

RECONSTITUTING THE RIGHT TO EDUCATION

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ABSTRACT

Confronting persistent and widening inequality in educational opportunity, advocates have regarded the right to education as a linchpin for reform. In the forty years since the Supreme Court relegated that right to the domain of state constitutional law, its power has surged and faded in litigation challenging state school finance systems. Like so many of the students it is meant to protect, however, the right to education has generally underachieved, in part because those wielding it have not always appreciated its distinctive forms and function.

Deconstructed, the right to education held by children has been formulated doctrinally as both a claim-right, imposing affirmative duties on the state to act, and an immunity, disabling certain state action. These two strands—oft-manifested as the claim-right to educational “adequacy” and an immunity entailing “equality” of educational opportunity—once considered irreconcilable, are actually interlocked by the right’s core historical function to protect children’s liberty and equality interests.

And yet the right to education is ill equipped to fulfill its protection function. Education clauses in state constitutions do not fix the standards for mutually enforcing equality and adequacy. This encumbers already-reluctant courts in addressing educational disparities and emboldens legislative resistance when they do. Appreciating that the right to education has a protection function entailing equality and liberty interests nevertheless suggests that the right can be adjudicated in a way that unifies the demands and guarantees of substantive due process and equal protection. That union holds the potential to ameliorate the enforcement standards thereby reconstituting the right to education as a mainstay of reform.

INTRODUCTION

The right to education is a constitutional aberration. Whittled by a 5–4 Supreme Court majority in *San Antonio Independent School District v. Rodriguez*—as nonfundamental, ostensibly without rank in the U.S. Constitution¹—the right persists explicitly in state constitutions. There it has been conscripted in the service of school finance litigation initiated in nearly every state but has failed to usher in the lasting reforms sought by advocates.² Rather, the fallout from the 1973 *Rodriguez* opinion has been

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

2. 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, 1360–73 (2010) (recounting successes and failures of school finance cases in state courts).

so desultory that this once-nascent entitlement appears somewhat of an ugly duckling of constitutional rights—stuck, alas, in a forty-year-plus ugly phase. The prospect that the right to education will mature into a proverbial swan is dim, and yet, for many it remains an irresistible vision.

Scholars have imagined various transformations of the right to advance its constitutional station.³ Some propose petitioning the Court to overrule *Rodriguez* and recognize a fundamental right to “equal educational opportunity,” implicating the Fourteenth Amendment’s Equal Protection Clause.⁴ They insist that such a conversion is not as improbable as it seems given the federal government’s increased role in education since *Rodriguez* and the Court’s subsequent precedent.⁵

Others suggest that the Court should, if not overrule, at least revisit *Rodriguez* because it did not properly consider alternative bases for the right, e.g., the First Amendment’s Free Speech Clause, the implied right to vote, and the Fourteenth Amendment’s Due Process and Privileges and Immunities Clauses;⁶ the Citizenship Clause;⁷ or the Ninth Amendment.⁸

Perhaps unconvinced that courts will rely on any of these sources to find the right implicit in the text, “groups of scholars, advocates, legal institutions, and communities have been theorizing and organizing a grassroots movement to amend the Constitution” to make the right

3. See *id.* at 1378–82 (reviewing previously proposed strategies for establishing a right to education in the U.S. Constitution).

4. Christopher R. Lockard, Note, *In the Wake of Williams v. State: The Past, Present, and Future of Education Finance Litigation in California*, 57 HASTINGS L.J. 385, 420–21 (2005–2006) (noting Berkeley Law professors’ “Rethinking Rodriguez” project, which considered “mounting a school finance lawsuit based on federal constitutional rights with the hope of overruling *Rodriguez* . . . to make education a fundamental right” (footnote omitted)); cf. Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 121–23 (2004) (concluding that *Rodriguez* was “tragically wrong”).

5. See, e.g., Sarah G. Boyce, Note, *The Obsolescence of San Antonio v. Rodriguez in the Wake of the Federal Government’s Quest to Leave No Child Behind*, 61 DUKE L.J. 1025 (2012); Kerry P. Burnet, Note, *Never a Lost Cause: Evaluating School Finance Litigation in the Face of Continuing Education Inequality in Post-Rodriguez America*, 2012 U. ILL. L. REV. 1225; see also Black, *supra* note 2, at 1361, 1406 (contending that *Rodriguez* need not be overruled directly because state education cases have “broaden[ed] the concept of equity to include a substantive component” such that federal equal protection is implicated when states provide one set of students an adequate education but deny it to others).

6. See Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 553 (1992).

7. See Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 330, 394 (2006); see also Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286, 1288 (2003) (“Because the early history of the Privileges or Immunities Clause indicates that the clause was designed to protect rights of national citizenship, the clause is potentially a more appropriate constitutional source for protecting the right to education than the Equal Protection Clause.” (footnote omitted)).

8. See DANIEL A. FARBER, *RETAINED BY THE PEOPLE* 153 (2007).

explicit.⁹ Most other commentators nevertheless encourage a more modest approach, to take what *Rodriguez* gives (by leaving undecided)—the possibility of a federal constitutional right to a “minimally adequate education.”¹⁰ Still others think that the solution is for Congress to bypass *Rodriguez* and the U.S. Constitution altogether and enact a federal statutory right to education.¹¹

An intensifying minority of scholars caution against federalizing the right to education¹² or are resigned to working within the state constitutional framework, from which nearly all of the right’s jurisprudence has evolved in the four decades since *Rodriguez*.¹³ Scott Bauries, for

9. See Black, *supra* note 2, at 1381 (citing campaigns to amend U.S. Constitution).

10. See *Rodriguez*, 411 U.S. at 36 (suggesting possibility that “some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [First Amendment freedoms and the right to vote]”); see, e.g., Julius Chambers, *Adequate Education for All: A Right, an Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 67–72 (1987); Edward B. Foley, *Rodriguez Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. 475, 480 (1998); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92 (2013); Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 WILLAMETTE L. REV. 279, 281–87 (1993); Matthew A. Brunell, Note, *What Lawrence Brought for “Show and Tell”: The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343 (2005); Lauren Nicole Gillespie, Note, *The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989, 1016 (2010); Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court’s Jurisprudence*, 26 HOFSTRA L. REV. 953 (1998); cf. Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 47 (2012) (advocating statutory and constitutional bases for a “right to comprehensive educational opportunity” in the No Child Left Behind Act and in the Court’s equal protection jurisprudence, including the adequacy issue left open in *Rodriguez*).

11. See, e.g., Christopher Edley, Jr., *Keynote Address*, 4 STAN. J. C.R. & C.L. 151 (2008) (calling for new academic approach to educational rights as fundamental civil rights, focusing on subconstitutional statutory means of rights definition, establishment, and enforcement); Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1712–16 (2007) (urging Congress to recognize federal right to education, enact it through spending legislation, and enforce it by federal panel); see also Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U.L. REV. 313, 321 (2010) (proposing modification of Title I’s funding to remedy inequitable disparities in educational funding and “restore the federal government to its proper role as a leader in education equality”).

12. See Black, *supra* note 2, at 1384–85 (citing Paul L. Tractenberg, *The Refusal To “Federalize” the Quest for Equal Educational Opportunity, the Role of State Courts and the Impact of Different State Constitutional Theories* 30 (Apr. 2006) (unpublished manuscript), http://www.law.berkeley.edu/files/tranctenberg_paper.pdf; Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. REV. 755, 772 (2008)).

13. See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 108–09 (1995); Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995); Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325 (1992); Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1; Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 308–17 (1991); Laurie Reynolds, *Full State Funding of Education as a State Constitutional Imperative*, 60 HASTINGS L.J. 749 (2009); William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 WEST’S EDUC. L. REP. 19 (1993); Deborah A. Versteegen, *Towards a Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in*

instance, analyzes the nature of the “right” to education under state constitutions, examining how it diverges or converges with federal doctrine¹⁴ and prescribing principles for its adjudication.¹⁵

Yet even “the state constitutional right to education is in danger of being rendered meaningless” due to lingering doubts about its justiciability and the increasing reluctance of courts to order remediation in the face of legislative deficiencies or outright defiance.¹⁶ School funding cases have long been laden with separation of powers concerns, causing some courts to abdicate their role entirely. Other courts previously willing to intervene have begun to demur, faced with the prospect of enforcing the right in ways that might continuously encroach on legislative prerogatives.¹⁷

Hence, despite decades of school funding litigation and the vast literature annotated above, the right to education remains conceptually fragmented. I do not wish to add another voice to this dissonant chorus by attempting to blueprint an entirely new edifice for the right. Rather, in this Article I deconstruct the right’s present, much-maligned composition to gain clarity about the legal architectures that have already been conceived and operationalized. In so doing, I show how two strands of the right to education once thought to be diametrically opposed—equality of educational opportunity and educational adequacy—are interlocked through the right’s forms and functions.

In Part I, I evaluate the right to education’s *forms*—privilege, claim-right, power, and immunity—within Hohfeld’s analytic scheme of rights.¹⁸

the Context of State Constitutional Challenges to School Finance Systems, 23 ST. LOUIS U. PUB. L. REV. 499 (2004); Josh Kagan, Note, *A Civics Action: Interpreting “Adequacy” in State Constitutions’ Education Clauses*, 78 N.Y.U. L. REV. 2241 (2003); see also Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1138, 1168 (1999).

14. 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) [hereinafter Bauries, *Judicial Review of Adequacy*]; Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301 (2011) [hereinafter Bauries, *Conceptual Convergence*].

15. See Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949 (2014) [hereinafter Bauries, *Common Law Constitutionalism*]; Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 736 (2012) [hereinafter Bauries, *Education Duty*].

16. 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, 87 (2010).

17. *Id.* at 96–97.

18. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710 (1917); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). These two articles were later combined in a book following Hohfeld’s death. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (Walter Wheeler Cook ed., 1919) [hereinafter HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS*].

Hohfeld's framework is ubiquitous,¹⁹ "the 'standard model' of legal rights,"²⁰ and renowned as "a canonical landmark in American jurisprudence."²¹ Although Hohfeld is not without his critics,²² his scheme "has withstood the test of time."²³ More importantly, some courts have utilized Hohfeld's framework for analyzing legal rights²⁴—including, significantly, two state supreme courts, which did so explicitly in interpreting their state constitutions' education clauses.²⁵

Coding the right to education's forms only reveals part of its nature, however.²⁶ The form provides a descriptor of the right's "internal structure."²⁷ But to fit our ordinary understanding of what it means to have a legal right, we also need a descriptor of "what rights do for those who hold them," i.e., their *function*.²⁸ Leif Wenar identifies six functions—exemption, discretion, authorization, provision, performance, and

19. See Bauries, *Conceptual Convergence*, *supra* note 14, at 306 ("Numerous articles and books have employed Hohfeld's framework since it was first introduced.")

20. Steven M. Wise, *Hardly a Revolution—the Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793, 800–01 (1998) (observing that Hohfeld's framework "was adopted by various Restatements of the Law, as well as by Black's Law Dictionary"); see Jay P. Kesau & Carol M. Hayes, *FRAND's Forever: Standards, Patent Transfers, and Licensing Commitments*, 89 IND. L.J. 231, 289 (2014) (observing that Hohfeld's "hundred-year-old article is so widely read and referenced that it landed a spot at number fifty in Shapiro and Pearse's recent study ranking the one hundred most-cited law review articles").

21. Allen Thomas O'Rourke, *Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law*, 61 S.C. L. REV. 141, 144 (2009); see HILLEL STEINER, AN ESSAY ON RIGHTS 59 (1994) ("The beginning of wisdom [on contemporary discussions of rights] is widely agreed to be the classification of juridical positions developed by Wesley N. Hohfeld."); Matthew H. Kramer, *Rights in Legal and Political Philosophy*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 414, 415 (Keith E. Whittington et al. eds., 2008) ("The most famous and influential analysis of legal rights ever propounded is that developed by the American jurist Wesley Hohfeld . . .").

22. See Matthew H. Kramer, *Rights Without Trimmings*, in A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES 7, 7 n.1 (Matthew H. Kramer et al. eds., 1998) (citing criticisms); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 989–93, 989 n.22 (describing central criticisms and legal rights debates spurred in response to Hohfeld's framework).

23. See Kramer, *supra* note 21, at 417.

24. See, e.g., *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 280 n.1 (3d Cir. 2008); *United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574, 577 (9th Cir. 1996), *abrogated by Astrue v. Ratliff*, 560 U.S. 586 (2010); *Cal. Grocers Ass'n v. City of Los Angeles*, 254 P.3d 1019, 1033 n.10 (Cal. 2011); *State v. Goldberg*, 85 A.3d 231, 243–44, 243 n.17 (Md. 2014); *Yu v. Paperchase P'ship*, 845 P.2d 158, 163–65 (N.M. 1992).

25. See *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 527 n.23 (Mass. 1993) ("[I]f legislatures and magistrates have a constitutional duty to educate, then members of the Commonwealth have a correlative constitutional right to be educated." (internal quotation marks omitted)); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 91 (Wash. 1978) ("Flowing from this constitutionally imposed 'duty' [to make ample provision for education] is its jural correlative, a correspondent 'right' permitting control of another's conduct." (footnote omitted)).

26. And fortunately Bauries has laid much of that groundwork. See Bauries, *Conceptual Convergence*, *supra* note 14, at 306–21.

27. Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA OF PHIL. (July 2, 2011), <http://plato.stanford.edu/archives/fall2011/entries/rights>.

28. *Id.*

protection—which, when paired with one or more forms, provide a complete description of the right’s “complex ‘molecular’ . . . structure.”²⁹

The practical implications of this description are quite serious because the right’s forms and functions dictate the scope of judicial review and the remedial measures that courts can undertake. Put simply, they predetermine the right’s potential strength and viability.

My analysis in Part I concludes that the right to education held by children has taken the form of both a claim-right and an immunity. Where the two forms overlap—the protection function—the claim-right denotes a right to educational *adequacy*, and the immunity is one of *equality* of educational opportunity.³⁰ Although the protection function has not attracted much scholarly attention, the right has long been justified and invoked to protect children from political, economic, and social inequalities and more generally to protect their capabilities to be responsible, productive citizens.

Broadly construed, such equality and liberty interests are underwritten by the equality and adequacy principles I explore further in Part II. At the core of the principle of educational adequacy is the notion that we must cultivate children’s positive liberties. Whereas the distributive principle of equality of educational opportunity has been utilized to negate resource inequities and social inequalities. Despite the potential of adequacy and equality intertwined,³¹ education clauses in state constitutions do not fix standards for their mutual enforcement, leaving the right to education vulnerable to the charge that it is judicially unmanageable.

Disjoined, equal protection and substantive due process offer little recourse, each being jurisprudentially flawed: equal protection demanding substantive equality poses its own intractable manageability problems, rendering it inadequate. Substantive due process, as a noncomparative right, tolerates and potentially exasperates, objectionable inequities. Conjoined, the egalitarian principles of equal protection and the substantive demands of due process might overcome these flaws, but exactly how they can be integrated remains unclear, even after the Court’s recent application in *Obergefell v. Hodges*.³²

I make no pretense that a grand unifying theory is viable or even desirable. Nevertheless, the right to education—an immunity-claim-right imparting a protection function vis-à-vis children’s liberty and equality

29. Leif Wenar, *The Nature of Rights*, 33 PHIL. & PUB. AFF. 223, 225 (2005).

30. “Equality of educational opportunity has been thought to require equal spending per pupil or spending adjusted to the needs of differently situated children. Adequacy has been understood to require a level of spending sufficient to satisfy some absolute, rather than relative, educational threshold.” Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 477 (2014).

