately evident just a few years after *Rose* that other state courts had indeed “shifted away” from the tiers of scrutiny and “toward the substance of a state’s education clause,” without specifying an alternate standard of review.<sup>188</sup> That pattern held steady for the majority of third-wave courts, as shown in Table C.<sup>189</sup>

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186. *Id.* at 189-90 (citing KY. CONST. § 183 (requiring the legislature to “provide for an efficient system of common schools”)).

187. *Id.* at 189.

188. See Underwood, *supra* note 129, at 510 & n.98.

189. Excluded from the analysis of third-wave decisions are the seven states that declined to entertain the merits of school finance litigation, reasoning that their state constitution education clauses vested discretion and plenary power in the legislature. See *Ex parte James*, 836 So. 2d 813, 819 (Ala. 2002) (per curiam); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 406-08 (Fla. 1996) (per curiam); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1190 (Ill. 1996); *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 183 (Neb. 2007); *Okla. Educ. Ass’n v. State*, 158 P.3d 1058, 1065-66 (Okla. 2007); *Marrero v. Commonwealth*, 739 A.2d 110, 113-14 (Pa. 1999); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 56 (R.I. 1995). In three of these cases, courts did entertain challenges under state equal protection clauses but, finding no fundamental interests nor suspect classification, applied rational basis review and concluded that the school financing scheme was rationally related to a legitimate state interest. See *Edgar*, 672 N.E.2d at 1194-96; *Sundlun*, 662 A.2d at 62; cf. *Okla. Educ. Ass’n*, 158 P.3d at 1066 (“[T]he only justiciable question is whether the Legislature acted within its powers.” (quoting *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1150 (Okla. 1987))).

Table C. Standards of Review in Select “Third-Wave” Decisions

Decision	Standard of Review for State Equal Protection	Standard of Review for Education Clause	Fundamental Right?	Prevailing Party
Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989)	N/A	Unspecified	Yes	Plaintiffs
Tenn. Small Sch. Sys. v. McWherter ( <i>McWherter I</i> ), 851 S.W.2d 139 (Tenn. 1993)	Rational Basis	Rational Basis	Undecided	Plaintiffs
McDuffy v. Sec’y of the Exec. Office of Educ., 615 N.E.2d 516 (Mass. 1993)	N/A	Unspecified	Undecided	Plaintiffs
Skeen v. State, 505 N.W.2d 299 (Minn. 1993)	Rational Basis	Strict Scrutiny	Yes	Defendants
Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994)	Intermediate Scrutiny	N/A	Yes	Plaintiffs
Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994)	N/A	Strict Scrutiny	Yes	Defendants
Campbell Cty. Sch. Dist. v. State ( <i>Campbell I</i> ), 907 P.2d 1238 (Wyo. 1995)	Strict Scrutiny	Strict Scrutiny	Yes	Plaintiffs
Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391 (Alaska 1997)	Means-Ends Relationship	N/A	Undecided	Defendants
Brigham v. State ( <i>Brigham I</i> ), 692 A.2d 384 (Vt. 1997) (per curiam)	Unspecified	Unspecified	Undecided	Plaintiffs



Decision	Standard of Review for State Equal Protection	Standard of Review for Education Clause	Fundamental Right?	Prevailing Party
DeRolph v. State ( <i>DeRolph I</i> ), 677 N.E.2d 733 (Ohio 1997)	N/A	Unspecified	Undecided	Plaintiffs
Abbott v. Burke ( <i>Abbott IV</i> ), 693 A.2d 417 (N.J. 1997)	N/A	Unspecified	Undecided	Plaintiffs
Claremont Sch. Dist. v. Governor ( <i>Claremont II</i> ), 703 A.2d 1353 (N.H. 1997)	N/A	Strict Scrutiny	Yes	Plaintiffs
Hull v. Albrecht ( <i>Albrecht II</i> ), 960 P.2d 634 (Ariz. 1998) (per curiam)	N/A	Adequacy & Substantial Disparities	Undecided	Plaintiffs
Lake View Sch. Dist. No. 25 v. Huckabee ( <i>Lake View III</i> ), 91 S.W.3d 472 (Ark. 2002)	Rational Basis	Unspecified	Undecided	Plaintiffs
Campaign for Fiscal Equity, Inc. v. State ( <i>CFE II</i> ), 801 N.E.2d 326 (N.Y. 2003)	Rational Basis	Unspecified	No	Plaintiffs
Hoke Cty. Bd. of Educ. v. State ( <i>Hoke I</i> ), 599 S.E.2d 365 (N.C. 2004)	N/A	Unspecified	Yes	Plaintiffs
Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257 (Mont. 2005)	N/A	Unspecified	Undecided	Plaintiffs
Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746 (Tex. 2005)	N/A	Reasonableness & Arbitrariness	Undecided	Defendants
Idaho Sch. for Equal Educ. Opportunity v. State, 129 P.3d 1199 (Idaho 2005)	N/A	Unspecified	Undecided	Plaintiffs

Decision	Standard of Review for State Equal Protection	Standard of Review for Education Clause	Fundamental Right?	Prevailing Party
Comm. for Educ. Equality v. State, 294 S.W.3d 477 (Mo. 2009)	N/A	Rational Basis	No	Defendants
Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206 (Conn. 2010)	N/A	Unspecified	Yes	Plaintiffs
Davis v. State, 804 N.W.2d 618 (S.D. 2011)	N/A	No reasonable doubt of violation	Undecided	Defendants
McCleary v. State, 269 P.3d 227 (Wash. 2012)	N/A	Means are “reasonably likely to achieve” end	Yes	Plaintiffs
King v. State, 818 N.W.2d 1 (Iowa 2012)	Rational Basis	N/A	Undecided	Defendants
Lobato v. State ( <i>Lobato II</i> ), 304 P.3d 1132 (Colo. 2013)	Unspecified	Rational Basis	Undecided	Defendants
Gannon v. State ( <i>Gannon I</i> ), 319 P.3d 1196 (Kan. 2014) (per curiam)	Reasonableness	“Reasonably calculated” to ends	Undecided	Plaintiffs
Abbeville Cty. Sch. Dist. v. State ( <i>Abbeville II</i> ), 767 S.E.2d 157 (S.C. 2014)	N/A	Unspecified	Undecided	Plaintiffs

The tiers of scrutiny were ill-suited for enforcing the positive form of the right to education. It was not just that rational basis review provided “too little relief,” while strict scrutiny provided “too much,” as is so often the case.<sup>190</sup> It was that they did not accommodate the new form that the right to education assumed in the third wave. State courts began formulating the right not (merely) as an immu-

190. See Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 439 (2000).

ity against unequal funding but as a claim-right to an adequate education.<sup>191</sup>

Adjudicating the right to education as an immunity has required courts to analyze whether the legislature's school financing scheme exceeded the limits imposed by state equal protection guarantees. The issue there is whether the funding distributions resulted in unequal treatment.<sup>192</sup> If so, the immunity thwarts state action, in effect disabling the legislature's power to enact its chosen funding formula.<sup>193</sup> Hence, as the Washington Supreme Court explains, "The role of the court is to police the outer limits of government power, relying on the constitutional enumeration of negative rights to set the boundaries."<sup>194</sup> For that purpose, the tiers of scrutiny, though flawed, can restrain state action that is not rationally related to a legitimate state interest or not narrowly tailored to meet a compelling state interest.

The tiers of scrutiny are inapposite, however, for adjudicating a claim-right that compels, rather than restrains, state action. Again the Washington Supreme Court explains that the "typical [negative rights] inquiry whether the State has overstepped its bounds therefore does little to further the important normative goals expressed in positive rights provisions."<sup>195</sup> For that purpose, rational basis review is too deferential to legislative prerogatives, given its "strong presumption of constitutionality" attendant to countermajoritarian, finality, and federalism concerns.<sup>196</sup> Such concerns, as Helen Hershkoff persuasively argues, are misplaced in state court because state judges are often elected, and thus, more politically accountable.<sup>197</sup> State constitutions are more easily amended, and thus state court decisions are less final.<sup>198</sup> And, in the absence of federalism

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191. See *supra* note 103 and accompanying text.

192. See Bauries, *supra* note 60, at 330 (citing *Serrano II*, 557 P.2d 929 (Cal. 1977)).

193. See *id.*

194. *McCleary v. State*, 269 P.3d 227, 248 (Wash. 2012) (citing Hershkoff, *supra* note 177, at 1137).

195. *Id.* at 248 ("[The negative rights] approach ultimately provides the wrong lens for analyzing positive constitutional rights, where the court is concerned not with whether the State has done too much, but with whether the State has done enough."); accord Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45, 87-88 (2011).

196. See Hershkoff, *supra* note 177, at 1157-69.

197. See *id.* at 1157-58.

198. See *id.* at 1162-63.

concerns, state courts are well-positioned to devise remedies responsive to local issues.<sup>199</sup> Utmost deference to the legislature is also antithetical with the propensity of state courts to exert judicial authority to conduct “independent examinations of educational quality” and craft “their own substantive [adequacy] standards.”<sup>200</sup>

Strict scrutiny is problematic in the opposite direction, against legislative action. That test has served different purposes, functioning as a near “categorical prohibition against infringements of fundamental rights,” curtailing unjustified “intrusion[s] on protected liberties,” and defining “constitutional rights as rights not to be harmed by governmental acts taken for forbidden purposes.”<sup>201</sup> The common purpose, however, is to restrain state action from impinging rights. Narrow tailoring serves that purpose by insisting “that infringements of protected rights must be necessary in order to be justified.”<sup>202</sup> Likewise, the compelling state interest requirement serves the state-limiting purpose by seeking “to prevent the grave assault to individual rights that occurs when government action trammels those rights to achieve goals directly inconsistent with the Constitution.”<sup>203</sup> The purpose and components of strict scrutiny therefore seem incompatible with the aim of positive claim-right enforcement—which is not to restrain but to compel state action when it furthers the interests protected by those rights.<sup>204</sup>

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199. See *id.* at 1167-69. Because these concerns are misplaced, Hershkoff contends that federal rationality review is a poor “fit with the institutional and substantive position of state courts adjudicating state constitutional welfare claims.” *Id.* at 1154; see also Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893 (1989).

200. See Cochran, *supra* note 190, at 439; cf. Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1651 (2016) (“Rationality permits a considerable amount of both over- and under-inclusiveness.”).

201. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1302-03 (2007).

202. *Id.* at 1326 (“The Supreme Court sometimes expresses essentially the same demand when it says that the government’s chosen means must be ‘the least restrictive alternative’ that would achieve its goals. A law would not be necessary to achieve its ends if the government could accomplish the same result while inflicting lesser burdens on protected rights.” (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

203. Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 299 (2015).

204. Roy Spece has proposed to me that strict scrutiny could be adapted for positive rights enforcement (“When government inaction trammels fundamental rights, strict scrutiny should apply.”). It is telling, however, that state courts have declined to adapt the standard in adequacy decisions. Perhaps that speaks more to the dual forms that the right to education has

This mismatch is reflected in third-wave adequacy decisions that did not apply strict scrutiny even when the right to education was deemed fundamental,<sup>205</sup> and in decisions that supposedly applied strict scrutiny but nevertheless upheld alleged funding inadequacies.<sup>206</sup> It may also explain why, for instance, the New Hampshire Supreme Court neglected to apply the narrow tailoring or compelling state interest requirements, even though it announced strict scrutiny as the test for determining adequacy under its education clause.<sup>207</sup> Instead, the court simply concluded that the state financing system imposed “unreasonable and inequitable tax burdens” on local districts.<sup>208</sup>

The incompatibility of strict scrutiny with positive claim-right enforcement is nowhere more apparent than in the Wyoming Supreme Court’s third-wave decisions. Initially, the court held that it would “review *any* legislative school financing reform with strict scrutiny to determine whether the evil of financial disparity, from whatever unjustifiable cause, has been exorcized from the Wyoming educational system.”<sup>209</sup> The court further explained that, although strict scrutiny was originally adopted for resolving a second-wave equal protection case, it would “extend that decision beyond a wealth-based disparity to other types of causes of disparities,” presumably including those caused by inadequate (as opposed to inequitable) funding.<sup>210</sup>

Notably, the Wyoming Supreme Court acknowledged the positive form of the right to education and that its “duty to protect individual rights includes compelling legislative action required by the consti-

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taken over the years, *see* Weishart, *Reconstituting*, *supra* note 34, at 922, than to the potential elasticity of strict scrutiny.

205. *See* Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 210-12 (Conn. 2010); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206, 209 (Ky. 1989); *Hoke Cty. Bd. of Educ. v. State (Hoke I)*, 599 S.E.2d 365, 374 (N.C. 2004); *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 256-57 (N.D. 1994); *McCleary v. State*, 269 P.3d 227, 246, 248 (Wash. 2012).

206. *See* *Skeen v. State*, 505 N.W.2d 299, 315 (Minn. 1993); *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994).

207. *See* *Claremont II*, 703 A.2d 1353, 1358-59 (N.H. 1997).

208. *Id.* at 1360.

209. *Campbell Cty. Sch. Dist. v. State (Campbell I)*, 907 P.2d 1238, 1266 (Wyo. 1995) (emphasis added) (citing *Washakie Cty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310, 335 (Wyo. 1980)).

210. *Id.*

tution.”<sup>211</sup> At the same time, the court also seemingly understood that strict scrutiny review was geared toward negative rights enforcement, meant to restrain “state action *interfering*” with the fundamental “right to an equal opportunity to a proper public education.”<sup>212</sup> And yet, as noted in Table C, the court made no distinction between equity and adequacy challenges in adopting strict scrutiny as the test that would apply “to legislative action which *affects* a child’s right to a proper education.”<sup>213</sup>

In follow-on suits, however, when the constitutional theory sounded more in adequacy than in equity, the Wyoming Supreme Court’s application of strict scrutiny was less exacting. The court continued to regard strict scrutiny as “appropriate” for claims affecting “the constitutional right to an equal and adequate education.”<sup>214</sup> But in analyzing adequacy challenges, the court’s language was more lax: “We are now faced with the difficult and unwelcomed task of determining whether the funding adopted by the legislature ... meets the constitutional standard of the ‘*best we can do*.’”<sup>215</sup> Entertaining a petition for rehearing on the adequacy of school capital construction, the court made no mention of the standard of review, but did reiterate its judicial authority to use “provisional remedies or other equitable powers intended to spur [legislative] action.”<sup>216</sup>

Eventually, seven years later, the court had to clarify that, in fact, “the strict scrutiny test ... [was] not in play” when it determined whether the state had complied with previous rulings to adequately

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211. *Id.* at 1264.