31. See generally *id.*

32. 135 S. Ct. 2584 (2015).

interests—presents a configuration that could make unifying substantive due process and equal protection more palpable. That union could, in turn, ameliorate the standards for enforcing the right to education. On the one hand, substantive due process advancing positive liberty interests reinforces the adequacy threshold from which resource inequities can be judicially measured and adjusted; on the other hand, equal protection can infuse equal educational opportunity principles in translating adequacy as a relational demand.

I. THE RIGHT TO EDUCATION’S “MOLECULAR STRUCTURE”

In human rights discourse, the right to education is a Johnny-come-lately.³³ Although the right formally arrived on the international scene in 1948 via the Universal Declaration of Human Rights (UDHR),³⁴ it was consigned with other so-called “second-generation” human rights—economic, social, and cultural rights—behind “first-generation” political and civil rights.³⁵ In the course of a few decades, however, human rights discourse has gradually expanded to include second-generation rights.³⁶ And the right to education figures prominently in that discussion.³⁷ In fact, “[t]he right to education is the most widely enshrined [socio-economic right], present in more than three-quarters of the world’s constitutions.”³⁸

Notwithstanding the burgeoning human rights discourse, the Supreme Court has observed that the UDHR is nonbinding,³⁹ and the United States is among the few industrialized nations that failed to ratify the two treaties that explicitly recognize a right to education, the International Covenant on

33. See generally Leah K. McMillan, *What’s in a Right? Two Variations for Interpreting the Right to Education*, 56 INT’L REV. EDUC. 531 (2010).

34. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 26(1) (Dec. 10, 1948) (“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.”).

35. See J. Oloka-Onyango, *Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples’ Rights in Africa*, 18 AM. U. INT’L L. REV. 851, 852–55 (2003) (explaining that second-generation rights “have been relegated to a lower[,] less important sphere” and “are as much marginalized in the discourse[] as they are in the enforcement”).

36. See *id.* at 854; Nisha Thapliyal et al., “*Until We Get Up Again to Fight*”: *Education Rights and Participation in South Africa*, 57 COMP. EDUC. REV. 212, 213 (2013).

37. See, e.g., HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE (Yvonne Donders & Vladimir Volodin eds., 2007); JOEL SPRING, *THE UNIVERSAL RIGHT TO EDUCATION: JUSTIFICATION, DEFINITION, AND GUIDELINES* (2000).

38. Courtney Jung et al., *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1053 (2014); see also U.N. Econ. & Soc. Council, Comm. on Human Rights, Economic, Social and Cultural Rights: Annual Report of the Special Rapporteur on the Right to Education para. 66, U.N. Doc. E/CN.4/2001/52 (Jan. 11, 2001) (observing explicit guarantees of right to education in 142 of 186 countries surveyed).

39. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (“[T]he Declaration does not of its own force impose obligations as a matter of international law.”).

Economic, Social, and Cultural Rights and the Convention on the Rights of the Child.⁴⁰ Even if customary international law yet obligates the United States to discern and enforce a right to education,⁴¹ that recognition would not give the right any “constitutional stature”—the right “would merely become federal law[,] which could be superseded by subsequent contradictory federal legislation or treaty law.”⁴² Hence, although the development of the international human right to education can inform our analysis, it cannot dictate the scope of this domestic, constitutional-level inquiry.

As previously noted, there is no dearth of scholarship formulating the right to education under American law. Indeed, rights-based “claims about education reform enjoy a resurgence in [our] political discourse.”⁴³ Yet, “current scholarship has mostly produced very general descriptions of education rights, but little critical analysis of whether these general conceptions are logically sound or normatively desirable.”⁴⁴ Rather than query the nature of the right itself, much of the literature assumes it is a “positive right” and focuses on its “quantitative and qualitative entitlements” or its enforcement, that is, its “justiciability and remediability.”⁴⁵ A conceptually thin account of the right, however, further obscures its content and complicates problems with its enforcement.⁴⁶

Although Bauries has made significant inroads to fill this “theoretical void,”⁴⁷ I reconsider his account of the right to education’s forms and venture further, to chart the right’s functions. Together, the forms and functions provide a complete picture of the right’s structure.

A. *The Right to Education’s Forms*

Although Hohfeld aimed to clarify and, in a sense, simplify the term “right,” his scheme of rights is quite intricate.⁴⁸ Generations of scholars

40. See Angela Avis Holland, Note, *Resolving the Dissonance of Rodriguez and the Right to Education: International Human Rights Instruments as a Source of Repose for the United States*, 41 VAND. J. TRANSNAT’L L. 229, 245–50 (2008).

41. See *id.* at 254.

42. Bitensky, *supra* note 6, at 618–19.

43. ANNE NEWMAN, REALIZING EDUCATIONAL RIGHTS 60 (2013).

44. Bauries, *Judicial Review of Adequacy*, *supra* note 14, at 755–56; see *id.* at 758 & n.274 (citing “a few notable exceptions”).

45. See Bauries, *Conceptual Convergence*, *supra* note 14, at 303–04.

46. *Cf. id.* at 304 (“[B]oth scholarship and adjudication of education rights and responsibilities would be improved by a better understanding of which conceptions are actually at work in the cases.”).

47. See generally Bauries, *Judicial Review of Adequacy*, *supra* note 14.

48. See GEORGE W. RAINBOLT, THE CONCEPT OF RIGHTS 11–17 (2006); Eric Engle, *Taking the Right Seriously: Hohfeldian Semiotics and Rights Discourse*, 3 CRIT 84, 95 (2010) (“Hohfeld proposes a potentially infinite and, in all events, complex typology.”). For a sophisticated treatment of

have sought to recapitulate or refine his taxonomy. Because this ground has been covered numerous times before, we can forgo a lengthy discussion of the framework in the abstract; an abridged review of the Hohfeldian lexicon should facilitate a basic understanding of how courts have understood the right to education's forms in practice.

When we use the word "right" in a legal sense, we may have in mind one (or more) of four distinct entitlements: (1) claim-right, (2) privilege, (3) power, or (4) immunity.⁴⁹ Each of these four "Hohfeldian incidents" has a "jural correlative," which together comprise a legal relationship between two or more parties.⁵⁰ So, for instance, if Emma has a *claim-right* to education against the state, then the state has a jural correlative *duty* to Emma to educate her. If, however, Emma holds a *privilege* against the state regarding her education, then the state has a correlative *no-right* to interfere with Emma's education (and indeed, Emma has no duty to the state even to be educated). The claim-right and privilege are "first-order" rights in that they are rights one has "over objects such as one's body."⁵¹

Powers and immunities are "second-order" (read higher order), considered "[r]ights over rights."⁵² That is, they describe "the various ways in which people [or entities] can manipulate the first-order [rights]."⁵³ If the state holds a *power*, it is authorized to create, waive, or annul its own claim-right or privilege or Emma's claim-right or privilege, and thus, Emma is under a correlative *liability* to the state's power.⁵⁴ However, if Emma holds an *immunity*, then the state is under a correlative *disability*,

Hohfeldian relations as a basis for deontic logic, see Kevin W. Saunders, *A Formal Analysis of Hohfeldian Relations*, 23 AKRON L. REV. 465 (1990).

49. Scholars have taken issue with Hohfeld's terminology. Some prefer the term "liberty" instead of "privilege," see, e.g., Glanville Williams, *The Concept of Legal Liberty*, 56 COLUM. L. REV. 1129, 1131–35 (1956), and "claim-right" or "claim" instead of "right," see, e.g., Wendy J. Gordon & Daniel Bahls, *The Public's Right to Fair Use: Amending Section 107 to Avoid the "Fared Use" Fallacy*, 2007 UTAH L. REV. 619, 625 n.26 ("[C]ommentators tend to use the phrase 'claim right' . . . to preserve the simple term 'right,' with its rich connotative range, for more general applicability."); O'Rourke, *supra* note 21, at 145 n.27 (using "claim" as distinct from the "broader, popular usage" of "right"). To avoid confusion, I employ the terms used by both Bauries and Wenar.

50. To simplify matters further, we can omit a discussion of the "jural opposites," which are merely negations of the four Hohfeldian incidents. The opposites are "inessential"—the Hohfeldian incidents and their correlatives "cover all the conceptual material" needed to elucidate the right to education's forms. Cf. Frank I. Michelman, *"There Have To Be Four"*, 64 MD. L. REV. 136, 156 (2005).

51. Wenar, *supra* note 29, at 233. Claim-rights and privileges form what H.L.A. Hart referred to as "primary rules"—rules requiring people "to do or abstain from certain actions, whether they wish to or not." H.L.A. HART, *THE CONCEPT OF LAW* 81 (3d ed. 2012).

52. Wenar, *supra* note 29, at 233.

53. Rowan Cruft, *Rights: Beyond Interest Theory and Will Theory?*, 23 LAW & PHIL. 347, 350 (2004). Following Hart, powers and immunities are thus "secondary rules" because they allow people to "introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations." HART, *supra* note 51, at 81.

54. See Cruft, *supra* note 53, at 350–51.

and thus, the state has no power to create, waive, or annul its own claim-right or privilege or Emma’s claim-right or privilege.⁵⁵ In short, second-order rights either allow or disallow a party to change her own or another party’s legal relations.

Table A. Hohfeld’s Jural Correlatives.

First-order
A’s claim-right ↔ B’s duty
A’s privilege ↔ B’s no-right
Second-order
A’s power ↔ B’s liability
A’s immunity ↔ B’s disability

Until recently, commentators had been reluctant to describe Hohfeld’s Jural Correlatives in the context of a constitutional-level right and the legal relationship the right establishes between citizen and state.⁵⁶ That is because “Hohfeld developed his framework to describe private legal relationships, and the Hohfeld system has, during most of its existence, been applied solely to private law questions,” e.g., property, contracts, torts.⁵⁷ But several scholars have now demonstrated that the framework can be applied to public law questions as well.⁵⁸ Moreover, earlier criticism that the framework could not account for the correlativity between public law duties and rights⁵⁹ has been effectively rebutted. The criticism “is plainly wrong if the constitutional status of the state as a rights bearer is acknowledged”—public duties are those “owed to the state as representing the citizens.”⁶⁰ We will return to this point later.

55. *See id.*

56. *See* Bauries, *Conceptual Convergence*, *supra* note 14, at 306.

57. *Id.* at 308–09 (footnote omitted); *see* O’Rourke, *supra* note 21, at 142 n.8 (citing works characterizing Hohfeld’s framework as applicable to “private law” and “common law”).

58. *See* Bauries, *Conceptual Convergence*, *supra* note 14, at 309 & n.32, 311 (citing scholars “applying the Hohfeld framework in constitutional law” and finding O’Rourke’s defense of that application “very convincing”); O’Rourke, *supra* note 21, at 154–70; *see also* Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 694 & n.160 (2013) (citing scholarship in suggesting that “Hohfeldian analysis is common in contemporary constitutional literature”). *See generally* H. Newcomb Morse, *Applying the Hohfeld System to Constitutional Analysis*, 9 WHITTIER L. REV. 639 (1988).

59. *See* ALAN R. WHITE, RIGHTS 62–63 (1984); Ronen Perry, *Correlativity*, 28 LAW & PHIL. 537, 541–42 (2009) (citing Nigel E. Simmonds, *Introduction to* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (David Campbell & Philip Thomas eds., 2001)); *see also* J.W. HARRIS, LEGAL PHILOSOPHIES 81–83 (1980).

60. SURI RATNAPALA, JURISPRUDENCE 348 (2d ed. 2013); *see also* Perry, *supra* note 59, at 544 (“A possible answer [to the criticism] is that the correlativity axiom encompasses collective legal positions, including collective rights. Under this view, a public duty is owed to a collectivity which holds the correlative right, be it a distinct class of persons, the public at large, or the state.” (citing

Let us now consider the right to education's forms utilizing the Hohfeldian framework.⁶¹

1. A "Power" Held by the State

The right to education does not take the form of a Hohfeldian power held *by children*. No law entitles children to create, waive, or annul their own or anyone else's claim-rights or privileges with respect to public education. That is, no child is empowered to alter her or another's legal relations regarding publicly funded and regulated education.

Rather, the second-order power to amend first-order legal relationships regarding education is held almost exclusively by the state.⁶² In fact, "[t]he overwhelming majority of state constitutions give the state plenary power over the education of its children."⁶³ And as Bauries observes, in states where courts have held that the right to education is nonjusticiable, the legislature has a "nearly unlimited Hohfeldian power" that is, in practice, "virtually unreviewable."⁶⁴

In the majority of states where the right to education is justiciable, Bauries explains that courts have taken one of three paths in resolving school finance challenges. Bauries believes that the first two paths demonstrate that state courts have mainly conceived the right to education

Kramer, *supra* note 22, at 59)); cf. Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 27 (1993) ("The term correlative to the [constitutional] claim-right is of course the duty incumbent upon officials and others to respect and uphold the right. And the term correlative to the constitutional immunity is what Hohfeld would call a disability: in effect, a disabling of the legislature from its normal functions of revision, reform and innovation in the law.").

61. The following analysis builds on, supplements, and amends Bauries's scholarship which "analyzes the population of reported cases from the highest state courts to identify Hohfeldian conceptions of education rights held or applied by state courts." Bauries, *Conceptual Convergence*, *supra* note 14, at 305.

62. The people, of course, retain the power to amend the U.S. Constitution in a manner conforming with Article V and to amend their respective state constitution. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 74 (1998) (noting state constitutions commonly include "an explicit recognition that political power came from the people," and that such provisions clarified "that the people did not require amendment or . . . provisions to change the constitution" because they presumed existence of such power and "merely specified a procedure by which it could be exercised").

63. John Schomberg, *Equity v. Autonomy: The Problems of Private Donations to Public Schools*, 1998 ANN. SURV. AM. L. 143, 176; accord Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1329 (1992) (tallying forty-two state constitutions that grant states plenary power over education); see also Christopher P. Lu, Note, *Liberator or Captor: Defining the Role of the Federal Government in School Finance Reform*, 28 HARV. J. ON LEGIS. 543, 546 (1991) ("[T]he states possess 'plenary power' over education, despite having 'delegat[ed] considerable educational policymaking authority to local agencies.'" (alteration in original) (quoting Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1375–77 (1976))).

64. Bauries, *Conceptual Convergence*, *supra* note 14, at 340–42 (citing state court decisions in Rhode Island, Alaska, Louisiana, Oklahoma, Alabama, Florida, Nebraska, Pennsylvania, and Illinois).

as a Hohfeldian power held by the legislature.⁶⁵ Along these two paths, courts either (1) construe the right to education utilizing judicially created standards but then abstain from ordering remediation directed at the legislature due to “separation of powers concerns”⁶⁶ or (2) order remediation but only after adopting the “legislatively developed standard[s].”⁶⁷

In either case, although the language of the state constitutions and the opinions of the highest courts couch the right to education as a claim-right held by children correlative to a duty imposed on the state, Bauries thinks the deference accorded to the legislature at the merits review or remedial stages suggests otherwise—“that the courts are actually acting on conceptions of their education clauses as sources of legislative powers, not duties.”⁶⁸ I raise some doubts about this assertion later, but accepting Bauries’s framing for now, it should not be surprising or troubling.

It may seem counterintuitive to think of the right to education as a right that empowers *the state* and places children under a correlative liability. But the notion that a state must be so empowered to protect children’s well-being can be traced to the very beginnings of public education systems in the United States. It stems from the view that children are not fully autonomous agents—a recognition that states have long used to justify “*parens patriae* authority to intercede in the lives of children in order to protect their safety, to promote their education, or otherwise to further their best interests” when their parents or guardians have failed to do so.⁶⁹

The *parens patriae* doctrine “has governed American policy toward children and families for two centuries.”⁷⁰ “Consider the variety of these child-saving efforts: public schools, orphanages, reformatories, psychological testing, vocational guidance, Aid to Families with Dependent Children (AFDC), day-care centers, and parenting classes—to name just a few.”⁷¹ Regarding public schools in particular, states “have relied on the *parens patriae* doctrine in enacting compulsory-education laws” dating

65. *See id.* at 340.