212. *See id.* at 1266 (emphasis added); *see also id.* at 1266-67 (“Such state action will not be entitled to the usual presumption of validity; rather, the state must establish its interference with that right is forced by some compelling state interest and its interference is the least onerous means of accomplishing that objective.” (citing *Miller v. City of Laramie*, 880 P.2d 594, 597 (Wyo. 1994))).

213. *See id.* at 1267 (emphasis added).

214. *See State v. Campbell Cty. Sch. Dist. (Campbell II)*, 19 P.3d 518, 536 (Wyo. 2001).

215. *Id.* at 538 (quoting *Campbell I*, 907 P.2d at 1279); *see also id.* at 540 (considering “whether the contested components” such as teacher salaries, transportation and special education, and adjustments for student characteristics, “accurately reflect the cost a school district should incur to provide that component”).

216. *See State v. Campbell Cty. Sch. Dist. (Campbell III)*, 32 P.3d 325, 332 (Wyo. 2001) (citing *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1086 (1991)).

fund public education.<sup>217</sup> That determination, the court explained, “involves factual findings concerning whether the funding is adequate to allow school districts to provide the education deemed appropriate.”<sup>218</sup> Such a bare bones means-ends test typified the gradual approach of several third-wave courts—a more significant and perhaps unexpected development than the collapse of the tiers of scrutiny.

### *B. The Rise of Ends-to-Fit Review*

Over the three waves, state courts that declined to specify a standard of review for education clause claims ultimately assessed whether the legislature did enough (means) to provide a constitutionally adequate education (end).<sup>219</sup> Frequently, they engaged in this basic means-end scrutiny with the benefit of trial court factual findings, entitled to a deferential “substantial evidence”<sup>220</sup> or “clearly erroneous”<sup>221</sup> standard of review. The trial court’s conclusions of law, however, received “no particular deference.”<sup>222</sup> And although

217. See *Campbell Cty. Sch. Dist. v. State (Campbell IV)*, 181 P.3d 43, 50 (Wyo. 2008).

218. See *id.* at 51.

219. See, e.g., *Helena I*, 769 P.2d 684, 690 (Mont. 1989) (“We conclude that as a result of the failure to adequately fund the Foundation Program, ... the State has failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed under [the state education clause.]”); *Robinson v. Cahill*, 287 A.2d 187, 211 (N.J. Super. Ct. Law Div. 1972) (concluding that “the minimum support aid and save harmless provisions” of financing system failed to satisfy “the command of the Education Clause” to provide all children with “a ‘thorough’ education”), modified, *Robinson I*, 303 A.2d 273 (N.J. 1973); *DeRolph v. State (DeRolph I)*, 677 N.E.2d 733, 775 (Ohio 1997) (“The trial court’s findings of fact document that the appellant school districts and other districts throughout this state are starved for funds.... [I]t is obvious that the General Assembly has failed in its constitutional obligation to ensure a thorough and efficient system of common schools.”); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 97 (Wash. 1978) (“Thus we hold, compliance with [the state education clause] can be achieved only if sufficient funds are derived ... to permit school districts to provide ‘basic education’ through a basic program of education in a ‘general and uniform system of public schools.’” (quoting WASH. CONST. art. IX, §§ 1-2)).

220. See, e.g., *Gannon I*, 319 P.3d 1196, 1246 (Kan. 2014) (per curiam); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 790 (Tex. 2005); *McCleary v. State*, 269 P.3d 227, 253 (Wash. 2012).

221. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 196 (Ky. 1989); *Campbell IV*, 181 P.3d at 51.

222. *Abbott v. Burke (Abbott VII)*, 971 A.2d 989, 992 n.2 (N.J. 2009) (quoting *State v. Chun*, 943 A.2d 114, 137 (N.J. 2008)); accord *Neeley*, 176 S.W.3d at 785 (“To the extent that [the constitutionality] determination rests on factual matters that are in dispute, we must, of course, rely entirely on the district court’s findings. But in deciding ultimately the constitu-



some courts began their analysis with a presumption that the statutory financing scheme is constitutional,<sup>223</sup> those courts showed little reservation in concluding the presumption rebutted.<sup>224</sup>

That a means-end test has been the fallback for state courts reaching conclusions of law on education clause claims is not surprising as it “may well be the most frequently invoked technique in the judicial review of the validity of federal and state legislation.”<sup>225</sup> What is unusual is the way that state courts have employed this technique. Means-end review is supposed to entail judicial scrutiny of (1) the legislative means, (2) the legislative or constitutional ends, and (3) the fit between the means and the ends.<sup>226</sup> Under federal doctrine, much of the U.S. Supreme Court’s jurisprudence, particularly in equal protection cases, adheres to the view that courts should scrutinize “the means chosen by the government to pursue its ends, rather than ... the validity of the ends themselves.”<sup>227</sup> And,

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tional issues, those findings have a limited role.” (citing *Owens Corning v. Carter*, 997 S.W.2d 560, 582 (Tex. 1999); *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 625 (Tex. 1996); *Texas Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1968)); *McCleary*, 269 P.3d at 246 (“We review de novo the trial court’s conclusions of law, including its interpretation of statutes and constitutional provisions.”).

223. See *Abbott IV*, 693 A.2d 417, 431-32 (N.J. 1997) (“We do not discount or minimize the State’s contention that ... a legislative enactment ... is entitled to a presumption of validity.”); *DeRolph I*, 677 N.E.2d at 737 (“We are aware that the General Assembly has the responsibility to enact legislation and that such legislation is presumptively valid. However, this does not mean that we may turn a deaf ear to any challenge to laws passed by the General Assembly.” (internal citations omitted)); *Abbeville Cty. Sch. Dist. v. State (Abbeville II)*, 767 S.E.2d 157, 161 (S.C. 2014) (“[A]ll statutes are presumed constitutional and, if possible, will be construed to render them valid.’ Accordingly, we will not find a statute unconstitutional unless ‘its repugnance to the Constitution is clear beyond a reasonable doubt.’” (alteration in original) (quoting *Curtis v. State*, 549 S.E.2d 591, 597 (S.C. 2001))).

224. See *Abbott IV*, 693 A.2d at 432 (“The factors we have recounted that bear on the adequacy of the statute’s funding provisions thoroughly refute the State’s fundamental contention that ... the [prescribed] amount is adequate to provide the basic thorough and efficient education and that all spending in excess of the [prescribed] amount in the wealthy and successful districts is educational waste; those considerations undermine any presumption in favor of the validity of the statute’s funding measures.”); *DeRolph I*, 677 N.E.2d at 776 (“There is no question that Ohio’s system of school funding violates the [education clause] of the Ohio Constitution.”); *Abbeville II*, 767 S.E.2d at 175 (“The measurable inputs and outputs show that the Defendants have failed to provide students in the Plaintiff Districts the requisite constitutional opportunity.”).

225. GERALD GUNTHER, *CONSTITUTIONAL LAW* 93 n.2 (11th ed. 1985).

226. See Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 304 (1997).

227. *Id.* at 307 (crediting Gerald Gunther as one of the influential and earliest proponents of that view (citing Gunther, *supra* note 178, at 20-24)).

indeed, the categorization of the means has often been “outcome-determinative.”<sup>228</sup> Legislative means that are based on suspect classifications or that burden fundamental rights rarely withstand strict scrutiny (because they are usually not necessary, narrowly tailored, or least restrictive).<sup>229</sup> Consequently, under federal doctrine, “the fit between means and ends has tended to be a mere formality, and ends scrutiny has been notably absent.”<sup>230</sup>

There has been some recent deviation from this pattern; “rational basis with bite” may provide the clearest example of the Court’s renewed interest in government purposes” or ends scrutiny.<sup>231</sup> In these cases, although the Court applied rational basis review, it struck down the challenged law, perceiving “that the actual ends—as distinct from the proffered ends—motivating the legislation were illegitimate.”<sup>232</sup> Some have suggested, for example, that the Court applied rational basis with bite in *Lawrence*<sup>233</sup> and *Windsor*.<sup>234</sup> In general, however, “ends scrutiny is [still] considered particularly intrusive to other branches of government because it involves ... expressing that the Court does not believe the government’s statement of its purpose.”<sup>235</sup>

State court adjudication of education clause claims diverges from federal means-end testing in two ways. First, ends scrutiny has not been used to “smoke out” illicit motives or improper purposes.<sup>236</sup>

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228. *Id.* at 304.

229. *See id.* at 303.

230. *Id.* at 304; *see also* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2448 (2003) (“In cases involving presumptively valid legislation, the Court, with rare exception, has refused to consider the legitimacy of legislative ends. The Court has also backed away from its *Lochner*-era insistence on a substantial means-ends fit.” (footnotes omitted)).

231. Bhagwat, *supra* note 226, at 312 (quoting Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 799, 800-03 (1987)).

232. *Id.* (emphasis omitted).

233. *See, e.g.*, Winkler, *supra* note 178, at 808-09; Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331, 336 (2013).

234. *See, e.g.*, Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 872 & n.252 (2014) (citing cases discussing the *Windsor* standard of review); Susannah W. Pollvogt, *Windsor, Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204, 206-11 (2013). *But see* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 165-66 (2016) (“[S]exual orientation enjoys a tier of its own, and ... [t]he animus model that the Court applies to sexual orientation claims ... defies traditional categories and seems to evade particular constraints of the two-track approach.”).

235. Spece & Yokum, *supra* note 203, at 297.

236. *See* Niels Petersen, *Legislative Inconsistency and the “Smoking Out” of Illicit Motives*,

That brand of ends scrutiny is often unnecessary in cases where the education clause already prescribes the purpose for the legislation, namely, to provide a constitutionally adequate education.<sup>237</sup> Although courts have found excuses for legislative inaction unsatisfactory or intolerable, they generally have assumed that legislators acted in “good faith” even after successive rounds of litigation.<sup>238</sup> Indeed, when the Washington Supreme Court held the legislature in contempt for failure to comply with its previous rulings, the court said it “assumes and expects that the other branches of government will comply in good faith.”<sup>239</sup> A year later, with the legislature still in contempt, the court again acknowledged the “good intentions” of the legislature’s “pledge” before insisting it was “not a plan for achieving full constitutional compliance.”<sup>240</sup>

Second, it is means scrutiny, not ends scrutiny, that has been notably absent in school finance cases. Courts understand that the school “budget is a prerogative of the Legislature and Executive,”<sup>241</sup>

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64 AM. J. COMP. L. 121, 122 (2016) (“[M]eans-ends tests have an instrumental purpose: they are used to ‘smoke out’ illicit motives.”). *But see* Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627, 644 (2015) (“[T]he function of strict means-ends scrutiny is less to be an information sensor and more to function as a substantive shield against certain types of actions.”).

237. *See* Cochran, *supra* note 190, at 438 (“[S]chool officials likely would have little problem proving that their ‘ends’ are ‘legitimate’ or ‘compelling’ because the school financing precedents already have established that districts have an affirmative constitutional duty to provide educational services.”).

238. *See, e.g.*, Londonderry Sch. Dist. SAU No. 12 v. State, 958 A.2d 930, 932 (N.H. 2008) (“We presume that ... the legislature acted in good faith and crafted a responsive mandate intended to address the constitutional infirmities of the prior legislation.”); *Abbott VII*, 971 A.2d 989, 1008 (N.J. 2009) (“The State has constructed a fair and equitable means designed to fund the costs of a thorough and efficient education .... The quality of the effort and the good faith exhibited in the exercise of discretion over and over again ... lead us to conclude that the legislative effort deserves deference.”); *Robinson v. Cahill*, (*Robinson V*), 355 A.2d 129, 187 (N.J. 1976) (*per curiam*) (“The decisions which we have rendered have not been written with an eye to impugning either the integrity or good faith of the Governor or the Legislature.”); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 89 (Wash. 1978) (“[W]e are firmly convinced the other branches of government also will carry out their defined constitutional duties in good faith and in a completely responsible manner.”); *Campbell IV*, 181 P.3d 43, 68 (Wyo. 2008) (“We hold that the state acted in good faith on issues of operations funding and heeded the urgency expressed in our opinions.”).

239. Contempt Order at 10, *McCleary v. State*, 269 P.3d 227 (Wash. 2015) (No. 84362-7).

240. Continuing Contempt Order at 11, *McCleary v. State*, 269 P.3d 227 (Wash. 2016) (No. 84362-7).

241. *Campaign for Fiscal Equity, Inc. v. State (CFE III)*, 861 N.E.2d 50, 58 (N.Y. 2006).

and that the “details of education policymaking” are innumerable,<sup>242</sup> testing a “delicate balancing of powers and responsibilities among coordinate branches of government.”<sup>243</sup> Therefore, most courts have conferred substantial deference to the other branches in determining the means to fulfill a state’s affirmative duty to provide a constitutionally adequate education:

- ◇ “The General Assembly must provide adequate funding for the system. How they do this is their decision.”<sup>244</sup>
- ◇ “The legislature generally enjoys broad discretion in selecting the means of discharging its duty under [the education clause], including deciding which programs are necessary to deliver the constitutionally required ‘education.’”<sup>245</sup>
- ◇ “We shall presume at this time that the Commonwealth will fulfil its responsibility with respect to defining the specifics and the appropriate means to provide the constitutionally-required education.”<sup>246</sup>
- ◇ “This Court cannot suggest methods of fixing the problem, but we can recognize a constitutional violation when we see one.”<sup>247</sup>
- ◇ “[The] Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty.”<sup>248</sup>

Rather than engage in any meaningful means scrutiny, courts since at least *Robinson I* have been primarily concerned with “the end product.”<sup>249</sup> While acknowledging the “many different ways”

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242. See *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1152 (Mass. 2005).

243. *McCleary*, 269 P.3d at 258.

244. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 216 (Ky. 1989).

245. *McCleary*, 269 P.3d at 251-52.

246. *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 554 n.92 (Mass. 1993).

247. *Abbeville II*, 767 S.E.2d 157, 175 (S.C. 2014).

248. *Gannon I*, 319 P.3d 1196, 1226 (Kan. 2014) (per curiam).

249. *Robinson I*, 303 A.2d 273, 294 (N.J. 1973); accord *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 262 (Mont. 2005) (“Nonetheless, in order to address the Coalition’s claims we have to address the *educational product* that the present school system

that adequacy standards can be satisfied, courts nevertheless insist that the standards “must be satisfied.”<sup>250</sup> Progress toward such ends is “typically measured through proficiency levels on end-of-grade standardized tests, graduation rates, and preparedness for higher education, employment, and the responsibilities of citizenship.”<sup>251</sup>

Such ends scrutiny can eclipse inquiries into the degree of fit between the legislative means and the constitutional ends. A few state courts have nevertheless specified the degree of fit they expect, echoing the U.S. Supreme Court: “[A] fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served.’”<sup>252</sup> The reasonableness of the fit dates back to that first-wave New Jersey trial court decision: “The Legislature may approach the goal required by the Education Clause by any methods *reasonably* calculated to accomplish that purpose consistent with the equal protection requirements of law.”<sup>253</sup> And that is still the benchmark used by third-wave courts in Kansas,<sup>254</sup> Washington,<sup>255</sup> Wyoming,<sup>256</sup> and New York,<sup>257</sup> among others.

The Texas Supreme Court explains why “the crux” of this inquiry “is reasonableness”:

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provides, not just the *manner* in which the Legislature funds that school system.”).

250. *E.g.*, *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 784 (Tex. 2005).

251. Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 14 (2016).

252. Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

253. *Robinson v. Cahill*, 287 A.2d 187, 217 (N.J. Super. Ct. Law Div. 1972) (emphasis added), *modified*, *Robinson I*, 303 A.2d 273 (N.J. 1973).

254. *See Gannon I*, 319 P.3d 1196, 1236-37 (Kan. 2014) (per curiam) (“[The] adequacy [requirement] is met when the public education financing system provided by the legislature for grades K-12—through structure and implementation—is *reasonably calculated* to have all Kansas public education students meet or exceed the standards set out in *Rose* and presently codified in [the relevant statute].” (emphasis added)).

255. *McCleary v. State*, 269 P.3d 227, 248 (Wash. 2012) (“[W]e must ask whether the state action achieves or is *reasonably likely* to achieve ‘the constitutionally prescribed end.’” (emphasis added) (quoting Hershkoff, *supra* note 177, at 1137)).

256. *See Campbell IV*, 181 P.3d 43, 55 (Wyo. 2008) (“[T]he parties somewhat lost perspective on the primary constitutional issue—does the state’s chosen method of funding represent, as close as *reasonably possible*, the cost of education.” (emphasis added)).

257. *CFE III*, 861 N.E.2d 50, 57 (N.Y. 2006) (“The role of the courts is not ... to determine the best way to calculate the cost of a sound basic education ... but to determine whether the State’s proposed calculation of that cost is rational.... [Here] the state budget plan had already *reasonably calculated* that cost.” (emphasis added)).

These [adequacy] standards import a wide spectrum of considerations and are admittedly imprecise, but they are not without content. At one extreme, no one would dispute that a public education system limited to teaching first-grade reading would be inadequate, or that a system without resources to accomplish its purposes would be inefficient and unsuitable. At the other, few would insist that merely to be adequate, public education must teach all students multiple languages or nuclear biophysics, or that to be efficient, available resources must be unlimited. In between, there is much else on which reasonable minds should come together, and much over which they may differ.<sup>258</sup>

Again, however, the reasonableness of the fit need not be examined, as suggested by the Washington Supreme Court's use of the disjunctive in its test: "[W]e must ask whether the state action achieves *or* is reasonably likely to achieve 'the constitutionally prescribed end.'"<sup>259</sup> Indeed, on one side of the disjunctive, most courts that have initially struck down a school financing scheme have been persuaded that the facts conclusively established that the ends have not been or cannot be achieved, without assessing the reasonableness of the fit.<sup>260</sup> On the other side, when courts have upheld the financing scheme, often after successive rounds of litigation, they have taken assurances from the fact that, even though the ends have not yet been fully achieved, the means are

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258. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005).

259. *McCleary*, 269 P.3d at 248 (emphasis added) (citing Hershkoff, *supra* note 177, at 1137).

260. *See, e.g., Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 189 (Ky. 1989) ("[W]hen we consider the evidence in the record, and when we apply the constitutional requirement ..., it is crystal clear that the General Assembly has fallen short of its duty to enact legislation to provide for an efficient system of common schools throughout the state."); *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 552 (Mass. 1993) ("[T]he record shows clearly that, while the present statutory and financial schemes purport to provide equal educational opportunity in the public schools for every child, rich or poor, the reality is that children in the less affluent communities (or in the less affluent parts of them) are not receiving their constitutional entitlement of education as intended and mandated by the framers of the Constitution.").



reasonably calculated to achieve them.<sup>261</sup> And that may “be the best that we can do.”<sup>262</sup>

### III. A JUDICIAL CRISIS OF CONFIDENCE: TO WHAT END?

It is ironic that state courts have been disposed to scrutinizing the achievement of constitutional ends given their uncertainty at times about what those ends should be. Recall that first-wave courts accepted equality à la horizontal equity as the appropriate, if impractical, end; second-wave courts gradually espoused vertical equity, the more pragmatic form of equality; and third-wave courts surged predominantly toward the end goal of adequacy as a font of positive liberty.<sup>263</sup> For the past two decades, advocates and scholars have predicted or proposed a “fourth wave” with new ends in sight.<sup>264</sup> Whether or not that fourth wave ever surfaces, there has been a strong undercurrent drifting a few courts toward both adequacy and

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261. See, e.g., *Abbott VII*, 971 A.2d 989, 1009 (N.J. 2009) (“The legislative and executive branches of government have enacted a funding formula that is designed to achieve a thorough and efficient education for every child, regardless of where he or she lives.... There is no absolute guarantee that [statute] will achieve the results desired by all. The political branches of government, however, are entitled to take reasoned steps, even if the outcome cannot be assured, to address the pressing social, economic, and educational challenges confronting our state. They should not be locked in a constitutional straitjacket.”); *Neeley*, 176 S.W.3d at 789-90 (“Having carefully reviewed the evidence and the [factual] findings, we cannot conclude that the Legislature has acted arbitrarily in structuring and funding the public education system so that school districts are not reasonably able to afford all students the access to education and the educational opportunity to accomplish a general diffusion of knowledge.”).

262. *Campbell I*, 907 P.2d 1238, 1279 (Wyo. 1995) (emphasis omitted); *accord Campbell IV*, 181 P.3d 43, 67 (Wyo. 2008) (“In every school finance case, this Court has consistently recognized the constitutional directive that it is the legislature’s duty and prerogative to determine the appropriate standards for our public schools and to assure sufficient funding is provided to allow the districts to achieve those standards. While perfection is not required or expected, a good faith effort to preserve and protect our constitution’s commitment to a sound public education system is. We are convinced, as was the district court, that the state has met that standard and will continue to do so in the future.”).

263. See *supra* Part II.A.

264. See generally David G. Hinojosa, “Race-Conscious” School Finance Litigation: Is a Fourth Wave Emerging?, 50 U. RICH. L. REV. 869 (2016); Ryan, *supra* note 48, at 307-10; Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857 (2006); Christopher E. Adams, Comment, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613 (2007); Lauren Nicole Gillespie, Note, *The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989 (2010); McMillan, *supra* note 48.



vertical equity (that is, equal liberty).<sup>265</sup> Two structural barriers have prevented this undercurrent from emerging as a wave of its own, however.

First, courts have tended to analyze vertical equity and adequacy separately, treating them as distinct claims or remedies. For a time, that orientation was understandable, given that vertical equity and adequacy originated from different constitutional sources: equal protection and education clauses, respectively.<sup>266</sup> But the distinction has carried over even when vertical equity and adequacy are said to share the same source.<sup>267</sup> The Kansas Supreme Court, for instance, recognized that “equity and adequacy” are “two components” of its education clause.<sup>268</sup> Yet that court has identified them as separate “challenges”<sup>269</sup> subject to separate constitutional “tests.”<sup>270</sup> Most re-

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265. See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee (Lake View III)*, 91 S.W.3d 472, 500 (Ark. 2002) (recognizing the state must “determine whether equal educational opportunity for an adequate education is being substantially afforded”); *Gannon I*, 319 P.3d 1196, 1219 (Kan. 2014) (per curiam) (“We have recognized that [the education clause] contains at least two components: equity and adequacy.”); *Helena I*, 769 P.2d 684, 690 (Mont. 1989) (“[T]he State has failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed.”); *Abbott II*, 575 A.2d 359, 375 (N.J. 1990) (“[W]e conclude that a significant number of poorer urban districts do not provide a thorough and efficient education for their students; that the measurement of the constitutional requirement must account for the needs of the students; that in most poorer urban districts, the education needed to equip the students for their roles as citizens and workers exceeds that needed by students in more affluent districts; that the education provided depends to a significant extent on the money spent for it, and on what that money can buy—in quality and quantity—and the ability to innovate.”); *Hoke I*, 599 S.E.2d 365, 393 (N.C. 2004) (agreeing with the trial court that the state failed to meet the needs of at-risk students and thus deprived them of an adequate education); *DeRolph v. State (DeRolph II)*, 728 N.E.2d 993, 999-1000 (Ohio 2000) (recognizing the “inherent inequities” and “inadequacies” of “funding systems that rely too much on local property taxes”); *Tenn. Small Sch. Sys. v. McWherter (McWherter II)*, 894 S.W.2d 734, 738 (Tenn. 1995) (“It appears that the [statute] addresses both constitutional mandates imposed upon the State—the obligation to maintain and support a system of free public schools and the obligation that that system afford substantially equal educational opportunities.”); *McCleary v. State*, 269 P.3d 227, 252 (Wash. 2012) (noting the tax source “implicates both the equity and the adequacy of the K-12 funding system”).

266. See, e.g., *Lake View III*, 91 S.W.3d at 486 (considering in turn contentions “on adequacy under Article 14” and “equality under Article 2, §§ 2, 3, and 18”).

267. See, e.g., *McCleary*, 269 P.3d at 252 (considering a claim under the education clause noting the tax source “implicates both the equity and the adequacy of the K-12 funding system”).

268. *Gannon I*, 319 P.3d at 1219.

269. See *id.*

270. The adequacy test is measured against the *Rose* standards and state law. *Id.* at 1236-37. The equity test does not require adherence to “precise equality standards,” but “[s]chool

cently, the Kansas Supreme Court held separate oral arguments and issued separate opinions for each component.<sup>271</sup> Even when courts have acknowledged the “considerable overlap between the issue of whether a school funding system is inadequate and whether it is inequitable,” they have nonetheless analyzed vertical equity and adequacy separately.<sup>272</sup> Hence, courts have not established standards for mutually enforcing these reciprocal demands.<sup>273</sup> And, until recently, the symbiosis of adequacy and vertical equity has been undertheorized.<sup>274</sup>

Second, justiciability concerns still haunt courts despite decades of resolute enforcement of the right to education.<sup>275</sup> Indeed, seven *third-wave* courts were so concerned about separation of powers that they refused to entertain the merits of school finance challenges, rendering the right to education in those states nonjusticiable and abdicating the judiciary’s role entirely.<sup>276</sup> Courts’ abiding fear “that they might overstep the boundaries of their authority”<sup>277</sup> makes them averse to line drawing and reticent about standards generally. Due to the complexity of adequacy standards, education policy making, and budget appropriations, courts also doubt their institutional competency to order a remedy.<sup>278</sup> Consequently, even though a majority of courts have entertained the merits of adequacy claims and found a constitutional violation, justiciability concerns

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districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort.” *Id.* at 1239.

271. See *Gannon v. State (Gannon IV)*, 390 P.3d 461, 468 (Kan. 2017) (per curiam); see also *Gannon v. State (Gannon III)*, 372 P.3d 1181 (Kan. 2016) (per curiam); *Gannon v. State (Gannon II)*, 368 P.3d 1024 (Kan. 2016) (per curiam).

272. See *Lake View III*, 91 S.W.3d 472, 496 (Ark. 2002) (“Deficiencies in certain public schools in certain school districts can sustain a finding of inadequacy but also, when compared to other schools in other districts, a finding of inequality. Bearing that in mind, we first address whether state *revenues* paid to the school districts under the school-funding formula is the test for deciding equality or whether the test is actual *expenditures* spent on the students.”).

273. See Weishart, *Reconstituting*, *supra* note 34, at 974 (explaining that “the difficulty lies in vague education clauses”).