66. *Id.* at 343–46 (citing state court decisions in Kentucky, Ohio, South Carolina, New Hampshire, Vermont, Montana, Idaho, and Arizona).

67. *Id.* at 346–49 (citing state court decisions in Kansas, Georgia, Missouri, Oregon, and Indiana).

68. *Id.* at 343.

69. Anne C. Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. 2099, 2106–12 (2011).

70. David F. Labaree, *Parens Patriae: The Private Roots of Public Policy Toward Children*, 26 HIST. EDUC. Q. 111, 112 (1986) (reviewing W. NORTON GRUBB & MARVIN LAZERSON, *BROKEN PROMISES* (1982)); *see also* *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 60 n.1 (1890) (“Instances of this kind of legislation, in which the legislature clearly acts as *parens patriae*, may be found almost without number.”).

71. Labaree, *supra* note 70, at 111.

back to at least the nineteenth century.⁷² States have also invoked that common law doctrine together with their general police powers⁷³ to hold children liable under truancy laws⁷⁴ and discipline them for their misconduct in school.⁷⁵

As the Supreme Court has explained, concurrent with the state's *parens patriae* power is the state's *duty* to act in the interest of the child and the public.⁷⁶ "The concept of *parens patriae* is derived from the English constitutional system" wherein "the King retained certain duties and powers . . . as guardian of persons under legal disabilities to act for themselves."⁷⁷ In America, states were "vested with the historic *parens patriae* power, including the duty to protect" such persons.⁷⁸ *Parens patriae* has thus been "defined by many states as more than just a [power], but also a duty to protect the interests of children."⁷⁹ The state's duty to protect children through education in particular emanates from "the natural duty of the parent to give his children education suitable to their station in life."⁸⁰

72. See Gregory Thomas, *Limitations on Parens Patriae: The State and the Parent/Child Relationship*, 16 J. CONTEMP. LEGAL ISSUES 51, 57 (2007); see also *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("[T]he state as *parens patriae* may restrict the parent's control by requiring school attendance" (footnotes omitted)).

73. "Since it is difficult to distinguish the two sources of power in this context, commentators suggest that 'the authority of the state to oversee the child's education is founded upon both' the *parens patriae* power and the police power of the states." Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913, 1944 (1996) (quoting James C. Easterly, Comment, "Parent v. State": *The Challenge to Compulsory School Attendance Laws*, 11 HAMLINE J. PUB. L. & POL'Y. 83, 89 (1990)).

74. See Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J.L. & GENDER 715, 759–60, 765 (2013). Or, by extension, parents and legal guardians can be held liable for their children's truancy. See generally Janet Stroman, *Holding Parents Liable for Their Children's Truancy*, 5 U.C. DAVIS J. JUV. L. & POL'Y 47 (2000).

75. See Cecelia M. Espenosa, *Good Kids, Bad Kids: A Revelation About the Due Process Rights of Children*, 23 HASTINGS CONST. L.Q. 407, 426 (1996) (explaining that the Supreme Court "extended power to the state under the *parens patriae* power to justify compulsory education, then found a coextensive *parens patriae* power to justify disciplining the children" (emphasis added)).

76. See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972).

77. *Id.* The concept probably arose earlier "in ancient civilizations such as Greece, Egypt, and Persia." Thomas J. Cunningham, *Considering Religion as a Factor in Foster Care in the Aftermath of Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act*, 28 U. RICH. L. REV. 53, 96 (1994).

78. *O'Connor v. Donaldson*, 422 U.S. 563, 583 (1975). For a history of the doctrine's application, see George B. Curtis, *The Checkered Career of a Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895 (1976).

79. See Rebecca Williams, Note, *Faith Healing Exceptions Versus Parens Patriae: Something's Gotta Give*, 10 FIRST AMEND. L. REV. 692, 722 (2012) (citing cases); see also *Cty. of McLean v. Humphreys*, 104 Ill. 378, 383 (1882) ("It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae*, to protect and provide for the comfort and well-being of such of its citizens [who] are unable to take care of themselves.").

80. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

Hence, even if, as Bauries maintains, the majority of state courts have operationalized the right to education as a Hohfeldian power held by the legislature,⁸¹ that power is not unfettered and indeed must be attendant to the state's duties. Whether any of these state duties correspond to Hohfeldian claim-rights—as suggested by the third path that some states have taken—is, again, an issue we will address in depth later. For now, it should be understood that the Hohfeldian power does not exhaust all forms of the right to education.

2. A Qualified “Privilege” Held by Parents or Guardians

The right to education does not take the form of a Hohfeldian privilege held *by children*. The law enables—indeed encourages—parents, guardians, and state actors to interfere directly in the public education of children. Moreover, compulsory education laws deprive children of the privilege not to receive an education.

To be sure, parents retain the privilege under the U.S. Constitution to decide whether their children will receive a public or private education⁸² and, in a more general sense, the privilege “to control the education of their own,”⁸³ including directing the religious education of their children.⁸⁴ Notably, however, these privileges are not unrestrained⁸⁵ and may be subject to the exercise of state powers that bear “reasonable” regulations.⁸⁶ Consequently, although these parental privileges have been described as fundamental,⁸⁷ some courts have concluded otherwise because the language

81. See Dailey, *supra* note 69, at 2112–13 (explaining that “state *parens patriae* authority does not lead to children having rights of their own”).

82. See *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

83. *Meyer*, 262 U.S. at 401.

84. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

85. See *Runyon v. McCrary*, 427 U.S. 160, 178 (1976) (“The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and . . . to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.”); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533–34 (1st Cir. 1995) (concluding parents’ liberty interest to choose their children’s education free of governmental interference did not include right to “dictate the curriculum” and thereby “restrict the flow of information”), *abrogated by Cty. of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1067–70 (6th Cir. 1987) (denying parental challenges to textbook reading series).

86. See *Parham v. J. R.*, 442 U.S. 584, 603 (1979) (“[W]e have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”); *Yoder*, 406 U.S. at 213 (“There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.”); *Meyer*, 262 U.S. at 402 (“The power of the state to compel attendance at some school and to make reasonable regulations for all schools . . . is not questioned.”).

87. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 680 n.5 (2002) (Thomas, J., concurring) (“This Court has held that parents have the fundamental liberty to choose how and in what manner to

of the Supreme Court's opinions suggests that laws infringing on these privileges merit rational basis review, not strict scrutiny.⁸⁸ And the Court has failed to specify the applicable standard. On the one hand, it has emphasized that the interest of parents "in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests" it has recognized,⁸⁹ on the other hand, it has employed a balancing test, weighing parental liberty interests against competing state interests.⁹⁰

Whether the parental privilege to "control the . . . education" of children is fundamental or not, it is by no means absolute.⁹¹ Furthermore, as Bauries points out, courts have typically construed state constitutional rights to education in resolving school finance litigation, and in that context, "it simply fits poorly" to speak of children possessing a privilege "to a certain amount of educational resources."⁹² The focus in those cases is not on the child's ability to act without interference but on whether the state's appropriation of resources is adequate or equitable.⁹³ The point being that courts have not confined the right to education's form to a Hohfeldian privilege. And even when the right does take the form of a privilege, it is one essentially held by parents and guardians. Still, it is fair to say that we think of children themselves as holders of some form of the right to education. The next two sections explore that idea.

3. *An "Immunity" Held by Children Against the State*

The right to education has taken the form of an immunity held by children. Curiously, "immunities have not generally received as much attention" as other Hohfeldian incidents, even though "they are of huge

educate their children."); see also Jack MacMullan, Comment, *The Constitutionality of State Home Schooling Statutes*, 39 VILL. L. REV. 1309, 1320 n.64 (1994) (citing scholarship concluding that parental privileges regarding their children's education are fundamental and should be subject to strict scrutiny).

88. See MacMullan, *supra* note 87, at 1320 & n.65 (collecting cases where courts "have balked at recognizing a fundamental parental right to direct their children's education"); Timothy Brandon Waddell, Note, *Bringing It All Back Home: Establishing a Coherent Constitutional Framework for the Re-Regulation of Homeschooling*, 63 VAND. L. REV. 541, 569 (2010).

89. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *id.* at 80 (Thomas, J., concurring) (observing that none of the six Justices who joined the opinion "articulate[] the appropriate standard of review" but asserting that strict scrutiny should apply "to infringements of fundamental rights").

90. See *Doe v. Heck*, 327 F.3d 492, 519–20 (7th Cir. 2003) (interpreting *Troxel* to require balancing of factors regarding parents' fundamental right and state's compelling interests); David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1152–53, 1163–64 (2001).

91. *Care and Prot. of Charles*, 504 N.E.2d 592, 598–99 (Mass. 1987) (concluding liberty interest of parents to educate their children "is not absolute but must be reconciled with the substantial State interest in the education of its citizenry").

92. Bauries, *Conceptual Convergence*, *supra* note 14, at 328.

93. See *id.*

importance.”⁹⁴ Significantly, many of the constitutional entitlements enshrined in the Bill of Rights can take the form of immunities.⁹⁵ These immunities deprive Congress and, by incorporation, state legislatures of the power to enact certain kinds of laws, thereby imposing on legislative bodies correlative disabilities.⁹⁶

“For instance, one has an immunity right to freedom of expression, which bars the legislature from enacting legislation that extinguishes one’s [‘privilege’] to speak.”⁹⁷ If the legislature enacts such a law, it will be deemed unconstitutional “because the legislature will have exceeded the limits of what it is constitutionally empowered to do.”⁹⁸

It is expedient that many of our most prominent constitutional rights include or take the form of immunities. A Hohfeldian immunity plays a critical “role in stabilizing other legal entitlements”—mainly by preventing others from divesting one of his claim-rights and privileges.⁹⁹ And it is “because legal rights are almost always accompanied by immunities against most types of divestiture, [that such rights] provide solid legal protection against interference or uncooperativeness.”¹⁰⁰ Hence, “we are likely to assert even trivial immunities as rights when we find others trying to make us do things that they are not empowered to require of us.”¹⁰¹

So it should not diminish the right to education to note that it has taken the form of an immunity held by children. Indeed, Bauries avers that *Brown v. Board of Education*,¹⁰² the most renowned public education case, can be viewed as recognizing an immunity held by children against “state legislation requiring segregated schools.”¹⁰³ For a time, *Brown* was

94. Kramer, *supra* note 21, at 416–17.

95. See *id.* at 417. Bauries goes so far as to assert that “the vast majority of the legal relationships set up in the U.S. Constitution between individuals and legislative bodies are relationships of powers, liabilities, immunities, and disabilities.” Bauries, *Conceptual Convergence*, *supra* note 14, at 312. I reserve judgment regarding the unassailability of that assertion.

96. Alon Harel, *Theories of Rights*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 191, 193 (Martin P. Golding & William A. Edmundson eds., 2005).

97. *Id.*; see also WILLIAM A. EDMUNDSON, *AN INTRODUCTION TO RIGHTS* 91 (2004) (“To say that citizens enjoy a right of free speech is to say that they are immune from certain alterations of their legal duties, and this is in turn to say that the legislature is disabled from imposing certain legal duties.”); Waldron, *supra* note 60, at 27 (“To think that a constitutional immunity is called for is to think oneself justified in disabling legislators in this respect (and thus, indirectly, in disabling the citizens whom they represent).”).

98. PETER JONES, *RIGHTS* 24 (1994); see also Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 *IND. L.J.* 669, 694–95 (2013) (“Constitutional disabilities on government action necessarily create correlative constitutional immunities from the consequences of actions that exceed the bounds of the disability.”).

99. Kramer, *supra* note 21, at 417.

100. *Id.*; see also REX MARTIN, *A SYSTEM OF RIGHTS* 31 (1993) (“[T]he most important means of institutionalizing some rights may be to create second-party disabilities . . . rather than duties.”).

101. JONES, *supra* note 98, at 25.

102. 347 U.S. 483 (1954).

103. See Bauries, *Conceptual Convergence*, *supra* note 14, at 326.

perceived to confer more than an immunity against de jure segregation. Courts faithfully interpreted *Brown's* assertion that “the opportunity of an education . . . is a right [that] must be made available to all on equal terms”¹⁰⁴ to signify a fundamental right to education under the Equal Protection Clause.¹⁰⁵ *Rodriguez* explicitly held otherwise; nevertheless, several state courts continued to adhere to *Brown's* reasoning in interpreting their own constitutions, and as Bauries observes, many of these courts essentially took Hohfeldian “disability- and immunity-based approaches when presented with equality-based arguments” in school finance cases.¹⁰⁶

In several of these cases, the immunity held by children regarding the distribution of educational resources derives from recognition that the right to education is fundamental under the state constitution.¹⁰⁷ In two of these states, California and Wyoming, the immunity against disparities in school funding also arises from the classification of wealth as a suspect class for equal protection purposes.¹⁰⁸

To be clear, none of the state courts that construe the right to education as fundamental characterize it explicitly as an immunity. But several of these courts have analyzed “whether legislative action was taken in excess

104. 347 U.S. at 493.

105. See Enrich, *supra* note 13, at 117 n.77 (“Over and over again, the initial education financing cases in the early 1970’s relied on *Brown* for the conclusion that education was a fundamental right, deserving of intensive equal protection scrutiny.” (citing *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 282 (W.D. Tex. 1971), *rev’d*, 411 U.S. 1 (1973); *Serrano v. Priest (Serrano I)*, 487 P.2d 1241, 1258 (Cal. 1971) (en banc); *Milliken v. Green*, 203 N.W.2d 457, 469–70 (Mich. 1972), *vacated*, 212 N.W.2d 711 (Mich. 1973); *Robinson v. Cahill*, 287 A.2d 187, 214 (N.J. Super. Ct. Law Div. 1972))).

106. Bauries, *Conceptual Convergence*, *supra* note 14, at 330.

107. The highest courts of fifteen states have previously recognized the right to education as a fundamental constitutional right in resolving school finance litigation. See *Opinion of the Justices*, 624 So. 2d 107, 159 (Ala. 1993); *Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973) (but see *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 811 (Ariz. 1994) (declining to decide whether education is fundamental right under state’s constitution)); *Serrano I*, 487 P.2d at 1258; *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 201 (Ky. 1989); *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993); *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1358–59 (N.H. 1997); *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997); *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 259 (N.D. 1994); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993); *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 104 (Wash. 1978) (en banc); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979); *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wis. 1989); *Washakie Cty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 332–33 (Wyo. 1980).

In a different context—a due process challenge to student discipline—the Supreme Court of Mississippi recognized a statutorily created fundamental right to a “minimally adequate public education.” See *Clinton Mun. Separate Sch. Dist. v. Byrd*, 477 So. 2d 237, 240 (Miss. 1985). The court has not yet revisited that declaration since the education clause of the Mississippi constitution was amended in 1987 to provide “for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe.” MISS. CONST. art. 8, § 201.

108. See *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 951 (Cal. 1976); *Herschler*, 606 P.2d at 334.

of the limitations placed on it by the state constitutions.”¹⁰⁹ That is, their focus has been on whether the legislature had contravened the constitutionally imposed Hohfeldian disabilities correlative to “immunities against unequal treatment.”¹¹⁰ Courts in seven states recognizing a fundamental right to education have indeed subjected their school financing schemes to equal protection analysis.¹¹¹ Five of those courts applied strict scrutiny, as would be expected for a fundamental right;¹¹² one court diverged on its own, applying an intermediate level of scrutiny;¹¹³ and yet another court required only rational basis review to find its school financing scheme unconstitutional.¹¹⁴

It is worth pausing here to point out that equal protection need not take the exclusive form of an immunity, though that seems to be Bauries’s own view.¹¹⁵ In certain contexts, equal protection reasonably can be regarded in the form of a claim-right correlative to a duty on the state¹¹⁶—an entitlement that cannot be divested, without satisfying judicial scrutiny, because it is embedded with an immunity.¹¹⁷ Moreover, although Bauries

109. Bauries, *Conceptual Convergence*, *supra* note 14, at 332.

110. *Id.*

111. See *Opinion of the Justices*, 624 So. 2d at 159 (but see *Ex parte James*, 836 So. 2d 813 (Ala. 2002) (dismissing school finance litigation as nonjusticiable)); *Serrano II*, 557 P.2d at 951; *Horton*, 376 A.2d at 373; *Bismarck Pub. Sch. Dist. No. 1*, 511 N.W.2d at 257; *McWherter*, 851 S.W.2d at 156; *Pauley*, 255 S.E.2d at 878; *Herschler*, 606 P.2d at 335.

112. See *Opinion of the Justices*, 624 So.2d at 159; *Serrano II*, 557 P.2d at 951; *Horton*, 376 A.2d at 373; *Pauley*, 255 S.E.2d at 878; *Herschler*, 606 P.2d at 335.

113. See *Bismarck Pub. Sch. Dist. No. 1*, 511 N.W.2d at 257.

114. See *McWherter*, 851 S.W.2d at 156.

115. See Bauries, *Conceptual Convergence*, *supra* note 14, at 318 (“[W]here it exists against a legislative body of the state or federal government, what we call a ‘right to equal protection’ is actually an immunity against statutes that create invidious classifications, and where this immunity has been ignored or transgressed for decades, the vestigial harms thereby created sometimes necessitate affirmative remedial actions.”).

116. See O’Rourke, *supra* note 21, at 160 (contending that the language of the Equal Protection Clause “creates a primary rule giving each state a duty not to deny a person ‘the equal protection of the laws,’ which correlates with a claim for ‘any person within its jurisdiction’” (quoting U.S. CONST. amend. XIV, § 1)); see also *Vieth v. Jubelirer*, 541 U.S. 267, 333 (2004) (Stevens, J., dissenting) (“[T]he Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose.”); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 1–4* (1994) (arguing that equal protection imposes affirmative duties of protection); Black, *supra* note 11, at 321–30 (contending that Fourteenth Amendment imposes affirmative duty on Congress to further and act consistently with, not merely enforce, equal protection); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R. L.J. 219, 220 (2009) (defending “duty-to-protect reading” of equal protection); Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 123–24 (1983) (“[T]he [E]qual [P]rotection [C]lause imposes a duty of ‘virtual representation’ upon the legislature, an obligation that it consider the interests of all those whom its actions will affect.”).

117. See Kramer, *supra* note 21, at 416–17; Jeremy Waldron, *Introduction to THEORIES OF RIGHTS 1, 7* (Jeremy Waldron ed., 1984) (“Constitutionally guaranteed privileges and claim-rights often also involve an immunity”); see also Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283, 329 (2002) (analyzing equal protection in the

implies that the right to education has taken the form of an immunity against *unequal* or *inequitable* distributions, a few courts have comprehended an immunity against *inadequate* educational resources as well. Courts in four states that regard the right to education as fundamental have suggested that their legislatures were disabled from enacting a school financing scheme that produced certain educational inadequacies.¹¹⁸

The right to education also need not be exalted to fundamental right status to confer an immunity. The highest courts in five states have effectuated an immunity without declaring the right fundamental or recognizing wealth as a suspect class. Those courts have held instead that the school finance schemes approved by the legislatures directly violated their state constitutions' education clauses.¹¹⁹ Again, these decisions indicate that the right to education can take the form of an immunity against inequitable¹²⁰ or inadequate¹²¹ distributions, or against both

context of desegregation jurisprudence and suggesting that, in Hohfeldian terms, it takes the form of both "an immunity from being forced into segregated schools" and a "duty to assign all children to school on a non-discriminatory basis").

118. See *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 815 (Ariz. 1973) ("[T]he system the legislature chooses to fund the public schools must not itself be the cause of substantial disparities. . . . [I]f reliance on property taxes and school districts] produce a public school system that cannot be said to be general and uniform throughout the state, then the laws chosen by the legislature to implement its constitutional obligation . . . fail in their purpose."); *Skeen v. State*, 505 N.W.2d 299, 315 (Minn. 1993) ("[T]his court will not strike down the legislature's *financing* of such a system unless the resulting disparities dilute the adequacy of the constitutional entitlement to a 'general and uniform system' of education."); *Claremont II*, 703 A.2d 1353, 1360 (N.H. 1997) ("Imposing dissimilar and unreasonable tax burdens on the school districts creates serious impediments to the State's constitutional charge to provide an adequate education for its public school students."); *Kukor v. Grover*, 436 N.W.2d 568, 582 (Wis. 1989) ("While our deference would abruptly cease should the legislature determine that it was 'impracticable' to provide to each student a right to attend a public school at which a basic education could be obtained, or if funds were discriminatorily disbursed and there existed no rational basis for such finance system, we will otherwise defer to the legislature's determination of the degree to which fiscal policy can be applied to achieve uniformity.").

119. See *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 92–95 (Ark. 1983); *Gannon v. State*, 319 P.3d 1196, 1239–47 (Kan. 2014); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 689–91 (Mont. 1989); *DeRolph v. State*, 677 N.E.2d 733, 747 (Ohio 1997); *Brigham v. State*, 692 A.2d 384, 397 (Vt. 1997).

120. See *DuPree*, 651 S.W.2d at 95 (affirming lower court's ruling that financing scheme violated "state constitutional provisions guaranteeing equal protection of the laws [by denying] equal educational opportunity" (quoting *Serrano II*, 557 P.2d 929, 946 (Cal. 1976))); *Helena*, 769 P.2d at 690 (affirming lower court's ruling that "spending disparities among the State's school districts translate into a denial of equality of educational opportunity"); *Brigham*, 692 A.2d at 397 ("[W]e hold that the student and school district plaintiffs are entitled to judgment as a matter of law that the current educational financing system in Vermont violates the right to equal educational opportunities under . . . the Vermont Constitution.").

121. See *DeRolph*, 677 N.E.2d at 741 (agreeing with prior precedent that legislature's discretion was "not without limits" and that a financing scheme would be unconstitutionally inadequate "if a school district was receiving so little local and state revenue that the students were effectively being deprived of educational opportunity" (internal quotation marks omitted)).

inequitable and inadequate distributions.¹²²

Altogether, then, courts in at least sixteen states have at times articulated the right to education in the form of an immunity, though the content and relative strength of that immunity vary. As we shall see, a few of these same courts and several others have espoused the right to education as a claim-right as well—the third path that courts have tread in resolving school finance litigation.

4. A “Claim-Right” Held by Children Correlative with State Duties

The right to education has taken the form of a claim-right held by children. First and foremost, “most state constitutions [furnish] a strong textual basis for an explicit Hohfeldian *duty* to provide for education.”¹²³ For instance, most of the education clause provisions employ “duty-based terms such as ‘shall’ to impose obligations” on the state.¹²⁴ Some express the duty generally to “establish and maintain” public schools, others direct the duty “to hortatory purposes, such as to ‘encourage’ education,” and still others “specify detailed requirements for the provision of educational services.”¹²⁵

Notwithstanding the strong textual support, Bauries concludes that the majority of state courts have not conceptualized “the education clauses in their state constitutions as sources of Hohfeldian claim-rights correlative to legislative duties.”¹²⁶ By his count, courts in six states have construed their states’ constitutions as sources of a Hohfeldian claim-right to education.¹²⁷ According to Bauries, only these six state courts “articulated both the duty and the individual right” and entered or approved entry of a remedial order “*compelling the performance* of the legislative duty on behalf of the plaintiffs.”¹²⁸

The last point is key for Bauries because “claim-rights call for enforcement.”¹²⁹ On his view, to enforce a claim-right correlative to a “positive” duty, like the duty to provide education, a court “must compel

122. See *Gannon*, 319 P.3d at 1233, 1238–47 (remanding to lower court for determination of whether school financing scheme satisfied “adequacy test” but upholding lower court’s decision that scheme failed the “equity test” by creating “unconstitutional, wealth-based disparities”).

123. Bauries, *Conceptual Convergence*, *supra* note 14, at 325.

124. *Id.* at 323.

125. *Id.* at 323, 324.

126. *Id.* at 340.

127. See *id.* at 333–40 (discussing the decisions of state courts in Arkansas, New Jersey, New York, North Carolina, Washington, and Wyoming).

128. *Id.* at 340 (emphasis added).

129. *Id.* at 352.

action (as it does in a specific performance contractual case).”¹³⁰ So even though Bauries notes that eight other state courts have articulated “duty-based conceptions” of the right to education, those courts did not compel their legislatures to undertake specific remediation, citing “separation of powers concerns.”¹³¹ Thus, according to Bauries, the plaintiffs in those cases apparently did not possess a claim-right because they could not “judicially compel the duty’s performance.”¹³²

To be sure, a right must be enforceable to take the form of a genuine claim-right.¹³³ But it does not follow that a right to education exists as a claim-right only if it has been *judicially* enforced by an *injunctive remedy*. Here we must consider the elusive relationship between legal rights and remedies. For Hohfeld, “the question of the existence of a right is distinct from the question of the availability of a remedy for the violation of that right.”¹³⁴ That is, he considered a right logically prior to its remedy, tracking the noted distinction between a “primary right” and a “secondary right” (also referred to simply as the “remedy” or, as used here for consistency, a “remedial right”).¹³⁵

130. *Id.* at 353 (“Ostensibly, if an individual has a claim-right to educational services, then he should be able to compel the provision of such services to him.”); *see also id.* at 317 (“[A] positive right, in Hohfeldian terms, can only take the form of a claim-right to compel the government to act in a certain way toward the holder of the right.”).

131. *Id.* at 343–46 (discussing state court decisions in Kentucky, Ohio, South Carolina, New Hampshire, Vermont, Montana, Idaho, and Arizona).

132. *Id.* at 343.

133. *See* Kramer, *supra* note 22, at 9, 64 (“[Claim-rights] must be enforceable if they are to qualify as genuine claims . . .”). Apart from *legal* rights, philosophers debate whether *moral* rights can exist independent of enforcement mechanisms. *Compare* RAYMOND GEUSS, *HISTORY AND ILLUSION IN POLITICS* 146 (2001) (asserting that rights exist only when they are “backed up by an effective method of implementation”), and Susan James, *Rights as Enforceable Claims*, 103 *PROCEEDINGS ARISTOTELIAN SOC’Y* 133, 136–37 (2003) (agreeing with Geuss and proposing three conditions of enforceability), with Cruft, *supra* note 53, at 393 (contending that a moral right “can exist whether or not institutions exist to enforce it”), and Katherine Eddy, *Against Ideal Rights*, 34 *SOC. THEORY & PRAC.* 463, 466 (2008) (rejecting James’s enforcement view of moral rights).

134. RATNAPALA, *supra* note 60, at 350; *see also* Hanoch Dagan, *Remedies, Rights, and Properties*, 4 *J. TORT L.* 1, 3 (2011) (“Hohfeld claims that rights should be carefully distinguished from, and not only be thought as dependent on, both the character of the proceedings by which [they] may be vindicated and the remedies arising from their violation.” (alteration in original) (internal quotation marks omitted)). This is not to say that Hohfeld was necessarily committed to the proposition that a right can exist without any remedy. In truth, “there is nothing in his writing that commits him either way.” EDMUNDSON, *supra* note 97, at 99; *see also* John Finnis, *Some Professorial Fallacies About Rights*, 4 *ADELAIDE L. REV.* 377, 380 (1972) (“The relevance of ‘legal remedies’ to the defining terms of his schema is left entirely undetermined by Hohfeld.” (emphasis omitted)).

135. *See* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 122–34 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). The primary–secondary rights distinction preceded Hart and Sacks’s exposition. *See, e.g.*, 1 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 44–45 (Robert Campbell ed., 5th ed. 1885); 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 117–21 (1979); JOHN NORTON POMEROY, *REMEDIES AND REMEDIAL RIGHTS* §§ 1–3 (1876). “Hohfeld too emphasized the distinction in his classification” before Hart and Sacks. Shyamkrishna Balganes, *Demystifying the Right to Exclude: Of*

Primary rights are created by voluntary agreement or by operation of law.¹³⁶ For instance, a primary right to education might exist by operation of the education clause in the state constitution, and it would exist independently, meaning its existence would not depend “on the breach of a preexisting right or duty.”¹³⁷ By contrast, remedial rights—including the power to initiate legal proceedings to demand damages or performance—exist solely to provide a legal process and consequence for infringements of the primary right.¹³⁸ Thus, primary rights have been regarded as the “pure values” of the law, whereas “remedial rights are those tangential, practical questions of how to implement those core values.”¹³⁹ Daryl Levinson dubs this approach, to constitutional law in particular, “rights essentialism.”¹⁴⁰

Rights essentialism assumes a process of constitutional adjudication that begins with judicial identification of a pure constitutional value. The pure value is then corrupted by being forced into a remedial apparatus that translates the right into an operational rule applied to the facts of the real world.¹⁴¹

That “rights exist in a separate realm from—and can be defined without reference to—remedies” pervades “the conventional understanding of constitutional law,”¹⁴² counting among its adherents eminent legal

Property, Inviolability, and Automatic Injunctions, 31 HARV. J.L. & PUB. POL’Y 593, 607 (2008) (citing HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 18, at 108–09).

136. Balganes, *supra* note 135, at 605.

137. Shyamkrishna Balganes, “Hot News”: *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 481 (2011) (citing HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 18, at 101–02); *see also* Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 249 (1991) (“Primary law concerns the authoritative directive arrangements—or more simply, the legal rules—that govern persons independently of litigation.” (internal quotation marks omitted)).

138. *See* HART & SACKS, *supra* note 135, at 122. A remedial right can take the form of a “right of action,” which is the “capacity to invoke the judgment of a tribunal of authoritative application upon a disputed question about the application of preexisting arrangements and to secure, if the claim proves to be well-founded, an appropriate official remedy.” *Id.* at 137; *see also* Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 632–33 (Jules Coleman & Scott Shapiro eds., 2002) (suggesting that the remedial right of action takes the form of a Hohfeldian “legal power (albeit conditioned and mediated)” because if the plaintiff is successful, she “will alter the legal relation between herself and the defendant”).

139. Tracy A. Thomas, *Congress’ Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 683 (2001) (citing Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 46, 54–55 (1979); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978)).

140. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

141. *Id.* at 858 (footnote omitted).

142. *Id.* at 858, 914. “Rights occupy an exalted sphere of principle, while remedies are consigned to the banausic sphere of policy, pragmatism, and politics.” *Id.* at 857.

theorists¹⁴³ and Supreme Court Justices.¹⁴⁴ Nevertheless, Levinson rejects rights essentialism in favor of “remedial equilibration,” a view that acknowledges the interdependence of rights and remedies: “Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.”¹⁴⁵ This notion, that rights and remedies are so “inextricably intertwined,”¹⁴⁶ accords with the thinking of early legal realists, law and economics scholars, and leading pragmatists.¹⁴⁷

i. The Claim-Right to Education—Emblematic of Rights Essentialism or Remedial Equilibration?