274. See Weishart, *Transcending*, *supra* note 34, at 480-83.

275. See generally Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83 (2010).

276. See *supra* note 189.

277. Black, *supra* note 119, at 463.

278. See Simon-Kerr & Sturm, *supra* note 275, at 99.

dissuade them from undertaking any means scrutiny, leaving it to the legislature to decide exactly how to remedy the violation.<sup>279</sup> During and after the Great Recession, even courts that had been reliably active and emphatic in their demands on state government “stopped short of dictating remedies at a level of detail that encroaches on legislative prerogative.”<sup>280</sup>

Sustained legislative resistance and defiance to school finance decisions, especially within the past decade, proved courts are right to be concerned about exercising judicial authority. For example, “the New Jersey Supreme Court has been the most aggressive of any in enforcing education rights and duties.”<sup>281</sup> School finance litigation has been ongoing there in one form or another since that first-wave trial court decision in the early 1970s.<sup>282</sup> Yet there are signs now that the repeated showdowns with the state legislature are starting to take their toll.<sup>283</sup> In 2009, for the first time in decades, the court relented, agreeing that the funding formula was at least reasonably calculated to provide a constitutionally adequate education.<sup>284</sup> Within a year of that decision, however, “the state made massive cuts to the funding formula.”<sup>285</sup> When the case eventually worked its way back to the court, it only “restored funding to a subset of school districts, but not all,” effectively excusing “\$600 million in cuts to disadvantaged districts.”<sup>286</sup>

Even among courts that have maintained their assertiveness, for example, the Washington and Kansas Supreme Courts, “the legislatures in those states defied or evaded the courts’ orders.”<sup>287</sup> Recall

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279. See Bauries, *supra* note 27, at 742 (“These courts, like the courts completely abstaining, have often referred to separation of powers principles to justify remedial abstention.”).

280. Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75, 114 (2016) (“When lower courts have peremptorily mandated specific remedies, some higher courts have been quick to strike them down, particularly when there was more than one way to solve the problem.”).

281. Black, *supra* note 119, at 453.

282. See *id.*

283. See *id.* at 453-54; Helen Hershkoff & Stephen Loffredo, *Tough Times and Weak Review: The 2008 Economic Meltdown and Enforcement of Socio-Economic Rights in US State Courts*, in ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS 234 (Aoife Nolan ed., 2014).

284. See *Abbott VII*, 971 A.2d 989, 1009 (N.J. 2009).

285. Black, *supra* note 119, at 454.

286. *Id.* at 455.

287. *Id.* at 456.

that the Washington Supreme Court was forced to impose contempt sanctions on the state legislature for failing to comply with its orders to draft a remedial plan.<sup>288</sup> In Kansas, defiant legislators and the Governor turned on the court, threatening to make “changes to judicial funding and appointment.”<sup>289</sup> The Kansas Supreme Court weathered that political storm; the four justices who were targeted by opposition groups were nevertheless retained in the 2016 election.<sup>290</sup> All the while, the court has continued to issue equity and adequacy decisions.<sup>291</sup> Nevertheless, the lengths to which state lawmakers were willing to go to obstruct such decisions might give pause to the highest courts in other states, if not the Kansas Supreme Court.

Given the lack of standards for mutually enforcing adequacy and vertical equity, the persistent justiciability concerns, and the escalating legislative resistance, it is little wonder that the equal liberty undercurrent has not developed into its own wave. Although acute in equal liberty claims, these problems are endemic to school finance litigation, which one scholar compared to a Russian novel: “[I]t’s long, tedious, and everybody dies in the end.”<sup>292</sup> But in fact, school finance litigation has not ended and shows no signs that it will. On the contrary, there may well be a resurgence in state court challenges following the passage of the ESSA, which enacts “an enormous devolution of power to states.”<sup>293</sup> Therefore, any hope that the equal liberty claim will mature and improve the cause of school finance litigation in this new political and legal environment rests on developing solutions to problems of judicial review which have eroded the confidence of courts.

It is encouraging that previous reforms proposed by scholars have directly or indirectly influenced the adjudication of school finance cases. Scott Bauries surveyed some of these “adjudicatory reforms”

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288. See *supra* notes 239-40 and accompanying text.

289. Black, *supra* note 119, at 456-57.

290. See Associated Press, *Justices Retained to the Kansas Supreme Court*, KSN.COM (Nov. 9, 2016, 7:47 AM), <http://ksn.com/2016/11/09/justices-retained-to-the-kansas-supreme-court/> [<https://perma.cc/DW3K-96XA>].

291. See *Gannon IV*, 390 P.3d 461 (Kan. 2017) (per curiam); *Gannon III*, 372 P.3d 1181 (Kan. 2016) (per curiam); *Gannon II*, 368 P.3d 1024 (Kan. 2016) (per curiam).

292. Mark G. Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 HARV. J. ON LEGIS. 499, 499 (1991).

293. Black, *supra* note 35, at 131.

described below.<sup>294</sup> Alas, none of the reforms that have been adopted have fully resolved the problems plaguing judicial review of the state constitutional right to education.

#### A. “Output-Based” Review

At the beginning of the third wave, Molly McUsic proposed that courts conduct an “‘output-based,’ rather than ‘input-based’” review of adequacy claims.<sup>295</sup> Specifically, she proposed that courts adopt state-developed educational standards as the measure of adequacy and ensure that the state is enabling children to satisfy those standards.<sup>296</sup> McUsic argued that by enforcing only education standards (outputs) rather than financing (inputs), the courts avoided actual policy making and any attendant separation of powers concerns.<sup>297</sup> In line with the main thrust of McUsic’s proposal, most third-wave courts have judged constitutionality on the outputs (the ends) more so than the inputs (the means).<sup>298</sup>

Bauries rightly points out that no state can maintain a constitutional school financing scheme if it is to be judged strictly and solely, through testing or other measures, by whether *all* children are in fact reaching the adequacy threshold.<sup>299</sup> But that critique takes McUsic’s proposal far too literally. No court has endorsed equality of outcomes as the end-goal; none appear to be operating under the “delusion that all children can or want to achieve the same outcomes.”<sup>300</sup> Rather, the output that courts assess is whether “*every*

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294. See Bauries, *supra* note 27, at 721-35.

295. See *id.* at 722 (citing Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 329-30 (1991)).

296. See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 330 (1991).

297. See *id.*

298. See *supra* Part II.A. But courts generally have not used state-developed standards to set the constitutional bar, as McUsic proposed. See Bauries, *supra* note 27, at 723. Instead, as previously discussed, courts have devised their own standards for adequacy. See *supra* notes 122-27 and accompanying text. This has been a positive development because court-adopted standards prevent states from setting the bar low “through a simple legislative or administrative change in the learning standards.” Bauries, *supra* note 27, at 724.

299. See *id.* at 723-24 (suggesting McUsic’s proposal “would virtually guarantee that a state’s system would be unconstitutional in perpetuity” which would itself “offend the separation of powers”).

300. See Weishart, *Transcending*, *supra* note 34, at 485.

*child*” has “the same opportunity and access to an adequate education.”<sup>301</sup> And, as previously explained, when the evidence is not conclusive on that score, courts look to the degree of fit between the inputs and the outputs,<sup>302</sup> just as the next scholar proposed.

*B. “A Jurisprudence of Consequences”*

As the third wave was in full motion, Helen Hershkoff proposed a “Jurisprudence of Consequences,” wherein a court’s review should concentrate on whether the legislation “is likely to effectuate the constitutional goal.”<sup>303</sup> Bauries observes that Hershkoff’s proposal and other similar scholarship recognize state constitutional rights to education as “positive rights” that “compel affirmative action.”<sup>304</sup> Hence, Hershkoff explains that the question is not “How does this policy burden a constitutional right?”<sup>305</sup> That question would be apt if the right to education were merely a negative right. The question for positive rights enforcement is rather “How does this policy further a constitutional right?”<sup>306</sup> More precisely, the question is whether the statute “achieves, or is at least likely to achieve, the constitutionally prescribed end.”<sup>307</sup>

The Washington Supreme Court quoted this language almost verbatim as its constitutional test.<sup>308</sup> “The test,” as Hershkoff noted, “should be ‘one of fitness to an end.’”<sup>309</sup> And, as previously discussed, a few courts have expressed that they expect a reasonable degree of fit between the means and ends.<sup>310</sup> By engaging in this type of review, Hershkoff contemplated that the state court’s decision would “comprise only the opening statement in a public dialogue with the other branches of government and the people.”<sup>311</sup> Together, the court along with the other branches would “develop and share information

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301. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211 (Ky. 1989).

302. See *supra* Part II.A.

303. Hershkoff, *supra* note 177, at 1183-84.

304. Bauries, *supra* note 27, at 731-32.

305. Hershkoff, *supra* note 177, at 1184.

306. *Id.*

307. *Id.* at 1137.

308. See *supra* note 259 and accompanying text.

309. Hershkoff, *supra* note 177, at 1137 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 103 (1921)).

310. See *supra* notes 252-58, 261.

311. Hershkoff, *supra* note 177, at 1163.

about workable alternatives that might reasonably carry out the state constitutional ... mandate.”<sup>312</sup> As Bauries notes, this “ongoing ‘dialog’ with the coordinate branches” represents “a version of the dialogic approach” discussed next.<sup>313</sup>

### C. “The Dialogic Approach”

Scholars advocating the dialogic approach believe that “courts should adjudicate the merits, but should abstain from making specific injunctive remedial orders binding on state legislatures.”<sup>314</sup> Bauries identifies three strains of the dialogic approach—“active,” “super active,” and “passive”—based on varying degrees to which courts should abstain from remediation.<sup>315</sup> Nevertheless, the three strains converge toward “a rough consensus that, once the merits are adjudicated, courts should abstain from ordering or compelling any specific, judge-made remedial measures, but should instead engage in dialog with the coordinate branches to encourage reform.”<sup>316</sup>

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312. *Id.* at 1184.

313. Bauries, *supra* note 27, at 733.

314. *Id.* at 725 (citing Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 76-84 (2000)).

315. The active dialogic approach favored by William Thro requires courts to “defer to the more politically accountable branches for remediation, but—rather than completely abstaining from all aspects of remediation—they should give guidance to the coordinate branches as to how to remedy the violation.” *Id.* at 726 (citing William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & Pol. 525, 552 (1998)). The super active approach favored by Michael Rebell would take that guidance a step further, seeing “the courts’ role as one of specifying legislative actions that must be taken to determine necessary expenditure levels, ... setting up mechanisms for ensuring accountability,” and then managing the remediation. *See id.* at 728 (citing Rebell, *Poverty*, *supra* note 119, at 1540-42). At the other extreme, a court employing the passive approach favored by Larry Obhof will entirely refrain from specifying a course of action from the legislature, limiting itself to applying the constitutional standard to the factual record. *See* Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL’Y 569, 602-03 (2004).

316. *See* Bauries, *supra* note 27, at 733. A variant of the dialogic approach, “non-court-centric judicial review” proposed by James Liebman and Charles Sabel, views “the courts’ role as providing a forum for debate over educational issues between the public and its representatives,” particularly about “outcome standards.” *See id.* at 729-30 (citing James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 280-82 (2003)). “In contrast to at least the passive form of the dialogic model, though, Liebman and Sabel’s model would allow these politically developed standards to become the means by which courts can monitor compliance with the constitution and with judicial orders on an ongoing basis.”



By Bauries's count, eleven state supreme courts have taken the dialogic approach, abstaining in one way or another from remediation.<sup>317</sup> That observation accords with the one made here that most courts defer to legislatures concerning the means to achieve the constitutional end.<sup>318</sup> Only a few courts have on occasion diverged, stipulating certain remedial steps to the legislature, as the next scholar proposed.

#### *D. "Policy-Directive Remedial Orders"*

Contrary to the previous proposals, James Ryan believes that courts can and should have a significant role in formulating remedies, including issuing specific education policy directives.<sup>319</sup> "If courts are willing, as they should be, to determine whether state constitutions create a right to equal or adequate educational opportunities," Ryan contends, "they must be committed to defining the content of those opportunities."<sup>320</sup> So, for example, Ryan has argued that content should include preschool, and that courts should require states "to increase access to preschool" as a remedy for violations of state constitutional rights to education.<sup>321</sup>

By Bauries's count, at least seven courts have authorized "policy-directive remedial orders, ranging from requiring the legislative body in the state to commission a third-party study to determine the cost of providing an adequate education system, to mandating the

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*Id.* at 730.

317. *Id.* at 742 & n.224 (citing decisions in Arizona, Idaho, Kentucky, Massachusetts, Montana, Ohio, Oregon, South Carolina, Texas, Vermont, and Washington).

318. *See supra* Part II.A.

319. *See* James E. Ryan, *A Constitutional Right to Preschool?*, 94 CALIF. L. REV. 49, 85-86 (2006); *see also* Ryan, *supra* note 122, at 1226, 1256 (disagreeing with the "shibboleth ... that courts should focus on outcomes rather than inputs").

320. Ryan, *supra* note 319, at 85.

321. *See id.* at 85-86. "If courts conclude they are authorized and competent to assess the inputs and outputs necessary to give life to the right to an adequate education, they are necessarily authorized and competent to decide the preschool question." *Id.* at 86. Nevertheless, only the New Jersey Supreme Court has decided that question in favor of recognizing certain disadvantaged students have "a right to preschool." *See id.* at 52 (citing *Abbott v. Burke*, 748 A.2d 82 (N.J. 2000)). Three other state supreme courts in Massachusetts, North Carolina, and Arkansas, however, "declined to recognize a right to preschool, all overturning trial court decisions that had done so." *Id.* at 52 & n.18 (citing *Lake View III*, 91 S.W.3d 472, 500-02 (Ark. 2002); *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1156-57 (Mass. 2005); *Hoke I*, 599 S.E.2d 365, 393-94 (N.C. 2004)).

actual appropriation of additional state funding for education.”<sup>322</sup> Notably, some of these decisions came after dialogic approaches failed.<sup>323</sup> Hence, the overriding preference of courts is still to defer to legislative means to remedy violations. As discussed next, Bauries himself thinks such deference is due because of the nature of the education duty imposed on the legislature.