Levinson proposes three observable means by which remedies alter rights,¹⁴⁸ one of which is most pertinent to school finance litigation—remedial deterrence. Its “defining feature is the threat of undesirable remedial consequences motivating courts to construct the right in such a way as to avoid those consequences.”¹⁴⁹ For example, Levinson suggests that courts constricted the scope of *Brown’s* equal protection right to a prohibition on de jure segregation because a de facto interpretation would

143. See *id.* at 867–72 & nn.49, 58 & 64 (identifying Ronald Dworkin, Richard Fallon, Owen Fiss, Henry Monaghan, Lawrence Sager, Frederick Schauer, and Peter Schuck as rights essentialists). “Scholars who work in this tradition see their mission as elucidating the essential characteristics of legal entitlements, offering typologies of entitlements, and positioning entitlements within the greater framework of legal concepts.” Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1335 (2012).

144. See, e.g., *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 213 (2005) (Ginsburg, J.) (“The substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is.” (quoting D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 1.2, at 3 (1973))); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 65–66 (1992) (“As we have often stated, the question of what remedies are available under a statute that provides a private right of action is ‘analytically distinct’ from the issue of whether such a right exists in the first place.” (quoting *Davis v. Passman*, 442 U.S. 228, 239 (1979))).

145. Levinson, *supra* note 140, at 858.

146. *Id.*

147. See, e.g., K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 94 (1960) (“[A] right is best measured by effects in life. Absence of remedy is absence of right.”); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Guido Calabresi, *Remarks: The Simple Virtues of The Cathedral*, 106 YALE L.J. 2201, 2205 (1997) (“Of course, the so-called remedy defines the nature of the right . . .” (footnote omitted)); Oliver Wendell Holmes, *Supreme Judicial Court of Mass., The Path of the Law* (Jan. 8, 1897), in 110 HARV. L. REV. 991, 992 (1997) (“[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; — and so of a legal right.”); Levinson, *supra* note 140, at 927–31 & n.315 (contending that “remedial equilibration has deep affinities” with the “anti-rights-essentialist thrust” of Richard Posner’s and Cass Sunstein’s scholarship and that David Strauss and Posner can, despite their differences, “comfortably coexist under the big tent of remedial equilibration”).

148. See Levinson, *supra* note 140, at 885–88, 889–911 (defining “remedial deterrence,” “incorporation,” and “substantiation” and providing case illustrations of each form of equilibration at work).

149. *Id.* at 885.

have entailed indefinite federal court supervision of school districts and measures such as busing to achieve and sustain racial balance.¹⁵⁰

Remedial deterrence reinforces Bauries's conclusion that the right to education has not been conceptualized as a claim-right in cases where courts have articulated a claim-right–duty correlation but have nevertheless failed to enter an injunction compelling specific performance. Those courts have been disinclined to enjoin their legislatures to perform—i.e., in most cases, to increase school funding—because such orders might encroach on legislative prerogatives over the state budget and thus potentially violate the separation of powers.¹⁵¹ As a result, Bauries contends that those courts have curtailed the constitutional duty to a simple “duty to legislate” and have paired that duty with legislative Hohfeldian powers to decide how to establish and maintain the education system, “at what level to fund it,” and sometimes even “the discretion to determine what the education clause itself means.”¹⁵² In so doing, Bauries thinks those courts have, despite their rhetoric, altered the form of the right to education from a claim-right to a modest immunity correlative to few legislative disabilities, preventing “only legislative action that is arbitrary” in providing an adequate education.¹⁵³

From the remedial equilibration viewpoint, that analysis may be sound. Yet rights essentialists could perceive those same decisions as illustrating the expected “gaps” between rights and remedies.¹⁵⁴ They could even commend the courts for preserving the constitutional value at stake by articulating the right to education as a claim-right correlative to a legislative duty notwithstanding the reluctance to enforce that primary right through a remedial right of specific performance.

It is unclear whether Bauries fully assents to either perspective. Although he acknowledges the “force” of arguments favoring equilibration, he “adheres to the view that, at some level, rights and remedies can and

150. See *id.* at 884; see also Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 602 (1983) (analyzing school desegregation decisions and asserting that remedial “costs obviously play a role in defining the content of the right itself”).

151. See Bauries, *Conceptual Convergence*, *supra* note 14, at 353–54.

152. *Id.* at 349, 350, 351.

153. *Id.* at 364; see *id.* at 361. Such a description of the legislative disability, according to Bauries, “fits the conception that the overwhelming majority of state courts have actually applied.” *Id.* at 364.

154. See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 87, 91–95 (1999) (“The distance between the ideal and the real means that there will always be some shortfall between the aspirations we call rights and the mechanisms we call remedies.”); see also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1317 (2006) (“[A] gap frequently exists between constitutional meaning and judicially enforced doctrine . . .”).

should be thought of distinctly.”¹⁵⁵ Bauries would not be the first to attempt to straddle both rights essentialism and remedial equilibration.¹⁵⁶ Even Hohfeld, who advanced the right–remedy dichotomy, has been accused of distorting it.¹⁵⁷

To Bauries’s credit, both accounts acknowledge that rights and remedies can be distinguished, at least conceptually. The rights essentialist finds value in legal discourse that venerates that conceptual distinction, even when remedies influence the way rights are adjudicated and enforced;¹⁵⁸ the pragmatist finds value in discourse that is more forthright in expressing “the permeability of the conceptual membrane separating rights from remedies.”¹⁵⁹ Perhaps, as some have suggested, these positions are not that far apart and could be reconciled in some manner.¹⁶⁰ That

155. See Bauries, *Conceptual Convergence*, *supra* note 14, at 318 n.73. For Bauries, the “distinction is that the primary right is present and the remedial right is inchoate and conditional.” *Id.* (noting that “especially in public law litigation[, the remedial right] is subject to significant ad hoc judicial discretion—which includes the discretion not to order a remedy at all”).

156. See Bauries, *Education Duty*, *supra* note 15, at 733 (implying that when the remedial right cannot be perfected the primary right is “devalued at best and eliminated at worst”). *But see id.* at 733 n.147 (suggesting that such a “conclusion is a natural extension of the well-known theory of ‘remedial equilibration’”).

157. See David A. Case, *Article I Courts, Substantive Rights, and Remedies for Government Misconduct*, 26 N. Ill. U. L. Rev. 101, 198 n.502 (2005) (noting that Hart and Sacks claimed that Hohfeld “blurred” the distinction between primary and secondary rights “by essentially arguing that it is obvious that if there is no remedy, there is no right, but conced[ing] that in some circumstances the secondary right may be in addition to an obligation to perform a court-ordered performance of a primary duty”). *But see* GERALD J. POSTEMA, *LEGAL PHILOSOPHY IN THE TWENTIETH CENTURY: THE COMMON LAW WORLD* 102 (2011) (“Hohfeld’s analysis is not committed to the familiar doctrine that there is no right without a remedy, but it can explain the doctrine.”).

158. Cf. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 13 (2004) (suggesting that “judges, scholars, and litigators should make greater efforts to distinguish whether a constitutional rule is an announcement of constitutional meaning (i.e., a constitutional operative proposition) or, instead, is a constitutional decision rule,” which might be supplemented by remedial rules, because it will “improve the project of constitutional adjudication” to make that distinction).

159. Levinson, *supra* note 140, at 939; see Gewirtz, *supra* note 150, at 678–79 (“There is a permeable wall between rights and remedies: The prospect of actualizing rights through a remedy—the recognition that rights are for actual people in an actual world—makes it inevitable that thoughts of remedy will affect thoughts of right, that judges’ minds will shuttle back and forth between right and remedy.”).

160. See Berman, *supra* note 158, at 50–51 (proposing the possibility of drawing “coherent dividing lines within the sprawling sphere of constitutional doctrine . . . in a way that does not depend upon the anti-Pragmatist assumption that a meaningful sort of constitutional interpretation exists which does not involve ‘practical’ or ‘instrumental’ considerations” (footnote omitted)); Fallon, *supra* note 154, at 1314 (disagreeing with remedial equilibration but noting that “many of [his own] claims” about constitutional adjudication and the gaps between constitutional norms and their implementation “would fit comfortably within a pragmatist framework”); Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1013–14 (2010) (attempting to bring the “pragmatist” (remedial equilibration) and “decision rules model[s]” (rights essentialism) together by elucidating the process of “rights translation,” which “prioritizes stability in constitutional meaning and attention to the relationship between constitutional principles and the tests that implement them” but “demands that courts assess the possibility that remedial imperatives require doctrinal refinement”); Kermit Roosevelt III, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193, 194–95 (2005) (agreeing with Levinson that “remedial considerations exert an important influence

project is, of course, well beyond the purview of this Article. Yet we need not resolve the larger debate to find an acceptable path forward.

ii. Nominal Claim-Rights

When the primary right has been deemed judicially unenforceable, and thus the remedial right is unobtainable, the primary right is “inoperative” and “purely nominal.”¹⁶¹ Bauries questions whether, in such circumstances, it makes sense to call a constitutional provision a “right.”¹⁶² That sentiment is shared by supporters of the “will theory” of rights, as explained in the next section.¹⁶³ But, assuming the ontological existence of nominal rights, there is no logical reason that such rights cannot take the form of Hohfeldian claim-rights correlative to nominal duties.¹⁶⁴

“Nominal” might be somewhat of a misnomer because such claim-rights still impose legal norms that can “channel and direct people’s conduct[—e.g., elicit compliance—]in ways that are not attainable by nonexistent legal norms.”¹⁶⁵ People can and do resolve to discharge their nominal duties in recognition of the important interests they serve, perform

over the shape of” decision rules “that courts apply to determine whether rights have been violated” and that such “interrelation of remedies and decision rules is . . . entirely consistent with the decision rules model”).

161. See Matthew H. Kramer, *On the Nature of Legal Rights*, 59 CAMBRIDGE L.J. 473, 482–83 (2000) (explaining that, without a remedy, a “legal duty is purely nominal . . . because no one has any legal power to take or induce” measures to enforce the duty); cf. Levinson, *supra* note 140, at 934 (observing that when the Supreme Court “put an end to effective school desegregation by cutting off remedies . . . the nominal right [to integration remained] intact” (emphasis added)).

162. See Bauries, *Education Duty*, *supra* note 15, at 763.

163. See Kramer, *supra* note 161, at 486 (“[T]he [w]ill [t]heory obliges its proponents to deny the existence of any unenforceable legal rights.”). It is also a sentiment reflected in the jurisprudential tradition that “where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (internal quotation marks omitted); see also Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 & n.6 (2003) (observing that the right to a remedy “expressly or implicitly appears in forty state constitutions”); Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665 (1987). As it has been repeatedly observed, however, “the *Marbury* dictum simply does not describe reality.” Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1586 (2007).

164. See Kramer, *supra* note 22, at 34 (“Though an absence of enforcement deprives [claim-] rights of their genuineness, it has exactly the same effect on the rights’ correlative obligations. Hence, an unenforced statute maintains a strict correlativity of duties and rights; just as genuine duties must correlate with genuine rights, nominal duties must correlate with nominal rights.”); see also HART & SACKS, *supra* note 135, at 137 (“Such a right, in strictness, is a valid claim to the personal benefit of the performance of a legal duty, not deriving from any default (through breach of duty or defective exercise of power) occurring in any precedent legal position. . . . The breach of a primary private duty may or may not give rise, by operation of law, to a remedial private duty.”).

165. Kramer, *supra* note 161, at 493. Such norms establish more than voluntary guidelines because they are presented “as mandates which disallow routes that are incompatible with what the norms require.” *Id.* at 495; see also TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 57–68 (1990) (drawing on sociological research to suggest that individual compliance with criminal norms depends less on the sanctions attached to those norms and more on perceptions of a legal system’s legitimacy).

them “simply out of habit,” or fulfill their duties to avoid “punishment[—] even if this is only social or moral criticism or regret.”¹⁶⁶

Legislators are not impervious to such pressures and “might feel a moral obligation, enforced through politics, to do what the constitution says.”¹⁶⁷ Indeed, just because nominal claim-rights are *judicially* unenforceable “does not mean that they are not enforceable at all. Judicially unenforceable rights can have real world consequences if enforced by the political branches.”¹⁶⁸ After all, “[m]any constitutional provisions[, including many education clauses in state constitutions,] speak in the first instance to officials other than judges.”¹⁶⁹

Short of formal litigation, the holder of a nominal claim-right can also “demand the recognition and performance of the duty in numerous extra-judicial ways: in personal contact, in out of court settlements, in arbitration[,] or before officials other than judges.”¹⁷⁰ Within the confines of a civil or criminal proceeding, the holder might raise a nominal claim-right or duty as a shield in her defense.¹⁷¹ Courts can also justify their refusal to recognize other rights that conflict with nominal claim-rights and duties.¹⁷² And, as Helen Hershkoff has explained, even when the judiciary declines to enforce certain constitutional rights directly, an “indirect

166. MARK R. REIFF, *PUNISHMENT, COMPENSATION, AND LAW: A THEORY OF ENFORCEABILITY* 236–39 (2005) (explaining the previolation value of nominal rights).

167. Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 *TEX. L. REV.* 1895, 1901 (2004) (maintaining that nonjusticiable rights may have political salience in societies with “entrenched democratic cultures—where civil society stands ready to inflict political damage to legislators who depart from the constitution’s requirements—and advanced welfare states”); see also Frank I. Michelman, *What (If Anything) Is Progressive-Liberal Democratic Constitutionalism?*, 4 *WIDENER L. SYMP. J.* 181, 199 (1999) (asserting that in “some political cultures” constitutional rights that “impose on non-judicial political actors” judicially unenforceable rights need not be “an empty gesture,” although acknowledging that American political culture may not be such a culture).

168. Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 *J. MARSHALL L. REV.* 441, 453 (2004).

169. Fallon, *supra* note 154, at 1315; see also EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS*, 92–94 (2013) (observing that education activists and political actors encouraged the drafting of detailed, mandatory education clauses in state constitutions to make it “harder for legislatures to ignore” and to “insulate educational policies from potentially hostile judiciaries”).

170. PAVLOS ELEFTHERIADIS, *LEGAL RIGHTS* 117 (2008); see Philip Harvey, *Aspirational Law*, 52 *BUFF. L. REV.* 701, 714 (2004) (“The most interesting and historically important examples of the vindication of human rights claims have always involved situations in which popular movements used extra-judicial means to enforce what they perceived to be a higher species of law.”).

171. See John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 *CALIF. L. REV.* 1387, 1392 (2007) (“One way or another, persons who are targets of government coercion must be given an opportunity to defend by showing that this action is taken in violation of the Constitution.”); see also Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 *COLUM. L. REV.* 247, 327 (1988) (“Offensive remedies will often be preferable, [however], because the very freedom that defensive remedies give officials in choosing how to respond is not always desirable.”).

172. Tushnet, *supra* note 167, at 1898.

constitutional effect” can be achieved when courts import a nominal right’s implicit norms into common law doctrine.¹⁷³

If a primary right can take the form of a claim-right when there is no remedial right, then it must also be the case that a primary right can take the form of a claim-right when there is a remedial right to some relief other than an injunctive remedy. The type of relief available may well affect the primary right’s content or scope,¹⁷⁴ but it need not change its Hohfeldian *form*.¹⁷⁵ So long as the constitutional provision establishes a claim-right–duty correlation, the right can retain the form of a genuine (as opposed to a nominal) claim-right, provided it is judicially enforceable.¹⁷⁶ “Enforcement,” however, “is not a single event but is a process with stages.”¹⁷⁷

iii. *Enforcement of the Claim-Right to Education*

The early stages of judicial enforcement involve the claim-right holder exercising his power to seek redress in court. The possession of a cognizable cause of action that invokes the coercive power of the state can itself be a substantial means of enforcement.¹⁷⁸ “In some states, the mere

173. Helen Hershkoff, “*Just Words*”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1556–70 (2010).

174. See Bauries, *Common Law Constitutionalism*, *supra* note 15, at 969 (suggesting that Court’s adoption of rational basis review in *Rodriguez* demonstrates “how the *content* of a right becomes bound up with concerns over its remediation” (emphasis added)); Dagan, *supra* note 134, at 6–7 (concluding “that while remedies indeed exist for a purpose that is captured in the language of rights, the scope and content of rights (and thus the availability of various types of remedies) are, or at least can and should be, carefully circumscribed according to their underlying rationales”); Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 416 (2012) (crediting Kermit Roosevelt’s work for explaining that “the decision rules and pragmatist positions share an important characteristic: the available remedy influences the content of the right that courts articulate in a given case”).

175. This view likely comports with the Hohfeldian scheme. See Balganes, *supra* note 135, at 630 n.125 (suggesting that Hohfeld probably did not think of rights as completely independent of remedies; rather his “analysis seems to be restricted to arguing that the *nature* and *character* of the primary right were to be understood independent of the nature and character of the secondary right that comes into play to enforce the former”); see also ELEFThERiADiS, *supra* note 170, at 112–13 (concluding that Hohfeld’s scheme lies “somewhere between the dominant traditions of jurisprudence at the dawn of the twentieth century, pragmatism and idealism”).

176. See ELEFThERiADiS, *supra* note 170, at 117 (explaining that a claim-right “can lead to a number of different remedies: specific performance or claim for damages, or a combination of the two”); cf. Bauries, *Common Law Constitutionalism*, *supra* note 15, at 1005 (suggesting violation of claim-right to education could lead to several types of individualized remedies, including tuition waivers, tutoring, after-school programs, changes in classroom settings, and vouchers).

177. Kramer, *supra* note 22, at 62; see also REiFF, *supra* note 166, at 45–75 (describing three critical stages of enforcement—the previolation stage, the postviolation stage, and the postenforcement stage).

178. See Kramer, *supra* note 22, at 62–63; see also *supra* note 134 and sources cited therein; cf. *Davis v. Passman*, 442 U.S. 228, 240 n.18 (1979) (“A plaintiff may have a cause of action even though he be entitled to no relief at all, as, for example, when a plaintiff sues for declaratory or injunctive relief although his case does not fulfill the ‘preconditions’ for such equitable remedies.”).

filing of a complaint has led to significant [school finance] reforms.”¹⁷⁹ Beyond the initiation of a civil action, the “claim-holder may miss a deadline or go to the wrong court, or provide insufficient evidence and therefore fail to win the remedy.”¹⁸⁰ But we would not say that the rightholder’s failure to secure a remedy in these circumstances means that the right he sought to enforce was not a claim-right.¹⁸¹ Moreover, even when, for instance, plaintiffs in school finance cases have been unsuccessful, the litigation itself has at times placed “the issue of finance reform at the top of the legislative agenda, in some cases prompting significant legislative changes.”¹⁸²

In later stages of judicial enforcement, courts have used “a variety of techniques to enforce state constitutional socio-economic rights,” like the right to education.¹⁸³ Many have coupled “declaratory relief with on[going] supervisory jurisdiction” in order “to ‘cue’ the political branches as to their constitutional duties and then allow those actors time and a zone of permissible discretion within which to meet their constitutional responsibilities.”¹⁸⁴ Several legal scholars favor such enforcement to the extent it facilitates an ongoing dialogue between the judiciary and legislature¹⁸⁵—sometimes referred to as the “experimentalist approach” to underscore that the resultant remedies are “provisional and subject to continuous revision.”¹⁸⁶

Declaratory relief and supervisory jurisdiction, so-called “weak remedies,”¹⁸⁷ cannot be categorically rejected as insufficient to enforce claim-rights. Experience shows that parties routinely obey declaratory

179. Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1527 (2007).

180. ELEFThERiADiS, *supra* note 170, at 118.

181. *See id.* at 118 (“Claims are therefore both distinct from and prior to remedies. Remedies are only one stage in the fate of the duty.”).

182. Rebell, *supra* note 179, at 1528.

183. *See* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 963, 941–62 (2011).

184. *Id.* at 945.

185. George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 546 (1994); Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1096–98 (1993); Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351, 397–402 (2008); Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL’Y 569, 593–94, 598–600 (2004); Rebell, *supra* note 179, at 1539–42; Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1365–76 (1991).

186. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1019 (2004); *see id.* at 1082–1110 (“The key characteristics of this revised conception of professional decisionmaking are collaborative dialogue, provisionality, and transparency . . .”).

187. *See* Tushnet, *supra* note 167, at 1910–11.

judgments,¹⁸⁸ leading some to observe that declaratory and injunctive remedies “are rough substitutes” because there are few differences between them when prospective relief is sought.¹⁸⁹ The two significant differences concern judicial management and timing.¹⁹⁰ “If the court foresees a need for heightened management of the parties, it should grant an injunction.”¹⁹¹ Otherwise, “the declaratory judgment is preferable,” particularly where it is needed “at an earlier stage than the injunction” to “resolve legal uncertainty in crossroads dilemmas.”¹⁹²

Those crossroads have been reached numerous times in school finance cases “of first impression in which a state’s high court is interpreting vague and century-old state constitutional language.”¹⁹³ It cannot be said that the courts’ declaratory judgments defining the right to education as a claim-right in these cases failed to enforce it as such. By giving content to the states’ duty, declaratory judgments in these contexts impose legal norms more forcefully and directly than nominal claim-rights.¹⁹⁴ And particularly when the declaration is accompanied by a judicial finding that the state has breached its duty, the judgment can be quite coercive despite the absence of an immediate sanction for noncompliance. Indeed, in the eight states Bauries cites as failing to conceptualize a claim-right to education because the courts did not grant injunctions, the legislatures were nevertheless spurred by the declaratory judgments to increase school funding.¹⁹⁵ One of

188. See Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1110–13 (2014) (“Over the past eighty years, the federal courts have issued thousands of declaratory judgments, but the statutory authorization of further relief has been considered in published district court opinions in only about seventy-five cases—less than one per year. And . . . the form of ‘further relief’ that plaintiffs request from district courts more than any other is attorneys’ fees.” (footnote omitted)).

189. *Id.* at 1143; see also DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 497 (2d ed. 1994) (“In practice, declaratory judgments that statutes are unconstitutional appear to have been as effective as injunctions against enforcement.”); MICHAEL L. WELLS & THOMAS A. EATON, *CONSTITUTIONAL REMEDIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 185–86 (2002) (“There is, in fact, little practical difference today between the two remedies, except that an injunction can be immediately enforced while a declaratory judgment cannot be.”).

190. See Bray, *supra* note 188, at 1124–43.

191. *Id.* at 1144.

192. *Id.* at 1143–44.

193. William S. Koski, *The Politics of Judicial Decision-Making in Education Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1226 (2004).

194. Bauries, *Common Law Constitutionalism*, *supra* note 15, at 986 (suggesting that declaratory judgments in school finance cases often “read like legislation”).

195. See Mary J. Amos, *DeRolph v. State: Who Really Won Ohio’s School Funding Battle?*, 30 CAP. U. L. REV. 153, 162–63 (2002); 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, 674 (2001) (evaluating legislative responses in New Hampshire and Vermont); Molly A. Hunter, *Building on Judicial Intervention: The Redesign of School Facilities Funding in Arizona*, 34 J.L. & EDUC. 173, 188–89 (2005); Robert C. Huntley, *Public Education School Funding Litigation in Idaho: A Tale of Legislative Irresponsibility and Delay*, 41 IDAHO L. REV. 247, 259 (2005); Erin E. Lawson, *Fulfilling the Promise of Education to South Carolina’s At-Risk Children: A New Preschool Initiative*

those states, Kentucky, passed what was described as “the most sweeping education package ever conceived by a state Legislature” less than a year after its high court declared the state in violation of the right to education.¹⁹⁶

Even so, the existence of a genuine claim-right should not hinge on whether, and to what degree, the legislature acted in response to the court’s judgment, be it declaratory or injunctive. Legislatures have resisted full compliance with both remedies.¹⁹⁷ In theory, courts possess inherent powers to issue contempt citations for such disobedience.¹⁹⁸ And the Supreme Court of Washington has exercised that power, holding the state in contempt and eventually imposing a \$100,000-a-day fine when the legislature failed to fulfill the constitutional mandate.¹⁹⁹ Other courts have reserved the option of closing public schools entirely until the legislature complied.²⁰⁰ But as one state supreme court justice somberly observed in contemplating whether legislators could be held in contempt of the court’s school funding decisions, enforcement of a contempt order also “poses

in South Carolina, 58 S.C. L. REV. 1025, 1027 (2007); Hillary A. Wandler, Comment, *Will Montana Breathe Life into Its Positive Constitutional Right to Equal Educational Opportunity?*, 65 MONT. L. REV. 343, 364 (2004). This is not to say, of course, that the increases in school funding were sufficient to satisfy the states’ constitutional duties.

196. See Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 499 (1999) (quoting Edward B. Fiske, *The Spring Report; Starting Over*, N.Y. TIMES, Apr. 8, 1990, at 34). “The Kentucky decision has been cited or relied on in nearly every state education clause case since.” Bauries, *Common Law Constitutionalism*, *supra* note 15, at 984.

197. See Black, *supra* note 2, at 1388 & n.223 (observing that legislative responses to school finance decisions are plagued by “unaccountability and unreliability”). See generally Joy Chia & Sarah A. Seo, *Battle of the Branches: The Separation of Powers Doctrine in State Education Funding Suits*, 41 COLUM. J.L. & SOC. PROBS. 125 (2007).

198. See *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987) (“The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.”); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 766–67 (2001).

199. See *McCleary v. State*, No. 84362–7 (Wash. Sept. 11, 2014) (order of contempt), [http://www.courts.wa.gov/content/PublicUpload/Supreme Court News/84362-7_order - 9-11-2014.pdf](http://www.courts.wa.gov/content/PublicUpload/Supreme%20Court%20News/84362-7_order_-_9-11-2014.pdf); *McCleary v. State*, No. 84362–7 (Wash. Aug. 13, 2015) (order imposing fine), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/843627_081315McCleary_order.pdf.

200. See *Hull v. Albrecht*, 960 P.2d 634, 640 (Ariz. 1998) (staying injunction that would have prevented state from distributing funds to the public school system to afford legislature time to comply with decision); *Robinson v. Cahill*, 358 A.2d 457, 459 (N.J. 1976) (staying injunction that would have enjoined public officials “from expending any funds for the support of any free public school”); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II)*, 804 S.W.2d 491, 499 (Tex. 1991) (staying injunction to shut down the public school system to permit legislature to pass constitutional legislation); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 399 (Tex. 1989); *Montoy v. State*, 138 P.3d 755, 759 (Kan. 2006) (noting that court issued order to show cause directing the state to explain why the court “should not enter an ORDER enjoining the expenditure and distribution of any funds for the operation of Kansas schools pending the Legislature’s compliance” with its constitutional obligations).

concerns” because a court “has no concrete powers like the sword (executive) or the purse (legislative) with which to carry its judgments into effect.”²⁰¹ A contempt order might also run afoul of legislative immunity and separation of powers principles.²⁰²

Bauries thinks that the potential for such inter-branch conflicts, which he predicts “the legislature would likely win,” means that “Hohfeldian claim-rights to educational resources and services are *unworkable*, at least where such claim-rights run against the state legislature to compel adequate funding or resources.”²⁰³ But such inter-branch tension inheres in the adjudication of nearly every constitutional right; it is not unique to the enforcement of the right to education.²⁰⁴ In fact, “federal courts, particularly the Supreme Court, have tended to be reluctant not just to accord broad structural remedies, but to accord *any* remedies at all in many instances, even when federal constitutional and statutory rights have been violated.”²⁰⁵ If constitutional rights have to be fully effectuated by all three branches of government before they can take the form of a claim-right, then there would be virtually no constitutional claim-rights.

At bottom, we have reasons to doubt Bauries’s assertion that the right to education takes the form of a claim-right in only six states where the courts have both articulated it as such and ordered specific performance. We can more readily accept his initial observation that the right to education takes the form of a claim-right in nearly every state constitution.²⁰⁶ Unlike Bauries, I believe that includes the thirteen states where the claim-right is nominal either because the highest court has

201. See *DeRolph v. State*, 93 Ohio St. 3d 309, 338, 2001-Ohio-1343, 754 N.E.2d 1184, 1211 (Douglas, J., concurring) (citing Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 219 (1994)), *vacated*, 97 Ohio St. 3d 434, 2002-Ohio-6750, 780 N.E.2d 529. As Bauries suggests, this perhaps “explains why no state court has gone so far as to issue an injunctive order in a school finance suit and to follow through by using its traditional contempt power when the order has been flouted by the state legislature.” Bauries, *Conceptual Convergence*, *supra* note 14, at 354–55.

202. See Richard E. Levy, *Gunfight at the K–12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021, 1082–83 (2006); see also Erwin Chemerinsky, *The Essential but Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 314 (2008).

203. See Bauries, *Conceptual Convergence*, *supra* note 14, at 355 (emphasis added).

204. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 398–99 (2007) (explaining that courts “limit[] majoritarian decisionmaking . . . whenever they vindicate any constitutional right”).

205. Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 525 (2004); see Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 738 (1992) (contending that “there is tremendous flexibility in the fit between right and remedy” in the federal court system, “in which failure to comply with, if not outright defiance of, judicial remedial orders is tolerated to a certain degree”); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2113 (2005) (“Constitutional rights are systematically ‘underenforced’ by the judiciary, and for excellent institutional reasons.” (citing Sager, *supra* note 139)).

206. See Bauries, *Conceptual Convergence*, *supra* note 14, at 325.

deemed it nonjusticiable²⁰⁷ or because the court has yet to interpret the right in a school funding case, though the text of the state constitution evinces a Hohfeldian claim-right–duty correlation.²⁰⁸ With the possible exception of Iowa and Indiana,²⁰⁹ the highest courts in the remaining thirty-five states have all construed the right to education in the form of a genuine (i.e., judicially enforceable) claim-right, including the six identified by Bauries that articulated a claim-right and ordered specific performance;²¹⁰ the eight discounted by Bauries that articulated a claim-right but did not order specific performance;²¹¹ and the twenty-one whose high courts have articulated a claim-right notwithstanding the outcome of the litigation or whether the state fully complied with its constitutional duty thereafter.²¹²

207. Courts in seven states have declined to entertain the merits of school finance litigation, reasoning that their state constitution education clauses vest discretion in the legislature. *See Ex parte James*, 836 So. 2d 813, 819 (Ala. 2002); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 406–08 (Fla. 1996); *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, 176 (Neb. 2007); *Okla. Educ. Ass'n v. State*, 2007 OK 30, ¶ 25, 158 P.3d 1058, 1066; *Marrero v. Commonwealth*, 739 A.2d 110, 111–12 (Pa. 1999); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 42–43 (R.I. 1995).