### E. “The Education Duty”

Bauries proposes that state courts reverse their approach to judicial review, from “a substance-oriented approach of review to a more process-oriented form of review.”<sup>324</sup> He claims such a reversal is in order because the focus on “the substantive results of legislative enactments,” that is, ends scrutiny, “has led some courts to overreach their institutional boundaries and other courts to abdicate their judicial role.”<sup>325</sup> Moreover, Bauries contends that the “right” to education is better construed as a fiduciary “duty” of loyalty and due care owed by state legislatures, obligating them “to pursue the ends identified” without entitling children “to a particular level of government service.”<sup>326</sup>

Bauries therefore envisions a form of means scrutiny that is highly deferential—so long as the legislature gathers the necessary information and gives it appropriate consideration when it enacts a “school finance system, the system should not be struck down as ‘inadequate’” even if it is imperfect.<sup>327</sup> He concedes that “such a

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322. Bauries, *supra* note 27, at 742-43, 742 n.225 (citing decisions in Arkansas, Kansas, New Hampshire, New Jersey, New York, North Carolina, and Wyoming).

323. *See id.* at 742 n.225.

324. Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 717 (2012).

325. *Id.* at 718.

326. *See id.* at 736, 748-53. “Scholars are divided over how best to interpret this precedent,” whether it creates individual rights or legislative duties. *See* Black, *supra* note 280, at 116 & n.214 (discussing competing views on individual education rights-holders). Bauries maintains education clause precedent does not create “any individual student rights-holders.” Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 952-53 (2014). Derek Black and Joshua Weishart think otherwise. *See* Weishart, *Reconstituting*, *supra* note 34, at 948-49 (contending that the vast majority of courts have recognized the right to education as a Hohfeldian claim-right imposing a duty on state); Derek Black, *The Constitutional Fix for SC Schools*, STATE (Nov. 18, 2012) [<https://perma.cc/ASQ6-PNTT>] (reasoning that students had individually enforceable constitutional rights to education that the court should recognize).

327. *See* Bauries, *supra* note 324, at 762. Rather, Bauries suggests that courts should

deferential approach will make plaintiff victories significantly rarer.”<sup>328</sup> Bauries maintains, however, that a “challenge to an entire legislative scheme based on the substantive terms of a state’s education clause should meet a high burden.”<sup>329</sup> In other words, “plaintiff victories should indeed be rare.”<sup>330</sup>

It is questionable whether the right to education is being “overenforced,” as Bauries contends.<sup>331</sup> After all, by his own count, only seven courts have issued or contemplated issuing policy-directive remedial orders.<sup>332</sup> And, in most of those cases, they did so only when forced by their recalcitrant legislatures after repeatedly trying the dialogic approach.<sup>333</sup> Thus, Bauries’s proposal seems to be an overcorrection of a relatively insignificant and infrequent “problem.”

Still, Bauries’s proposal is also meant to address the *underenforcement* of the right to education, which threatens to devalue that right.<sup>334</sup> A deferential means review that focuses on process over substance and places a high burden on plaintiffs presents little risk to courts. If judicial review entails no more than this, courts would likely be encouraged to at least entertain school finance challenges and not abdicate their role entirely, as seven courts have done. Although well-tailored to correct for such *nonenforcement* of the right to education, Bauries’s proposal represents a rather dramatic reversal to the majority of courts who already deem that right justiciable and regularly entertain the merits of school finance challenges. As discussed, most of these courts have now-longstanding precedents deferring to legislature means.<sup>335</sup> Moreover,

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strike down state education finance plans only when “the legislature has essentially abdicated its role by failing to act at all in the face of obvious needs, or by acting without due care by failing to consider relevant, material, and available information about the state’s existing education system’s needs and flaws.” *Id.* at 762-63.

328. *Id.* at 763.

329. *Id.*

330. *Id.*

331. *See id.* at 760.

332. *See supra* note 322 and accompanying text.

333. *See supra* note 323 and accompanying text. Breaking the numbers down further: only two of the seven courts ordered specific legislation or budget appropriations. *See Bauries, supra* note 27, at 742 n.225 (citing cases). Two more merely contemplated issuing such orders, or empowered the trial court to do so if necessary. *See id.* (citing cases). Two courts ordered costing-out studies, while another reserved the right to continue monitoring the capital funds budget. *See id.* (citing cases). These are hardly exemplars of judicial overreach.

334. *See Bauries, supra* note 324, at 733.

335. *See supra* Part II.B.

disengaging courts from scrutinizing the achievement of constitutional ends also threatens to devalue the right to education, in that a review of legislative process alone disregards the right's substance.

According to our next scholar, another way to deal with the underenforcement problem is for courts to engage in a prospective form of review and adopt remedies, rules, and structures that will prevent rights violations from occurring in the first place.

#### F. "Proactive Intervention"

Against the backdrop of plaintiffs' recent losses in school finance cases, budget cuts, and teacher shortages in the wake of the Great Recession, Derek Black proposes a judicial review that evaluates the right to education "prospectively and retrospectively," to "not only cure existing deficiencies, but also plan for future exigencies" in order to avert the next educational crisis.<sup>336</sup> He thus proposes a type of proactive intervention that can be achieved through "deterrence-based remedies, prophylactic rules, and prophylactic decisionmaking structures."<sup>337</sup>

To deter violations in the short term, state courts need to give "clear notice of how to comply with their constitutions," engage in "consistent and firm enforcement," and impose "real cost" for noncompliance, including fines for contempt.<sup>338</sup> Some of the prophylactic rules that courts could adopt include creating relative baselines for class sizes and funding increases<sup>339</sup> such as "mandating that disadvantaged districts be funded at a level no lower than the average per-pupil expenditure in high-performing suburban

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336. Black, *supra* note 119, at 468. Black explains that part of the problem with current thinking about the justiciability of the right to education is that "[i]t rests on the notion that the delivery of education, and the judicial oversight and enforcement of rights, occurs at singular moments in time rather than over the course of years." *Id.* That thinking is mistaken because "education is an ongoing project" and "educational harms and failures are not easily remedied after the fact." *Id.* at 469. Consequently, courts must "shape remedies to bring states into current compliance [and] require the state to take steps to ward off the possibility of new state violations." *Id.* at 470.

337. *Id.* at 468.

338. *See id.* at 470-71.

339. *See id.* at 474 (first citing FLA. CONST. art. IX, § 1; and then citing COLO. CONST. art. IX, § 17).

districts.”<sup>340</sup> Similar to Bauries’s proposed review of legislative process, courts could also impose prophylactic decision-making structures on legislatures to “incorporate expert knowledge into funding decisions,” and then give those “expert assessments presumptive weight in later disputes.”<sup>341</sup>

To deter violations in the long term, Black explains that courts need standards that will “allow the executive or legislative branch to judge the constitutionality of their own actions [and] reinforce the notion that the states’ constitutional education duty is governed by legal principles not simply judicial wisdom or judgement.”<sup>342</sup> The standard that is arguably most needed in that regard does not appear in the previous scholars’ proposals. Such a standard of review must overcome justiciability concerns while enabling courts to mutually enforce vertical equity and adequacy, and thereby reconcile equality and liberty interests.

#### IV. DIRECT-PROPORTIONALITY REVIEW

A half century of school finance litigation has brought us an equal liberty claim under the state constitutional right to education that has never been enforced as such.<sup>343</sup> All the while, “states generally have not taken consistent and sustained action to adopt and maintain funding systems that promote equal access to an excellent education.”<sup>344</sup> The “primary shortcomings” continue to be “lower funding to districts serving students with greater needs” (vertical inequity) and “low funding levels” coupled with an “insufficient linkage of funding systems to desired educational outcomes”

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340. See *id.* (citing *Abbott IV*, 693 A.2d 417, 439 (N.J. 1997)).

341. See *id.* at 476-77. Black acknowledges that dictating “structural changes to the legislative process [is] beyond the power of the judiciary and would be inappropriate in any event.” *Id.* at 478. He proposes that courts could instead “impose constitutional discipline” by being “clear about the elements and issues that should be involved in positive lawmaking, the restrictions and justifications it would place on retrogressive law making, and the weight it would afford to certain types of evidence.” *Id.* at 479; see also Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597, 1659 (2016) (contending that courts should “demand that states account for and address all of the internal and external forces ... that matter”).

342. Black *supra* note 119, at 473.

343. See *supra* note 37 and accompanying text.

344. Kimberly Jenkins Robinson, *No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism*, 27 STAN. L. & POL’Y REV. 201, 202 (2016).

(inadequacy).<sup>345</sup> Although there is no quick fix, one of the persistent problems has been the tendency of courts to “run from complexity rather than confront it.”<sup>346</sup> Hence, the number of second- and third-wave courts that have declined to specify a standard of review despite, in fact, using one.<sup>347</sup> The Vermont Supreme Court once rationalized not specifying a standard, claiming, “This is not a case ... that turns on the particular constitutional test to be employed.”<sup>348</sup> It then proceeded in the very next sentences to employ terms like “legitimate governmental purpose,” “fortuity,” and “capriciousness” to undercut its point.<sup>349</sup>

Critics charge that standards of review are “rhetorical covers for question-begging,” amount to “a kind of judicial and advocative fraud,” are too vague or “formalistic,” and have “no textual or other constitutional foundation.”<sup>350</sup> To be sure, courts often use standards of review in a way that is “clumsy, misleading, incomprehensible, or simply mistaken.”<sup>351</sup> And such critiques have been sharply (and fairly) directed at the tiers of scrutiny in particular, prompting proposed changes.<sup>352</sup> “But it is a mistake for anyone, Justices or commentators, to hide the use of standards of review” or to deny the need for a standard of review in constitutional adjudication.<sup>353</sup>

Modern courts interpret constitutions in a way that conveys a hierarchy or continuum of values.<sup>354</sup> Standards of review allow courts to sort through these values, “to typecast legal relations (rights, immunities, etc.) into categories that require varying degrees of justification for governments to burden or alter them.”<sup>355</sup> Viewed in this light, standards of review are “clarifying, not obfuscating.”<sup>356</sup>

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345. *See id.* at 206.

346. *See* Black, *supra* note 341, at 1604, 1659.

347. *See supra* Part II.A.

348. *Brigham I*, 692 A.2d 384, 396 (Vt. 1997).

349. *See id.*

350. *See* Michael H. Shapiro, *Constitutional Adjudication and Standards of Review Under Pressure from Biological Technologies*, 11 HEALTH MATRIX 351, 380, 485 (2001).

351. *Id.* at 485-86.

352. *See, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482-83 (2004).

353. *See* Shapiro, *supra* note 350, at 381.

354. *See id.* at 366.

355. *Id.* at 366-68.

356. *Id.* at 381-82.

Properly calibrated and applied, standards of review can promote a measure of “certainty and predictability in the law.”<sup>357</sup>

Frankly, whether these arguments are convincing or not, the fact is that “standards of review pervade, if not dominate, the actual practice of constitutional law” and “are not going to go away in the foreseeable future.”<sup>358</sup> Therefore, they should be “defined, designed, and implemented to make them work as best they can.”<sup>359</sup> With that in mind, I propose a new standard of review—direct-proportionality review—that could help resolve the current predicament of education rights jurisprudence.

A. “*All Things in Proportion*”<sup>360</sup>

“Proportionality,” a well-established principle of constitutional law in the United States and a widely accepted standard of review in other countries, is trending.<sup>361</sup> Scholars have illuminated its influence on our constitutional jurisprudence and have advocated for it to assume a greater role as a formally recognized mode of judicial review in the United States.<sup>362</sup> Justice Stephen Breyer has also supported the use of proportionality review in his opinions and scholarship.<sup>363</sup> Notwithstanding its ascension, proportionality review, at least as it is currently utilized in other countries, would

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357. See R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 242 (2002).

358. Spece & Yokum, *supra* note 203, at 287-88.

359. *Id.* at 288.

360. See Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797 (2011).

361. See Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015).

362. See *id.* at 3096-97; see also Stephen Gardbaum, *Proportionality and Democratic Constitutionalism*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 259, 260-61 (Grant Huscroft et al. eds., 2014); Helen Hershkoff, *Privatizing Public Rights: Common Law and State Action in the United States*, in BOUNDARIES OF STATE, BOUNDARIES OF RIGHTS: HUMAN RIGHTS, PRIVATE ACTORS, AND POSITIVE OBLIGATIONS 139 (Tsvi Kahana & Anat Scolnicov eds., 2016) (“Some US state courts use an interpretive practice in their common-law decision making that strongly resembles variations of proportionality analysis by courts abroad.”); Mathews & Sweet, *supra* note 360, at 864-65. See generally E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW (2009).

363. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 682, 689-90 (2008) (Breyer, J., dissenting); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 49 (2005).



be a poor fit for adjudicating equal liberty claims under state constitutions.

Proportionality review in nations such as Germany, Canada, and Israel proceeds through a “multi-part sequenced set of questions.”<sup>364</sup> That sequential form typically begins with an inquiry about *ends* served by the government’s infringement of a right.<sup>365</sup> If the infringement serves “a legitimate and sufficiently important purpose, then the constitutionality of the *means* used are examined through a three-fold inquiry into: (a) rationality; (b) minimal impairment; and (c) proportionality as such.”<sup>366</sup> As should be readily apparent from that description, proportionality review’s “criteria correspond with elements in U.S. ‘strict,’ ‘intermediate,’ or ‘rational basis’ scrutiny: the need for a sufficiently important or ‘compelling’ government purpose; the rational connection required between the means chosen and the end; and the ‘minimal impairment’ inquiry into whether there are less restrictive means towards the same goal.”<sup>367</sup>

The one glaring difference is the last inquiry. “Proportionality as such” or “proportionality in the narrow sense” or “*stricto sensu*” calls for “balancing,” though not necessarily in the manner to which we are accustomed in the United States.<sup>368</sup> It is described differently depending on the country or the scholar, but proportionality review balancing essentially entails weighing the public benefits of the challenged law (already deemed by this last stage to have a proper purpose and to be narrowly tailored) against the harm caused by the infringement of the constitutional right.<sup>369</sup> It is a “result-oriented test” that “focuses on the constitutionality of the weight of the marginal social importance of the benefit and harm.”<sup>370</sup>

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364. Jackson, *supra* note 361, at 3098-99, 3099 n.23 (noting that in other countries, such as South Africa, “such questions are considered but in a less sequenced way”).

365. *See id.* at 3099.

366. *Id.*

367. *Id.*

368. *See id.* at 3099, 3113 n.84 (first quoting HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Israel, 58(5) PD 807 (2004) (Isr.), *translated* in 2004 ISR. L. REP. 264, 297; and then quoting AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 340 (2012)).

369. *See* AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 340 (Doron Kalir trans., 2012); Mathews & Sweet, *supra* note 360, at 803.

370. *See* BARAK, *supra* note 369, at 342, 352. This type of balancing is “the most complex and controversial part of proportionality.” Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 190 (2006).

The means-ends inquiry and the balancing inquiry are equally problematic concerning judicial enforcement of the state constitutional right to education. The means-ends inquiry involves the most heightened judicial scrutiny, an amalgamation of strict, intermediate, and rational-basis.<sup>371</sup> As previously explained, state courts have rightfully abandoned heightened scrutiny because it does not accord with the affirmative or positive nature of the right to education.<sup>372</sup> At its core, the means-end inquiry of proportionality review is “state-limiting.”<sup>373</sup> “Proportionate limitations of rights are justifiable; disproportionate ones are not.”<sup>374</sup> In that regard, the proportional means-ends inquiry is suitable for negative rights taking the form of privileges and immunities but not for positive rights taking the form of claim-rights which are “state-inducing.”<sup>375</sup> Whereas “negative rights have a conjunctive structure” (interference with a legal interest protected by the right is either forbidden or it is not), “positive rights have an alternative or disjunctive structure” (“there is a free choice as to the means, as long as [the legal interest protected by the right] is achieved”).<sup>376</sup>

The balancing inquiry is more conducive to positive rights enforcement in that it is “optimi[z]ing” benefits and harms or competing values.<sup>377</sup> Yet even the balancing inquiry has been primarily focused on “whether the reasons offered by the government, relative

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371. See *supra* Part II.B.

372. See *supra* Part II.A.

373. See Rivers, *supra* note 370, at 176.

374. *Id.* at 174; see also Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463 (2011).

375. See Alison L. Young, *Proportionality Is Dead: Long Live Proportionality!*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 43, 52 (Grant Huscroft et al. eds., 2014) (“[S]tate-limiting theories of proportionality are connected to immunity-based theories of rights.”).

376. MATTHIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY 88-89 (2012).

377. See Rivers, *supra* note 370, at 176; see also Charles Fried, *Perfect Freedom, Perfect Justice*, 78 B.U. L. REV. 717, 744 n.91 (1998) (“[T]he general proposition that positive rights require balancing, while negative rights require line drawing for their closer specification.”); cf. Eric Engle, *The General Principle of Proportionality and Aristotle*, in 23 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 265, 271 (Liesbeth Huppel-Cluysenaer & Nuno M.M.S. Coelho eds., 2013) (“[I]nterest balancing and means-end review address two different types of rights: positive economic rights (interest balancing) and natural human rights (means-end review)... Their fusion is an error because they address two different categories of rights and are mathematically distinct.”).

to the limitation on rights, are sufficient to justify the *intrusion*.<sup>378</sup> Any limitation on a right must be justified by a corresponding “gain to the public interest.”<sup>379</sup> If not, then the state action is curtailed or forbidden.<sup>380</sup> In other words, even the balancing inquiry has been more suitably fabricated for negative rights enforcement.<sup>381</sup>

Aharon Barak, former president of the Supreme Court of Israel and a leading proponent of proportionality review, maintains that the balancing inquiry can be refabricated for positive rights enforcement: the greater the marginal social importance of the positive right and the chances of fulfilling it, the greater the justification must be for “avoiding the enactment of legislation” to fulfill that right.<sup>382</sup> Notice that this move seems to embrace the notion that constitutional rights are not “trumps” over collective goals, or “shields” against government intrusion, but rather “optimization requirements” that are only to be advanced as much as possible given countervailing non-rights interests.<sup>383</sup> Even assuming that the optimization conception of rights is correct, Barak’s proposed balancing is still primarily geared toward justifying a limitation on a constitutional right—namely, nonfulfillment of that right.<sup>384</sup> In that regard, there seems to be very little difference between nonfulfillment and intrusion in applying this “results-oriented test.” The practical effect when balanced in the state’s favor is to limit the right, not necessarily to optimize it. And there is reason to believe, based on the history and present trajectory of school finance litigation, that the balance more often would be struck in the state’s favor out of deference to legislative prerogatives.<sup>385</sup>

This is not to say that courts must take the opposite approach to “[i]nterest [b]alancing,” a “[r]ights [m]aximizing” approach in which

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378. See Jackson, *supra* note 361, at 3099 (emphasis added).

379. See Rivers, *supra* note 370, at 205-06.

380. See *id.*

381. See KLATT & MEISTER, *supra* note 376, at 88.

382. See BARAK, *supra* note 369, at 433-34.

383. See Mathews & Sweet, *supra* note 360, at 872-73; see also Jackson, *supra* note 361, at 3101-02. Barak contends that balancing “may well incorporate the notions of ‘rights as trumps,’ or ‘rights as firewalls,’” though he does not say exactly how, nor does he seem to advocate for that conception of balancing. See BARAK, *supra* note 369, at 490.

384. See BARAK, *supra* note 369, at 433-34.

385. See *supra* note 238 and accompanying text.

they order the most effective remedies to vindicate rights no matter the costs.<sup>386</sup> But if rights optimization is the objective, a standard of review should be devised with that purpose in mind. It should fulfill the legal interests protected by the right as much as possible. And it should be oriented toward compelling state action, if necessary, not toward excusing it. At the same time, it should be a standard that “seeks to accommodate ... concerns about *both* constitutional rights and unlimited legislative power by neither rendering the former an absolute bar to conflicting legislative action nor granting legislatures an absolute power to override rights.”<sup>387</sup> That standard is proportionality—not means-ends review, not balancing, nor a combination of the two.

Proportionality first appeared in the Code of Hammurabi as a principle of “commutative justice (‘an eye for an eye’ *lex talionis*).”<sup>388</sup> But it was Aristotle who “first clearly elucidated” it as a principle of “distributive justice,” that is, “the right ratio—the relationship between a distributive principle and the shares apportioned thereby.”<sup>389</sup> “In short: enough is enough and more is too much” (and less is too little).<sup>390</sup> Proportionality or “proportionalism” informs other “ethical traditions” as well, for example, natural law and utilitarianism.<sup>391</sup> In law, it is a bedrock principle in punishment, self-defense, and the law of war.<sup>392</sup> And as explained above, a standard of constitutional review bears its name.<sup>393</sup> Although that standard has been adopted worldwide, it consists of heightened means-ends review and balancing; it does not actually represent “proportionality

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386. See Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 588-89 (1983).

387. Gardbaum, *supra* note 362, at 274 (emphasis added).

388. Engle, *supra* note 377, at 265.

389. *Id.* at 265-66, 268.

390. Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 DUKE J. COMP. & INT'L L. 291, 292 (2012).

391. See R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 207 n.6 (2016) (citing GARTH HALLETT, *GREATER GOOD: THE CASE FOR PROPORTIONALISM* (1995); BERNARD HOOSE, *PROPORTIONALISM: THE AMERICAN DEBATE AND ITS EUROPEAN ROOTS* (1987); CHRISTOPHER KAZOR, *PROPORTIONALISM AND THE NATURAL LAW TRADITION* (reprint ed. 2010)).

392. See *id.* at 208 n.6 (citing, inter alia, Larry Alexander, *Self-Defense, Punishment, and Proportionality*, 10 LAW & PHIL. 323 (1991); Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34 (2005); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005); Jim Staihar, *Proportionality and Punishment*, 100 IOWA L. REV. 1209 (2015)).

393. See *supra* notes 361-63 and accompanying text.

as such.”<sup>394</sup> Let us now explore that possibility: proportionality as its own standard of review relative to equal liberty claims under the state constitutional right to education.

### *B. How Would It Work?*

Regarding the right to education, “a new paradigm must recognize and, ultimately, harmonize, two fundamentally different constitutional values,” equality and liberty.<sup>395</sup> Convention has it that these two values must be “balanced” or brought into constitutional “equilibrium.”<sup>396</sup> “The problem with balancing metaphors is that they slip commensurability in through the back door. If values are incommensurable, they cannot successfully be weighed against each other. Weighing is a form of measurement that presupposes a common unit of measure.”<sup>397</sup> Although equality and liberty are not incomparable, or incompatible, they are “incommensurable because neither of these values is reducible to the other.”<sup>398</sup>

It is tempting to say that loose talk of balancing in constitutional adjudication “is not meant to suggest anything like a literal weighing of values ... but rather to indicate that all ultimate values must be paid some minimum level of respect.”<sup>399</sup> Yet the risk is that

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394. See *supra* notes 364-67 and accompanying text.

395. See William E. Thro, *Judicial Paradigms of Educational Equality*, 174 EDUC. L. REP. 1, 41 (2003) (observing that these two principles represent “almost perfect illustrations of Sir Isaiah Berlin’s ‘Two Concepts of Liberty,’” negative liberty and positive liberty (citing BERLIN, *supra* note 75)).

396. See Jessica Knouse, *Reconciling Liberty and Equality in the Debate over Preimplantation Genetic Diagnosis*, 2013 UTAH L. REV. 107, 116 (“When liberty and equality are thus perceived as binary opposites, a presumption arises that, in any given case, the two must be balanced to determine which should prevail and which should acquiesce.”); Timothy P. Loper, *Substantive Due Process and Discourse Ethics: Rethinking Fundamental Rights Analysis*, 13 WASH. & LEE J. CIV. RTS. & SOC. JUST. 41, 49 (2006) (“There is a precarious balancing act for our democratic government to perform in fulfilling its Constitutional obligation to protect equality and liberty.”); Isaiah Berlin, *On the Pursuit of the Ideal*, N.Y. REV. BOOKS 18 (Mar. 17, 1988), <http://www.nybooks.com/articles/1988/03/17/on-the-pursuit-of-the-ideal/> [<https://perma.cc/R8BZ-TW5P>] (“[R]ules, values, principles must yield to each other in varying degrees in specific situations.... The best that can be done, as a general rule, is to maintain a precarious equilibrium that will prevent the occurrence of desperate situations, of intolerable choices.”).

397. Brett G. Scharffs, *Adjudication and the Problems of Incommensurability*, 42 WM. & MARY L. REV. 1367, 1416 (2001).

398. *Id.* at 1417.

399. David Wolitz, *Indeterminacy, Value Pluralism, and Tragic Cases*, 62 BUFF. L. REV.

“when liberty and equality are [said to be] balanced, both are diluted.”<sup>400</sup> Moreover, just because equality and liberty cannot be weighed or balanced, strictly speaking, does not mean that they cannot enjoy some direction of fit.<sup>401</sup>

Ironically, the answer to the ancient Aristotelian enigma of how to reconcile equality and liberty is Aristotelian proportionality. Specifically, Aristotle understood proportionality as “the right ratio” and “proportional equality” as a distribution that “treats all relevant persons in relation to their due,” that is, according to their needs.<sup>402</sup> Under this scheme “each person may be treated unequally (differently) in numerical terms; but the distribution itself is equal in the sense that each person receives the same consideration of his needs and interests.”<sup>403</sup> Proportional equality is in essence, then, vertical equity or “adequate equality.”<sup>404</sup>

To judge proportional equality (or vertical equity and adequacy) a court must review “the consequences of various proposed distributions and evaluate[] them in terms of the effectiveness with which they fulfill what are taken to be the relevant needs of the recipients.”<sup>405</sup> Note that review in and of itself does not yield “the right ratio” or direction of fit between vertical equity and adequacy. There are four possibilities for that assessment. First, the status quo: the relationship between adequacy and vertical equity can remain erratic, subject to an ends-to-fit review that sorts them into separate inquiries.<sup>406</sup> Second, adequacy and vertical equity can have an inversely proportional relationship such that when adequacy is

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529, 592 (2014).

400. See Knouse, *supra* note 396, at 116.

401. Cf. David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 652 (1994) (“Although constitutional values do not lend themselves to a simple calculus, they are amenable to comparison and rough measurement on a single scale.”); Jackson, *supra* note 361, at 3156-57 (“Even absent a common metric, ... judgments about the relative priority of two values can be rational.”).

402. See Stefan Gosepath, *Equality*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011), <https://plato.stanford.edu/archives/spr2011/entries/equality/> [<https://perma.cc/R7A9-KRY6>]. Proportional equality contrasts with “numerical equality” which “treats all persons as indistinguishable” and therefore grants “them the same quantity of a good per capita.” *Id.*

403. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1168 (1969) (footnote omitted) [hereinafter *Equal Protection*].

404. See Gosepath, *supra* note 402.

405. See *Equal Protection*, *supra* note 403, at 1168.

406. See *supra* notes 30-33 and accompanying text.



elevated, vertical equity is lowered, or vice versa.<sup>407</sup> Third, adequacy and vertical equity can have a directly proportional relationship and be leveled down together.<sup>408</sup> Fourth, adequacy and vertical equity can have a directly proportional, upward direction of fit.<sup>409</sup>

Regarding the first possibility, it should by now be obvious that adequacy and vertical equity should not be assessed separately because a singular focus on one to the exclusion or ignorance of the other yields unacceptable outcomes. Without adequacy, vertical equity is “an unmanageable and inadequate protection” because it cannot be properly measured nor fully achieved without a qualitative threshold.<sup>410</sup> A “baseline of adequacy” is, in fact, necessary to identify “spending targets in relation to the ‘level of spending needed to insure adequacy for each student category,’” to insure that funding is meeting the needs of disadvantaged children.<sup>411</sup> Without vertical equity, adequacy also cannot be fully achieved and would “otherwise tolerate resource inequities and social inequalities” that are constitutionally inexcusable.<sup>412</sup> Needless to say, the second and third possibilities will not do either. Vertical equity and adequacy should not have an inversely proportional relationship or be leveled down together—both patterns persist in states and engender educational disparities.<sup>413</sup>

And lo, the only place left for vertical equity and adequacy to go is up, together. This direction of fit parallels Kenji Yoshino’s explanation of the “synergy” between equal protection and due process conveyed in *Lawrence and Obergefell*: that reliance on either

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407. See Knouse, *supra* note 396, at 115 (“In some cases, liberty is privileged and equality is subordinated; in others, equality is privileged and liberty is subordinated.”); Douglas S. Reed, *Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC’Y REV. 175, 177 n.6 (1998) (“[A] state could have equitable funding that is inadequate, or it could have adequate funding that is inequitable.”).