208. As of this writing, the highest courts of six states—Delaware, Hawaii, Iowa, Mississippi, Nevada, and Utah—have yet to decide a school finance case, and no case appears to be immediately forthcoming. *See* NAT'L EDUC. ACCESS NETWORK, <http://schoolfunding.info> (last visited Mar. 1, 2016). *But see* *Guinn v. Legislature of Nev.*, 71 P.3d 1269, 1272 (Nev. 2003) (holding that issuance of writ of mandamus was warranted directing legislature to proceed with special session to approve balanced budget because, *inter alia*, legislature had failed to fulfill its constitutional mandate to fund education), *overruled in part by* *Nevadans for Nev. v. Beers*, 142 P.3d 339, 348 (Nev. 2006). Plaintiffs are pressing challenges in New Mexico. *See* *Complaint for Declaratory and Injunctive Relief, Martinez v. State*, No. D-101-CV-2014-00793 (N.M. 1st Jud. Dist. Ct. Apr. 1, 2014), http://www.maldef.org/assets/pdf/MartinezvNewMexico_Complaint04114.pdf; *Second Amended Complaint for Declaratory Judgment and Injunctive Relief to Bring New Mexico's Public Schools into Compliance with the Educational Mandate of the New Mexico State Constitution, Yazzie v. State*, D-101-CV-2014-02224 (N.M. 1st Jud. Dist. Ct. July 14, 2015), <http://nmpovertylaw.org/wp-content/uploads/2015/08/Complaint-Yazzie-Second-Amended-Complaint-2015-07-14.pdf>.

209. *See* *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 518, 520, 522 (Ind. 2009) (acknowledging the General Assembly's "duty to provide for a general and uniform system of open common schools without tuition" but concluding "that the Education Clause of the Indiana Constitution does not impose upon government an affirmative duty to achieve any particular standard of resulting educational quality" and thus "[t]o the extent that an individual student may have a right, entitlement, or privilege to pursue public education, any such right derives from the enactments of the General Assembly, not from the Indiana Constitution"); *King v. State*, 818 N.W.2d 1, 21, 33 (Iowa 2012) (declining to decide "whether plaintiffs' claims under the education clause present a nonjusticiable political question" but observing that Iowa Constitution "does not mandate that the legislature provide either 'free public schools' or an 'efficient system of common schools'").

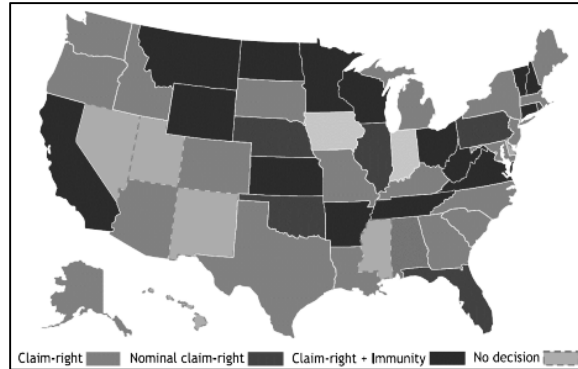
210. *See* Bauries, *Conceptual Convergence*, *supra* note 14, at 333–40 (discussing the decisions of state courts in Arkansas, New Jersey, New York, North Carolina, Washington, and Wyoming).

211. *See id.* at 343–46 (discussing state court decisions in Kentucky, Ohio, South Carolina, New Hampshire, Vermont, Montana, Idaho, and Arizona).

212. *See* *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 402 (Alaska 1997); *Wells v. One2One Learning Found.*, 141 P.3d 225, 239 (Cal. 2006); *Lobato ex rel. Lobato v. State*, 218 P.3d 358, 372 (Colo. 2009); *Sheff v. O'Neill*, 678 A.2d 1267, 1276 (Conn. 1996); *McDaniel v. Thomas*, 285 S.E.2d 156, 164 (Ga. 1981); *Gannon v. State*, 319 P.3d 1196, 1213 (Kan. 2014); *La. Ass'n of Educators*, 521 So. 2d at 394; *Sch. Admin. Dist. No. 1 v. Comm'r, Dep't of Educ.*, 659 A.2d 854, 857 (Me. 1995); *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 776 (Md. 1983); *McDuffy v. Sec'y*

Note the overlap with the state courts that have construed the right to education in the form of an immunity as well.²¹³ As discussed in the next section, rights can take the form of a combination of two or more Hohfeldian incidents, depending on their function.

Figure A. Immunity-Claim-Right Forms Among the States.



B. *The Right to Education's Functions*

All rights take the form of Hohfeldian incidents (power, privilege, immunity, claim-right), but not all Hohfeldian incidents are rights.²¹⁴ For instance, we may have a “privilege not to assault others on the street[, b]ut we would balk at saying that each of us has a legal right not to assault others on the street.”²¹⁵ A Hohfeldian incident qualifies as a right, then, if it serves a function that “captures our ordinary understanding of what rights there are and what significance rights have for rightholders.”²¹⁶

of the Exec. Office of Educ., 615 N.E.2d 516, 524 (Mass. 1993); *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993); *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 489 (Mo. 2009); *Bismarck Pub. Sch. Dist. No. 1 v. State ex rel. N.D. Legislative Assembly*, 511 N.W.2d 247, 259 (N.D. 1994); *Pendleton Sch. Dist. 16R v. State*, 200 P.3d 133, 139–40 (Or. 2009); *Davis v. State*, 2011 S.D. 51, ¶ 2, 804 N.W.2d 618, 623; *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 734 (Tenn. 1995); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989); *Scott v. Commonwealth*, 443 S.E.2d 138, 141–42 (Va. 1994); *Pauley v. Kelly*, 255 S.E.2d 859, 884 (W. Va. 1979); *Vincent v. Voight*, 2000 WI 93, ¶ 38, 236 Wis. 2d 588, 618, 614 N.W.2d 388, 404; *Milliken v. Green*, 203 N.W.2d 457, 462 (Mich. 1972), *vacated on other grounds*, 212 N.W.2d 711 (Mich. 1973). *But see* *LM v. State*, 862 N.W.2d 246, 252 (Mich. App 2014) (suggesting state constitution “merely ‘encourage[s]’ education, but does not mandate it” and directs responsibility for providing education to local school districts) *appeal denied sub nom.* *SS v. State, State Bd. of Educ., Dep’t of Educ.*, 869 N.W.2d 273 (Mich. 2015).

213. *See supra* notes 111, 115–119 and accompanying text.

214. *See Wenar, supra* note 29, at 245.

215. *Id.* at 246.

216. *See id.* at 238.

For centuries, the two main function theories have been will (or choice) theory and interest (or benefit) theory.²¹⁷ Will theory asserts that the function of rights is to protect the autonomy of the rightholder by giving her control over another person's duty.²¹⁸ Interest theory maintains that the function of rights is to advance some of the rightholder's interests, generally conceived as well-being.²¹⁹ The right to education illustrates why neither theory has predominated.

Will theory cannot account for inalienable rights, like the right to education.²²⁰ In keeping with the theory, A does not have control over B's duty unless A possesses *inter alia* the power to waive B's duty.²²¹ Children cannot waive the state's duty to provide them an education.²²² Hence, according to will theory, there is no such thing as an inalienable right to education—or any inalienable right (to life or liberty) for that matter.²²³ Moreover, even if the right to education were alienable, it could not be held by children because will theory insists that only competent adults, capable of exercising a full range of autonomous choices, possess rights.²²⁴ This view simply does not fit with our ordinary understanding of children as rightholders.²²⁵

Interest theory more plausibly explains the right to education's function because "it can recognize as rights unwaivable claims" and "has no trouble

217. See *id.* at 223 & n.1 (citing A DEBATE OVER RIGHTS, *supra* note 22). The debate between proponents of these two theories "stretches back through Bentham (an interest theorist) and Kant (a will theorist) into the Dark Ages." *Id.* at 238. Although this scholarly contest has been pursued with renewed fervor in recent decades, it has effectively ended in a stalemate. *Id.* at 223 (citing L. W. SUMNER, THE MORAL FOUNDATION OF RIGHTS 51 (1987) (describing debate as "standoff")).

218. See Harel, *supra* note 96, at 194.

219. See *id.* at 195–96.

220. See NEIL MACCORMICK, *Children's Rights: A Test-Case for Theories of Right*, in LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND POLITICAL PHILOSOPHY 154, 154–58 (1982); Kramer, *supra* note 21, at 69–70.

221. See H. L. A. HART, ESSAYS ON BENTHAM 183–84 (1982). In addition to the power to waive, the rightholder must also possess the power to enforce the duty and the power to waive the obligation to pay compensation for violation of the duty. *Id.*

222. See Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 155 (2008) ("[S]tate constitutional education obligations, like other constitutional obligations with broad social purposes, are appropriately nonwaivable."); see also Howard Klepper, *Mandatory Rights and Compulsory Education*, 15 LAW & PHIL. 149 (1996). To be sure, parents or guardians can "waive" the state's duty to provide a publicly funded education to their children, but the duty itself is not relinquished; it is merely assumed by the parent or guardian to pay for private education or homeschool the child. Therefore, the right to education remains inalienable. Cf. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1852–53 (1987) (explaining that the different "meanings of inalienability share a common core: the notion of . . . an entitlement, right, or attribute . . . that cannot be lost or extinguished").

223. See Harel, *supra* note 96, at 195–96.

224. See *id.*; Dailey, *supra* note 69, at 2100 n.3 (citing authors who have discussed the application of will theory to the exclusion of children).

225. Some have contended that will theory's failure to conceive of children as rightholders completely undercuts the theory. See, e.g., Kramer, *supra* note 21, at 69–70; MACCORMICK, *supra* note 220, at 154.

viewing children . . . as rightholders, since children [also] have interests that rights can protect.”²²⁶ Yet interest theory fails for another reason: namely, that rights often advance the interests of others besides the rightholder, raising doubts that the rightholder’s interests are sufficient to justify the right.²²⁷ “The right to free speech,” for instance, “is often ascribed to the speaker, or the potential speaker, but the justifications for protecting it are often grounded in the interests of other persons, or even the interests of the society as a whole.”²²⁸

Such is the case with the right to education: the interests of children advanced by providing them an education have not been sufficient to ground the right.²²⁹ Rather, the right to education is often justified as necessary to preserve other rights of citizens and a republican form of government as well as to sustain a market economy.²³⁰ Even when courts have seemingly invoked the intrinsic value of education in progressing a

226. Wenar, *supra* note 29, at 241.

227. See Harel, *supra* note 96, at 194.

228. *Id.* at 196.

On Raz’s variant of the interest theory the existence of a right turns not on the purpose of the right’s ascription, but on the sufficiency of the rightholder’s interests in justifying the right’s normative impact Yet this attempt to add the interests of the public to the interest of the [rightholder] merely highlights the fact that the [rightholder’s] interest is in itself insufficient to ground this right.

Wenar, *supra* note 29, at 242 (footnote omitted); see also Gopal Sreenivasan, *A Hybrid Theory of Claim-Rights*, 25 OXFORD J. LEGAL STUD. 257, 266 (2005) (objecting to Raz’s version of interest theory because “it instrumentalizes the individual’s status as right-holder . . . [and thus] fails to take the status of right-holder seriously enough” (footnote omitted)).

229. See Yuracko, *supra* note 222, at 154 (“[S]tate constitutional education obligations serve social goals and purposes that go well beyond the interests of any individual child.”).

230. See *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship”); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.”); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship.”); Yuracko, *supra* note 222, at 155 (“Courts interpreting these state constitution clauses have similarly emphasized the democracy- and citizenship-promoting purposes of the clauses as well as their importance for economic prosperity.”); Weishart, *supra* note 30, at 520 & n.237 (citing “courts favoring adequacy [that] have stressed the importance of preparing students to be competitive in higher education and/or in the job market”); Eli Savit, Note, *Can Courts Repair the Crumbling Foundation of Good Citizenship? An Examination of Potential Legal Challenges to Social Studies Cutbacks in Public Schools*, 107 MICH. L. REV. 1269, 1293–94 (2009) (“The education provisions in Indiana and New Hampshire celebrate ‘knowledge and learning’ as ‘essential to the preservation of a free government,’ while Idaho, Minnesota, and South Dakota’s provisions declare that the ‘stability of a republican form of government’ depends mainly on the ‘intelligence of the people.’ Six other states’ education provisions draw on John Adams’s language in the Massachusetts Constitution of 1780, and assert that the general diffusion of knowledge among the people is essential to ‘the preservation of [their] rights and liberties.’ Three more state provisions see an educated populace as ‘necessary to good government.’ And North Dakota’s education provision makes the nexus between democracy and education explicit” (alteration in original) (footnotes omitted)).

child's personal development, self-knowledge, and capacity to flourish,²³¹ they have suggested that these ends ultimately serve the common good.²³² If children's interests are insufficient to justify the right to education, then the interest theory also fails to fit with our ordinary understanding of the right's function.

Leif Wenar contends that will and interest theories err in conceiving of rights as serving only a single function, autonomy or well-being.²³³ Moreover, will and interest theories unacceptably limit the Hohfeldian incidents that qualify as rights. Will theorists typically identify a right as composed of a claim-right coupled with a power to decide whether to waive or enforce the claim-right.²³⁴ Although interest theory potentially could include the other Hohfeldian incidents (privilege and immunity), its two leading theorists have defended it based on the notion that only claim-rights qualify as rights.²³⁵ Adhering to the view that rights should be thought of "in the strictest sense" as claim-rights (or, at most, claims-rights and powers) does not fit our ordinary understanding of rights taking the form of important immunities (e.g., equal protection) and privileges (e.g., freedom to marry).²³⁶

Accordingly, Wenar proposes the "several functions theory," which "holds that any [Hohfeldian] incident or combination of incidents is a right, but only if it performs one or more of [these] six functions"—exemption,

231. See Regina R. Umpstead, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 BYU EDUC. & L.J. 281, 307 & nn.161–74 (citing, *inter alia*, *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989); *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); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979)).

232. See *Rose*, 790 S.W.2d at 211 ("Any system of common schools must be created and maintained with the premise that education is absolutely vital to the present and to the future of our Commonwealth."); *McDuffy*, 615 N.E.2d at 524 ("The immediate purpose of the establishment of the duty is the spreading of the opportunities and advantages of education throughout the people; the ultimate end is the preservation of rights and liberties. Put otherwise, an educated people is viewed as essential to the preservation of the entire constitutional plan: a free, sovereign, constitutional democratic State."); *Claremont II*, 703 A.2d at 1359 ("These guidelines accord with our Constitution's emphasis on educating our children to become free citizens on whom the [State] may rely to meet its needs and to further its interests." (alteration in original) (quoting *McDuffy*, 615 N.E.2d at 555)); *Seattle Sch. Dist. No. 1*, 585 P.2d at 94 ("Education plays a critical role in a free society. It must prepare our children to participate intelligently and effectively in our open political system to ensure that system's survival."); *Pauley*, 255 S.E.2d at 884 ("But the feature of the instrument that demonstrates most clearly the spirit of enlightened patriotism and enlarged sense of genuine interest in the cause of humanity, was the liberal provision for the establishment of a system of free schools." (quoting 1 W. Va. Preface)).

233. Wenar, *supra* note 29, at 224.

234. See Cruft, *supra* note 53, at 367.

235. See *id.* at 370, 377.

236. See Wenar, *supra* note 29, at 243 & n.36 (internal quotation marks omitted) ("It is only philosophers of law who speak a 'strict' dialect of rights . . . [And the only reason they do so] is to rescue one of the single-function theories from counterexamples." (citation omitted)).

discretion, authorization, protection, provision, and performance.²³⁷ The several functions theory accounts for the right to education better than will and interest theories.