408. See *supra* notes 52-57 and accompanying text.

409. See *infra* note 412 and accompanying text.

410. See Weishart, *Reconstituting*, *supra* note 34, at 974 & n.367; see also David R. Matthews, *Lessons from Lake View: Some Questions and Answers from Lake View School District No. 25 v. Huckabee*, 56 ARK. L. REV. 519, 533 (2003) (commenting on expert testimony suggesting that “as long as the amount of funding for the system is inadequate, achieving an equitable distribution of funds will be impossible”).

411. See Weishart, *Reconstituting*, *supra* note 34, at 974 n.374 (quoting Colleen Fahy, *Education Funding in Massachusetts: The Effects of Aid Modifications on Vertical and Horizontal Equity*, 36 J. EDUC. FIN. 217, 231 (2011)).

412. *Id.* at 975.

413. See *supra* notes 30-33, 52-57 and accompanying text.



equality or liberty must serve to “advance[ ] both interests”—to level up.<sup>414</sup> In addition to maintaining that upward, directly proportional relationship, courts would also need to confirm that the space between vertical equity and adequacy remains proportional, that is, in the right ratio.

Lest all of this sound too abstract, let us examine how direct-proportionality review could be applied in an actual case: the *Gannon* litigation in Kansas. Recall that the Kansas Supreme Court in *Gannon I* affirmed that its constitution’s education clause contained both an adequacy and equity component, yet analyzed each according to separate constitutional tests.<sup>415</sup>

For equity, the test does not require adherence to precise equality standards (that is, equal funding per student), but rather considers whether school districts “have reasonably equal access to substantially similar educational opportunity through similar tax effort.”<sup>416</sup> In *Gannon I* the Kansas Supreme Court affirmed a lower three-judge panel’s determination that the state had exacerbated wealth-based disparities by eliminating all “capital outlay state aid,” supplemental need-based payments to districts with lower property wealth.<sup>417</sup> The court further concluded that the state’s proration and reduction of all supplemental general state aid payments to districts that had adopted “a local option budget (LOB)” designed “to augment [their] funding through additional mill levy” was likewise inequitable and unconstitutional.<sup>418</sup> Following remand, the court held in *Gannon II* that the state failed to cure those inequities.<sup>419</sup> Months later lawmakers responded by passing a bill that the court concluded in *Gannon III* had cured the capital outlay inequities but not the LOB inequities.<sup>420</sup>

For adequacy, the test is whether the structure and implementation of the financing system “is reasonably calculated to have all

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414. Yoshino, *supra* note 16, at 172-73; *cf.* Knouse, *supra* note 396, at 117 (“Rather than accepting the conventional—and constitutionally problematic—perception that we protect liberty for one set of reasons and equality for another (conflicting) set of reasons, ... we ought to protect liberty and equality for the same reasons.”).

415. *See supra* notes 268-70 and accompanying text.

416. *Gannon I*, 319 P.3d 1196, 1239 (Kan. 2014) (per curiam).

417. *See id.* at 1242.

418. *See id.* at 1243, 1246.

419. *Gannon II*, 368 P.3d 1024, 1047 (Kan. 2016) (per curiam).

420. *Gannon III*, 372 P.3d 1181, 1190 (Kan. 2016) (per curiam).

Kansas public education students meet or exceed the standards set out in *Rose*.<sup>421</sup> In *Gannon IV*, the court affirmed the panel’s decision that the structure and implementation of responsive legislation failed to satisfy the adequacy test.<sup>422</sup> Structurally, the legislation merely provided “a funding stopgap” for a couple of years and thus did not actually provide a finance formula calculated to meet or exceed the adopted *Rose* standards.<sup>423</sup> In evaluating the legislation’s implementation, the court reviewed “both the financing system’s inputs, *e.g.*, funding, and outputs, *e.g.*, outcomes such as student achievement.”<sup>424</sup> It agreed that substantial evidence supported the panel’s findings that low funding levels and budget cuts negatively affected “staff, class sizes, and student opportunities” and inhibited progress toward each of the *Rose* standards.<sup>425</sup> Turning to the outputs during the relevant period, the court observed that nearly one-fourth of all students failed to meet basic math and reading skills and that such nonproficiency and other achievement gaps were disproportionately higher among certain subgroups, such as African Americans, Hispanics, and students receiving free or reduced-cost lunches.<sup>426</sup>

The Kansas Supreme Court should be commended for having the courage to utilize both the equity and adequacy tests to find the state’s action constitutionally infirm in the face of staunch legislative resistance and egregious threats to make “changes to judicial funding and appointment.”<sup>427</sup> To its great credit, the court also firmly acknowledged that adequacy and equity “do not exist in isolation from each other” and that a particular cure for one might affect the other.<sup>428</sup> Nevertheless, the court’s separate ends-to-fit review of adequacy and equity limits the potential long-term impact

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421. *Gannon I*, 319 P.3d at 1236-37. Because *Gannon I* was the first time the court formally adopted the *Rose* standards, it remanded the adequacy claim to the three-judge panel to consider, *inter alia*, studies estimating the “actual costs” of providing an adequate education in light of the *Rose* standards. *Id.* at 1237.

422. *Gannon IV*, 390 P.3d 461, 488 (Kan. 2017) (per curiam).

423. *Id.*

424. *Id.*

425. *Id.* at 491-93.

426. *Id.* at 496-98.

427. *See supra* note 289 and accompanying text.

428. *Gannon I*, 319 P.3d 1196, 1252 (Kan. 2014) (per curiam). For instance, “curing of the equity infirmities may influence the ... assessment of the adequacy of the overall education funding system.” *Id.*

of its decisions, guaranteeing future challenges and more legislative resistance.

Direct-proportionality review would require the court to analyze vertical equity and adequacy together as a united claim for equal liberty. Hence, although it is entirely appropriate for the court to assess whether the state's financing system is "reasonably calculated" to provide an adequate education in light of the *Rose* standards,<sup>429</sup> the court should simultaneously evaluate explicitly whether disadvantaged students have the compensatory resources and opportunities they need to actually meet those standards. Otherwise, courts create the possibility that adequacy and vertical equity maintain an inversely proportional relationship, with vertical inequities preventing disadvantaged children from meeting relatively high adequacy thresholds. In that case, the constitutional mandate of adequacy for all will go unfulfilled.

Likewise, courts should judge whether a school district has "reasonably equal access to substantially similar educational opportunity"<sup>430</sup> not merely by interdistrict property wealth disparities caused by supplemental state aid, but in relation to the qualitative education threshold set by the *Rose* standards. In other words, for vertical equity purposes, courts need to identify spending targets and "define educational need as the difference between where students should be performing academically and the level at which they are currently performing," that is, "how far the performance fell short of equity."<sup>431</sup> Otherwise, adequacy and vertical equity may maintain an erratic relationship (or worse) such that both, in practice, are leveled down.

In fairness, the Kansas Supreme Court and other state courts have at times analyzed vertical equity and adequacy together, even if unintentionally, in utilizing studies "costing-out" an adequate education. Essentially, these cost studies "aim to determine objectively the amount of funding that is actually needed to provide all

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429. See *supra* note 421 and accompanying text.

430. See *Gannon I*, 319 P.3d at 1239.

431. Weishart, *Reconstituting*, *supra* note 34, at 975 n.374 (first quoting Gloria M. Rodriguez, *Vertical Equity in School Finance and the Potential for Increasing School Responsiveness to Student and Staff Needs*, 79 PEABODY J. EDUC. 7, 17 (2004); then quoting Meaghan Field, Note, *Justice as Fairness: The Equitable Foundations of Adequacy Litigation*, 12 SCHOLAR 403, 409 (2010)).

students with a meaningful opportunity for an adequate education.”<sup>432</sup> They can therefore highlight vertical inequities as well as cost out the additional resources needed by disadvantaged children to reach the adequacy thresholds. Although cost studies have been commissioned in at least forty states, sometimes in response to court orders,<sup>433</sup> their influence has been somewhat limited in sustaining reforms that address educational inadequacies.

For one, cost studies tend to be conducted in “highly charged political environments created by ongoing litigation or legislative reform movements” and thus are subject to “intense disagreement” about their “results and recommendations.”<sup>434</sup> For another, courts have been sensitive to criticisms about the costing-out methodologies and so “less than half” of cost studies have withstood judicial scrutiny.<sup>435</sup> Michael Rebell has made specific recommendations for improving the accuracy of these methodologies<sup>436</sup> and, alternatively, he and other scholars have proposed a new “constitutional cost methodology” of their own.<sup>437</sup> Yet ultimately Rebell maintains that judicial oversight is necessary to unveil the value judgments implicit in these costs studies, to ensure cost analysis occurs on a regular basis to account for changing conditions and student needs, and to expose certain excesses.<sup>438</sup>

Direct-proportionality review provides a mechanism for courts to undertake such measures with transparency and analytical precision. Again, the trouble has been that courts have not uniformly insisted that adequacy and vertical equity be mutually reinforcing nor have they consistently demanded evidence (cost studies or other empirical findings) from which they could make that assessment.<sup>439</sup>

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432. Michael A. Rebell, *Professional Rigor, Public Engagement and Judicial Review: A Proposal for Enhancing the Validity of Education Adequacy Studies*, 109 TCHRS. C. REC. 1303, 1304 (2007).

433. *Id.* at 1304-05.

434. *Id.* at 1305, 1326.

435. *Id.*

436. *See id.* at 1349.

437. *See* Michael A. Rebell et al., *A New Constitutional Cost Methodology for Determining the Actual Cost of a Sound Basic Education*, TCHRS. C., COLUM. U. (Sept. 2016), <http://www.equitycampaign.org/publications/safeguarding-students-educational-rights/Constitutional-Cost-Methodology-final,-09-16.pdf> [<https://perma.cc/R8ST-YU83>].

438. *See* Rebell, *supra* note 432, at 1342-43, 1347-49.

439. *See* Christopher S. Elmendorf & Darien Shanske, *Solving “Problems No One Has Solved”: Courts, Causal Inference, and the Right to Education*, 2018 U. ILL. L. REV. (forth-

Direct-proportionality review compels that analysis and thereby increases the chance that children's equality and liberty interests will be advanced together—that they will be leveled up. Indeed, courts must have that very purpose in mind. But that is not all.

Maintaining an upward, directly proportional relationship between vertical equity and adequacy that otherwise perpetuates second-class citizenship would imperil equal liberty. Therefore, direct-proportionality review also requires courts to evaluate whether the margin between vertical equity and adequacy is proportional so as to protect children from the harms of educational disparities. That space would become disproportionate if, for example, children just meeting the adequacy threshold could not compete on comparable terms for admission to higher education and high-quality jobs with children soaring above the adequacy threshold.<sup>440</sup> So, in addition to educational outcomes, courts assessing the proportionality of the margin between adequacy and vertical equity could also consider evidence of socio-economic mobility, college admissions, and patterns of racial and class segregation. In instances of disproportionality, the court would require the adequacy threshold to be recalibrated to diminish the positional advantages held by children well above the threshold, and require adjustments to the distribution of educational opportunities to ensure vertical equity necessary to meet the higher thresholds. Such recalibration would also ensure that adequacy remains relational, responsive to changing societal conditions and the needs of children.

In sum, direct-proportionality review of the state constitutional right to education entails a two-part inquiry. First, do the state's actions advance children's equality and liberty interests by ensuring that vertical equity and adequacy maintain a mutually reinforcing, upward trajectory? Second, is the margin between vertical equity and adequacy proportional so as to protect children from the harms of educational disparities?

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coming 2018) (manuscript at 5), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2886754](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886754) [<https://perma.cc/33ZG-ZWAE>] (“[T]he state’s own choices [concerning the production and control of knowledge] substantially determine whether researchers—and hence litigators—can produce credible evidence concerning the causal effect of state laws and funding arrangements on the outcomes that ground the education right.”).

440. See Weishart, *Reconstituting*, *supra* note 34, at 976.

### C. *Objections and Responses*

A new standard of review invites criticism. In evaluating any standard of review, questions are most likely to be raised about its potential to encourage objectivity and predictability in the law, to maintain fidelity with separation of powers, and to present new and improved ways to enforce constitutional rights.

#### 1. *“The Mask of Objectivity”<sup>441</sup> and Indeterminacy*

“Its reasonableness and simplicity are seductive, the way it points is sometimes too easy, the answers it provides too uncritical.”<sup>442</sup> That has been the charge made against judicial balancing, that though it “purport[s] to be objective, neutral, and even scientific,” it in fact gives “judges enormous latitude in measuring values and facts for inclusion on the scales.”<sup>443</sup> Likewise, critics charge that proportionality’s objectivity is a facade, that it is just another vessel for judges to pour subjectivity into the law.<sup>444</sup> And considering those critiques have been made against proportionality doctrine in its current form, they no doubt would be lobbied at direct-proportionality review as well.

To be sure, direct-proportionality review does not eliminate all subjectivity from the act of judging, which “remains the engine of constitutional decision-making.”<sup>445</sup> Yet there is reason to believe that direct-proportionality review would involve fewer subjective judgments than balancing and the ends-to-fit review that state

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441. See Tracy A. Thomas, *Proportionality and the Supreme Court’s Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 125-26 (2007) (arguing remedial proportionality remains an inherently subjective standard).

442. Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1047 (1978).

443. See Faigman, *supra* note 401, at 648; see also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 992-95 (1987) (discussing drawbacks with scientific balancing analyses).

444. See Pamela S. Karlan, *“Pricking the Lines”: The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 882-83 (2004) (contending that despite the “invocation of objective factors ... a key aspect of proportionality review remains fundamentally subjective”); Thomas, *supra* note 441, at 126-30 (discussing the inherent subjectivity in proportionality analysis).

445. See Khiara M. Bridges, *“Life” in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1320 (2013).



courts currently engage in.<sup>446</sup> As the name implies, direct-proportionality review directs judges in one direction: UP. There may be subjective judgments about the length to which vertical equity and adequacy must be leveled up, but judges can adduce from objective facts whether they are on a mutually reinforcing, upward trajectory.<sup>447</sup> In assessing the proportionality of the margin between vertical equity and adequacy, subjectivity again cannot be eliminated, but there is reliable, objective evidence upon which courts can find disproportionality, if not proportionality.<sup>448</sup>

Assessments of the trajectory and margin of vertical equity and adequacy would not occur in a “black box” inside which courts mys-

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446. Mathews & Sweet, *supra* note 360, at 804 (observing that opponents view judicial balancing as “necessarily ad hoc, open-ended, and unprincipled from the standpoint of rights protection” (citing Aleinikoff, *supra* note 443, at 984-95)); *cf.* Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1380 (1990) (noting “the judicial subjectivity inherent in the means-ends examination”).

447. Although past studies have not undertaken such an evaluation, various social science methodologies for measuring educational opportunity and adequacy can yield valid and reliable data from which lawmakers and courts can assess, if not determine, the symbiosis and trajectory of vertical equity and adequacy. *See, e.g.*, BRUCE BAKER & JESSE LEVIN, AM. INSTS. RESEARCH, EDUCATIONAL EQUITY, ADEQUACY, AND EQUAL OPPORTUNITY IN THE COMMONWEALTH: AN EVALUATION OF PENNSYLVANIA’S SCHOOL FINANCE SYSTEM 30-43 (2014), [https://www.air.org/sites/default/files/downloads/report/AIR-EEAEO%20in%20the%20 Commonwealth%20-%20Full%20Report%2010-09-14.pdf](https://www.air.org/sites/default/files/downloads/report/AIR-EEAEO%20in%20the%20Commonwealth%20-%20Full%20Report%2010-09-14.pdf) [<https://perma.cc/3ALS-8LHF>]; CHRISTOPHER A. CANDELARIA & KENNETH A. SHORES, COURT-ORDERED FINANCE REFORMS IN THE ADEQUACY ERA: HETEROGENEOUS CAUSAL EFFECTS AND SENSITIVITY 9-29 (2017), <https://cepa.stanford.edu/sites/default/files/cofr-efp.pdf> [<https://perma.cc/D9Q5-ENAW>]; C. Kirabo Jackson et al., *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes* 13-42 (Nat’l Bureau of Econ. Research, Working Paper 20118, 2014), <http://www.nber.org/papers/w20118.pdf> [<https://perma.cc/SDF4-B4X3>].

448. Again, past studies have not measured the proportionality of the margin between vertical equity and adequacy, but there are existing datasets and methodologies that could be utilized and tailored for that purpose. *See, e.g.*, Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. ECONOMICS 1553 (2014); Matthew R. Della Sala & Robert C. Knoepfel, *Measuring the Alignment Between States’ Finance and Accountability Policies: The Opportunity Gap*, 23 EDUC. POLY ANALYSIS ARCHIVES, Jun. 2015, at 1; Catherine Kramarczuk Voulgarides, Edward Fergus & Kathleen A. King Thorius, *Pursuing Equity: Disproportionality in Special Education and the Reframing of Technical Solutions to Address Systemic Inequities*, 41 REV. RES. EDUCATION 61 (2017); Raj Chetty et al., *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility* (Nat’l Bureau of Econ. Research, Working Paper No. 23618, 2017), [http://www.equality-of-opportunity.org/papers/coll\\_mrc\\_paper.pdf](http://www.equality-of-opportunity.org/papers/coll_mrc_paper.pdf) [<https://perma.cc/AH89-N7U8>]; Alessandra Fogli & Luminita Stevens, *The Twilight of the American Dream? How Inequality and Segregation Are Shaping Social Mobility in the U.S.* (Soc’y for Econ. Dynamics, 2016 Meeting Paper No. 1684, 2016), [https://economicdynamics.org/meetpapers/2016/paper\\_1684.pdf](https://economicdynamics.org/meetpapers/2016/paper_1684.pdf) [<https://perma.cc/YC24-Y25T>].



teriously weigh or balance values and interests.<sup>449</sup> Rather, direct-proportionality review “provides a stable framework for persuasive reason-giving, thereby enhancing the transparency of decisions, unlike more opaque forms of balancing.”<sup>450</sup> The enhanced transparency “encourages or forces courts to analyze cases openly, in a fashion that elicits direct discussion of foundational” constitutional values.<sup>451</sup>

A related criticism might be that direct-proportionality review does not resolve the intractable problem of indeterminacy, whereby constitutional rights provide no “foundational assurances” on which we can rely so long as they “can only be determined by extensive deliberation” inviting the whims of “judicial discretion.”<sup>452</sup> Of course, the indeterminacy problem is ubiquitous; indeed it “appears to be built into the nature of the legal enterprise.”<sup>453</sup> Hence, the strength of “the indeterminacy critique depends to an important degree on what [direct-]proportionality review would replace.”<sup>454</sup> On that score, direct-proportionality avoids some of the problems of indeterminacy that plague ends-to-fit review, for example, “problems in determining and demonstrating the effectiveness and real necessity of a given means of pursuing a government interest; [or] problems in recognizing and properly accounting for all of the relevant rights and interests.”<sup>455</sup> Additionally, like more exacting forms of scrutiny, direct-proportionality review permits more disciplined judicial decision-making thanks to its simplicity and built-in normative standard.<sup>456</sup>

In short, direct-proportionality review does not resolve all problems of subjectivity and indeterminacy, but it is less subjective and more determinate than balancing and ends-to-fit review.

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449. See Aleinikoff, *supra* note 443, at 976; see also Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 67 (1992) (contending that standards can “make visible and accountable the inevitable weighing process that rules obscure”).

450. Jackson, *supra* note 361, at 3142.

451. David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 362 (2015).

452. See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 877 (2003).

453. *Id.* at 883.

454. See Jackson, *supra* note 361, at 3153-54.

455. Wright, *supra* note 391, at 228 (footnote omitted).

456. *Cf. id.* (noting the advantages of exacting judicial scrutiny).

## 2. *Justiciability*

“Most modern theories of constitutional interpretation strive to overcome or circumvent ... the ‘counter-majoritarian difficulty.’”<sup>457</sup> Inevitably, when a court concludes that there has been a violation based on “one of several plausible understandings” of a constitutional provision, “it removes the issue from the realm of majoritarian politics.”<sup>458</sup> This difficulty seems less significant at the state level because most state judges are elected and therefore more politically accountable.<sup>459</sup> Yet justiciability—meant “to resolve the perceived countermajoritarian difficulty”<sup>460</sup>—remains a troublesome concern even among the more active state courts.<sup>461</sup>

There are a range of conventional responses to the counter-majoritarian difficulty: radical majoritarianism (“do away with judicial review”); judicial restraint and minimalism (maintain a “presumption of constitutionality” and avoid abstraction); process theories (suspend presumption of constitutionality for certain rights when “legislative processes cannot be expected to correct the defect,” or “when prejudice against minorities curtails their ability to utilize the democratic process”); and originalism (interpret constitution “to reflect the original understanding of those who framed and ratified it”).<sup>462</sup> Along that range, direct-proportionality review falls somewhere between the judicial restraint and minimalism theories and process theories.

Leaning toward judicial restraint and minimalism, direct-proportionality review is consistent with output-based review, jurisprudence of consequence, and the dialogic approach, in that it generally defers to the legislative and executive branches regarding the means to provide a vertically-equitable and adequate education.

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457. Dorf, *supra* note 452, at 889 (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962)).

458. *Id.*

459. Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN. ST. L. REV. 837, 849-50 (2011); see also Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1886-88 (2001); Neuborne, *supra* note 199, at 899-900.

460. Hershkoff, *supra* note 459, at 1886-87 (citing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 28 (1962)).

461. See *supra* notes 279-80 and accompanying text.

462. See Dorf, *supra* note 452, at 890-99 (discussing these responses).

“Legislatures, not courts, have the best institutional ability to identify and assess the efficacy of means. When courts do second-guess legislative choices of this nature, they tend to be either proceeding *ad hoc* or disguising their true concerns.”<sup>463</sup> Even when the scrutiny is scaled back to the degree of fit between the means and ends—“an empirical problem” that “science, scholarship, and experience can help” to solve—judges in the end are left with “assumptions, contradictory experiences, and as many expert opinions as there are interests involved.”<sup>464</sup> Notwithstanding the deference to “legislatures and executive officials as the ‘primary decisionmakers,’” a “‘proportionality analysis’ by courts can serve as a check against serious disproportionalities.”<sup>465</sup>

Leaning toward process theories, direct-proportionality review does not provide as much deference as Scott Bauries’s proposed review of legislative process over substance.<sup>466</sup> Given that courts have recognized the right to education as one vital to the democratic process,<sup>467</sup> that would yield too much ground. Nevertheless, direct-proportionality review would not require the court to turn a blind eye toward process failures. On the contrary, serious “disproportionalities in the effects of government action may be a signal of failures in the legislative process that warrant increased scrutiny by the courts”—failures like “lawmakers’ insufficient concern with disproportionate effects on the relatively powerless” or “unconscious or unarticulated prejudices.”<sup>468</sup>

Direct-proportionality review is—after all—a standard, not a rule.<sup>469</sup> Nothing about direct-proportionality review, however, would preclude a court from adopting some of Derek Black’s proposed prophylactic rules, decision-making structures, and deterrence-based remedies.<sup>470</sup> Indeed, such proactive intervention might be necessary to advance vertical equity and adequacy in tandem while

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463. Bhagwat, *supra* note 226, at 308-09.

464. See Schlink, *supra* note 390, at 299.

465. See Jackson, *supra* note 361, at 3147 & n.245 (citing SULLIVAN & FRASE, *supra* note 362, at 8).

466. See *supra* Part III.E.

467. See *supra* notes 87-91 and accompanying text.

468. See Jackson, *supra* note 361, at 3151.

469. See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 385 (1985) (noting standards provide “evaluative terms,” enabling “individualized judgments”).

470. See *supra* Part III.F.

ensuring the margin between them remains proportional. Ultimately, however, as Black recognizes, education cannot be governed entirely by rules; standards are needed to guide courts and the other branches.<sup>471</sup> This is particularly the case with adequacy and vertical equity because they are dynamic and relational demands which are not best suited by static categorical rules. “Even if ‘categorical’ rules would result in fewer errors ... a standard may result in fewer ‘serious’ errors, or departures from a common sense of constitutional justice, than its ‘categorical’ counterpart.”<sup>472</sup>

At bottom, direct-proportionality review addresses the justiciability concerns by being at once more and less deferential to legislative prerogatives and staking out a vital role for the judiciary in enforcing equal liberty under the right to education.

### 3. *Nothing New Here*

“Not all rights have the same conceptual structure[,]... play the same role within the constitutional system[,]” or “involve the kinds of principles that can best be applied through ideas of proportionality.”<sup>473</sup> The right to education is compatible with principles of proportionality, however, *because of* its conceptual structure—its forms and function. As discussed, the right to education takes the form of both a positive claim-right to an adequate education and a negative immunity against inequitable distributions of educational opportunity.<sup>474</sup> There are other rights, such as the right to marry, with “the somewhat distinctive feature of being both a positive and a negative right.”<sup>475</sup> Such rights require synchronization to effectuate both their positive and negative dimensions. For the right to education, that synchronization is achieved by directing state action to sustain the right’s core function: “to protect children from being disadvantaged in life by disparities in educational opportunity.”<sup>476</sup>

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471. See *supra* note 341 and accompanying text.

472. Jackson, *supra* note 361, at 3155.

473. *Id.* at 3167-68 (footnote omitted).

474. See *supra* note 198 and accompanying text.

475. See Yoshino, *supra* note 16, at 168.

476. Weishart, *Reconstituting*, *supra* note 34, at 958. The function of most other rights is to authorize the rightholder’s actions, exempt him or her from some general duty, afford discretion concerning some action, or entitle the rightholder to specific performance. See *id.* at 954-55.

To enforce this protection function, courts need a standard of review that focuses the judicial lens on whether children's liberty and equality interests are being advanced by elevating vertical equity and adequacy while keeping the margin between them proportional. This dual inquiry serves both dimensions of the right to education: improving vertical equity and adequacy together serves the positive claim-right dimension, while ensuring the proportionality of the margin between them serves the negative immunity dimension.

Admittedly, this idea of proportionality is nothing new; indeed, it is ancient—but it has never been applied in this way.

### CONCLUSION

It is a “stunted image of our nation as a land that can afford one of two dreams—liberty or equity—but cannot manage both.”<sup>477</sup> It does not have to be this way. State courts were among the first to accept the interrelation of these constitutional principles and are thus posed to lead the nation in reconstituting the right to education to incorporate them. Part of what holds them back is their allegiance to a mode of constitutional review that they have long since forsaken. In truth, “there are no silver bullets to improving education.”<sup>478</sup> But with direct-proportionality review we can at least allow ourselves to reimagine the dream of equality *and* liberty in education.<sup>479</sup> That vision of equal liberty can no longer be made to teeter on a standardless balance but must remain fixed in one proportional direction.

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477. JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 173 (1991).

478. Black, *supra* note 341, at 1604.

479. Although it is fitting to start with the right to education, direct-proportionality review has potentially broader application when equal protection and due process are brought to bear on similar claims for equal liberty. Cf. Joseph Fishkin, *Voting as a Positive Right: A Reply to Flanders*, 28 ALASKA L. REV. 29, 34 n.27 (2011) (“The right to vote on an *equal* basis with other citizens ... sounds in both liberty and equality.”).