1. *For Children, no “Authorization,” “Exemption,” or “Discretion”*

Hohfeldian powers and privileges are “active” in the sense that they must be exercised by the rightholder and concern the rightholder’s own actions (signaled by statements like “A has a right to phi”).²³⁸ Rights taking the form of powers impart *authorization* “to alter the normative situation of oneself or another” by creating, waiving, or annulling one’s own or another’s claim-rights and privileges.²³⁹ In that sense, a “single power” is nondiscretionary (e.g., A has right to annul B’s privilege) while a “paired power” is discretionary (e.g., A has right to create or annul B’s privilege).²⁴⁰

When a right takes the form of a privilege, it confers the rightholder with one of two functions. In the case of a “single privilege,” the function is an “*exemption* from a general duty” (e.g., A owes B “no duty not[] to” speak).²⁴¹ In the case of a “paired privilege,” like the paired power, the function is “*discretion*, or choice, concerning some action” (e.g., A owes B “no duty []not[] to” speak *and* A owes B “no duty . . . to” speak).²⁴²

None of the above functions properly describe children’s right to education. Children lack authorization to alter their own or anyone else’s claim-rights and privileges vis-à-vis public education, and they are not exempt from the general duty to receive an education. Although parents and guardians are afforded some discretion regarding the choice of public or private education (assuming these options exist and are financially available), that limited discretion also fails to fully capture the function of the right to education that runs to children.

2. *For Children, a Right of “Performance” and “Provision”*

Hohfeldian claim-rights and immunities are “passive” in the sense that they concern the actions of others and are enjoyed rather than exercised by the rightholder (signaled by statements like “A has a right that B phi”).²⁴³

237. *Id.* at 246.

238. *See id.* at 233 (emphasis omitted) (internal quotation marks omitted). Here, “‘phi’ is an active verb.” *Id.* at 225.

239. *Id.* at 231.

240. *See id.*

241. *Id.* at 226.

242. *Id.* at 226–27.

243. *Id.* at 233 (emphasis omitted) (internal quotation marks omitted).

Rights taking the form of claim-rights denote functions of “*protection* against harm or paternalism,” “*provision* in case of need,” and “*specific performance* of some agreed-upon, compensatory, or legally or conventionally specified action.”²⁴⁴ Immunities serve the same protection function as claim-rights.²⁴⁵

That the right to education necessitates performance and provision is generally uncontested. “In the legislative context,” Bauries suggests that the conduct that must be performed pursuant to the state’s duty “is the act of legislating” or “making policy” under the state education clause.²⁴⁶ No doubt perceived legislative inaction has incited school finance lawsuits and prompted courts to intervene in response to either the initial challenge or subsequent challenges after the state failed to comply with the court’s directives.²⁴⁷ But, as Bauries keenly observes, school finance challenges “do not really go to legislative inaction” because, in fact, “legislatures have acted”—they “have simply acted in ways that the plaintiffs claim [are inadequate or] exceed the legislative discretion expressed or implied in the education clause.”²⁴⁸

Similarly, “every state constitution contains an education clause mandating the *provision* of a free, public education,”²⁴⁹ and all states have fulfilled that function by providing a free, public education system. So, “in no case is any legislature accused of failing to provide for an education system. Rather, each case presents a challenge to the legislature’s decision as to how much funding to provide and how to allocate it.”²⁵⁰ That challenge turns on the degree to which the right to education serves the protection function.

244. *Id.* at 229.

245. *See id.* at 232.

246. Bauries, *Conceptual Convergence*, *supra* note 14, at 311. Presumably, in the executive context, the conduct would be administering education policy (e.g., establishing a curriculum, resourcing schools, teaching).

247. *See* Jonathan Banks, Note, *State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?*, 45 VAND. L. REV. 129, 154–55 (1992) (concluding that “frustration with continual legislative inaction is implicit in virtually every [school finance] case” and that “[o]nly when courts conclude that their legislature is unwilling or unable to pass effective remedial legislation will they intervene”); *see also* Sonja Ralston Elder, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 758 (2007) (examining “three alternative court reactions to legislative inaction through the school financing experiences in Ohio and New Jersey, in New York and North Carolina, and in Nevada”).

248. Bauries, *Conceptual Convergence*, *supra* note 14, at 351.

249. 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, 466 (2004) (emphasis added). *But see* Umpstead, *supra* note 231, at 289 n.20 (contending that “Iowa’s constitution is the only state constitution to make no provisions for educational responsibilities”); *cf.* *King v. State*, 818 N.W.2d 1, 14 (Iowa 2012) (observing that prior court precedent found that “no aspect of the Iowa Constitution, including the education clause, authorized the legislature to provide for public schools (as opposed to merely funding them)”).

250. Bauries, *Conceptual Convergence*, *supra* note 14, at 351.

Table B. Wenar's Several Function Theory.

Active		Passive	
Power	Authorization to alter the normative situation of oneself or another	Immunity	Protection against harm
Privilege	Exemption from a general duty Discretion concerning some action	Claim-Right	Protection against harm Provision in case of need Performance of some agreed-upon compensatory or specified action

3. For Children, a Right of "Protection"

Despite the passage of more than forty years, there is still no definitive answer to the question left undecided by *Rodriguez*: is there a federal constitutional right to "some identifiable quantum of education"?²⁵¹ *Rodriguez*'s successors—*Plyler*, *Papasan*, and *Kadrmas*—failed to settle the matter,²⁵² as scholars as noted.²⁵³ Nevertheless, there should be no doubt that, if there is a federal constitutional right to education, its principal function is to protect children and, thereby, society at large.

The need to protect African-American children from the stigmatic harms of discrimination precipitated the Court's declaration in *Brown* that the right to education "must be made available to all on equal terms" and its holding that state-imposed, racially segregated schooling is "inherently unequal."²⁵⁴ The Court's allusion to a right to education in *Rodriguez* came by way of a response to the argument that "an opportunity to acquire []

251. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973).

252. *Plyler v. Doe*, 457 U.S. 202, 221, 224 (1982) (reiterating that "education is not a 'right' granted to individuals by the Constitution" but applying heightened scrutiny to invalidate statute denying public education to undocumented children as violative of the Equal Protection Clause); *Papasan v. Allain*, 478 U.S. 265, 285 (1986) ("As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."). *But see Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) ("Nor have we accepted the proposition that education is a 'fundamental right,' like equality of the franchise, which should trigger strict scrutiny when government interferes with an individual's access to it.").

253. *See, e.g.*, Bitensky, *supra* note 6, at 567–73; Boyce, *supra* note 5, at 1050–51; Greenspahn, *supra* note 12, at 769; Robinson, *supra* note 11, at 1683–84; James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1392–94 (2000); Emily Barbour, Note, *Separate and Invisible: Alternative Education Programs and Our Educational Rights*, 50 B.C. L. REV. 197, 216 (2009).

254. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 495 (1954); *see* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 350–51 (1987). "In education cases following *Brown*, we see racial stigma being defined as a citizenship-like harm, a matter of psychological harm, or both." R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 869–70, n.341 (2004) (citing cases).

basic minimal skills [is] necessary” to protect “the enjoyment of the rights of speech and of full participation in the political process.”²⁵⁵ And, the Court’s invalidation of a statute denying a “basic” public education to unauthorized immigrants was regarded in *Plyler* as vital to protecting those children from the “social economic, intellectual, and psychological” harms occasioned by absolute educational deprivation.²⁵⁶ The Court elaborated that among the harms that should be averted were “[t]he stigma of illiteracy” and the creation of a “subclass of illiterates” who would lack the “ability to live within the structure of our civic institutions” and “surely add[] to the problems and costs of unemployment, welfare, and crime.”²⁵⁷

Although emanating from state education rights and compulsory attendance laws, the Court has also recognized that children possess property and liberty interests in public education that must be protected by the Due Process Clause.²⁵⁸ Again, the Court’s concern was with the harms associated with being deprived of an education, remarking that “total exclusion from the educational process for more than a trivial period, [e.g., a suspension] for 10 days, is a serious event in the life of the suspended child.”²⁵⁹

Taken together, the Court’s decisions suggest that the federal constitutional right to education, should it exist, at least takes the form of an immunity against state-imposed racial segregation as well as a claim-right to a “basic” public education that cannot be denied without due process. This immunity-claim-right’s function is to afford protection against the harms of racial discrimination and educational deprivation.

The protection function is relatively more pronounced in the states that have translated the right to education as a safeguard against the harms of inequitable or inadequate distributions of educational opportunities.²⁶⁰

255. *Rodriguez*, 411 U.S. at 37. The Court accepted the State of Texas’s assurances that it was providing every child with “an adequate education.” *Id.* at 24 (internal quotation marks omitted).

256. *Plyler*, 457 U.S. at 221–22. Social science research overwhelmingly confirms the Court’s reflection about the indispensable role of education in contemporary life. See, e.g., GARY S. BECKER, HUMAN CAPITAL (3d ed. 1993); David Card, *The Causal Effect of Education on Earnings*, in 3 HANDBOOK OF LABOR ECONOMICS 1801 (O. Ashenfelter & D. Card eds., 1999); THE SOCIAL BENEFITS OF EDUCATION (Jere R. Behrman & Nevzer Stacey eds., 1997); Paul W. Kingston et al., *Why Education Matters*, 76 SOC. EDUC. 53 (2003); Philip Oreopoulos & Kjell G. Salvanes, *Priceless: The Nonpecuniary Benefits of Schooling*, 25 J. ECON. PERSP. 159, 160 (2011); Richard L. Wobbekind, *On the Importance of Education*, 47 BUS. ECON. 90, 91 (2012).

257. *Plyler*, 457 U.S. at 223, 230.

258. See *Goss v. Lopez*, 419 U.S. 565, 572–76 (1975).

259. *Id.* at 576; see Brent E. Troyan, Note, *The Silent Treatment: Perpetual In-School Suspension and the Education Rights of Students*, 81 TEX. L. REV. 1637, 1645–46 (2003).

260. Cf. Derek W. Black, *Civil Rights, Charter Schools, and Lessons To Be Learned*, 64 FLA. L. REV. 1723, 1777–78 (2012) (observing that state “courts have framed these cases in terms of how much is at stake for disadvantaged students” and “in describing the long-term effects of inequitable and inadequate education on society”); Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1866 (2012) (“Plaintiffs’ success in

Some courts stressed the latter; without equality of educational opportunity, children are denied an equal chance to succeed in their education, in the job market, and in their civic and social lives.²⁶¹ Other courts, less convinced that the right to education can or should afford equal life chances, nevertheless insist that there should be adequate educational opportunities such that children have an effective chance to succeed educationally, economically, politically, and socially.²⁶²

Notwithstanding this superficial rift between equality and adequacy, courts adopting either standard (or both) essentially perceive the need to protect children from being disadvantaged in life by disparities in educational opportunity.²⁶³ And virtually all of the state courts that have addressed it recognize that inequitable or inadequate distributions of educational opportunity threaten the exercise and enjoyment of other constitutional rights, productive and responsible citizenship, and an efficient market economy.²⁶⁴ Hence, by protecting children, the right to education is also meant to protect the rights of everyone to benefit from and participate in a democratic, capitalist society.

Yet despite its import, the protection function has been obfuscated in the right to education's jurisprudence. Though it seems integral to the Supreme Court's conception of a federal right to education, the Court remains ambivalent about whether such a right even exists. What's more, the putative federal right's protection function is largely inoperative as a result of subsequent precedent that effectively ended desegregation litigation²⁶⁵ and because arguably all states provide at least a "basic" education.²⁶⁶ Moreover, unlike the right's performance and provision

these cases has been based on evidence that demonstrated a wide-spread pattern of inequities and blatant educational inadequacies, primarily affecting low-income and minority students, in states throughout the country.”).

261. See, e.g., *Serrano I*, 487 P.2d 1241, 1257 (Cal. 1971) (“Unequal education, then, leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society.”) (quoting S.F. Unified Sch. Dist. V. Johnson, 479 P.2d 669 (Cal. 1971)).

262. See, e.g., *Abbott ex rel. Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 428 (N.J. 1997) (“[A] constitutionally adequate education has been defined as an education that will prepare public school children for a meaningful role in society, one that will enable them to compete effectively in the economy and to contribute and to participate as citizens and members of their communities.”).

263. See James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1237 (2008) (contending that courts in school finance cases “focus on disparities and seek to ensure rough comparability” of resources and opportunities).

264. See sources cited *supra* note 232. Of special note, one court has construed its state constitution's guarantee of equal educational opportunity to include a protection from the harms of racial segregation—whether the product of de jure or de facto discrimination. See *Sheff v. O'Neill*, 678 A.2d 1267, 1287–90 (Conn. 1996).

265. See Black, *supra* note 260, at 1732–38.

266. See Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1770 n.264 (2006) (“The debate over the citizenship-enabling aspects of education has been muted on a federal level by the existence of state constitutional provisions.”).

functions, which are plainly expressed or implicit in the education clauses of state constitutions, the protection function has been conveyed mainly through judicial interpretations of those clauses, and often by deduction— inferred from language in the clauses about the quality of education required, e.g., “thorough,” “efficient,” “suitable,” “adequate,” “general,” “uniform.”²⁶⁷ The protection function has also been unsettled as a result of the equality and adequacy divide. Yet, as explored below, the protection function actually serves to unite those doctrines.

C. Children’s Right to Education: An Immunity-Claim-Right with a Protection Function

Depending on who is regarded as the rightholder, the constitutional right to education has taken the form of all four Hohfeldian incidents and at least five of the six Wenarian functions.²⁶⁸ Courts have partially formulated the right to education as a power held by the state, imparting authorization to create, waive, or annul children’s claim-rights and privileges within the bounds of the Constitution. Courts have also formulated the right to education as a privilege held by parents and guardians, conferring a qualified discretion to elect a public or private education for their children and to maintain some degree of control over their children’s education. Although power-authorization and privilege-discretion are essential elements of the right to education, it is the sequence of the forms and functions of the right held by children that transmits the right’s distinctive ethos.

As expressed in the text of state constitutions and construed by several state courts, the right to education held by children takes the form of a claim-right to the state’s performance and provision of educational opportunities. Owed to its status as a fundamental right in some states and by judicial application of state equal protection guarantees, the right held by children has also taken the form of an immunity. Note that the right to education would be a fairly meager entitlement for children if the analysis were to end there—if, as Bauries surmises, the right has been operationalized primarily to satisfy the provision and performance functions such that states simply have affirmative duties to provide an

267. See Umpstead, *supra* note 231, at 290–91.

268. Cf. Randall Curren, *Right to an Education*, in *ENCYCLOPEDIA OF EDUCATIONAL THEORY AND PHILOSOPHY* 712, 713 (D.C. Phillips ed. 2014) (“The universal right to free and compulsory elementary education . . . would be a constellation of privileges to take advantage of opportunities to learn; claim on others (one’s parents, government, and to some extent the international community) to provide what is required for a suitable elementary education; immunity to others altering this privilege and claim and no power to waive, annul, or transfer the right (making it inalienable); and no privilege to not cooperate in learning opportunities others have a duty to provide (making the education compulsory).”).

education and to legislate, and that claim-right is paired with a modest immunity, disabling only arbitrary legislative action.²⁶⁹

My analysis concludes that the right has more bite because of the immunity-claim-right's shared protection function. As explained below, we can perceive educational adequacy as the theoretical backbone of that claim-right. Conversely, the immunity is linked by the principle of equality of educational opportunity. The sum of these revelations expose the right to education, not as a beautiful swan in the making but as a mutant of sorts; and that may be a good thing.

II. EQUALITY AND ADEQUACY \cong EQUAL PROTECTION AND DUE PROCESS

The right to education invites controversy because it provokes questions of distributive justice.²⁷⁰ Such questions lie at the heart of the decades-long, equality-adequacy debate: does the right require equal distributions of educational opportunities among all children or adequate distributions such that children have access to a certain threshold of educational opportunities?²⁷¹ Understandably, in this context, there is a tendency to presume the right to education takes the form of a claim-right and concentrate on its provision function.²⁷² As a matter of principle, we may think any provision of educational opportunities that is unequal is, *a fortiori*, immoral. Or, we may find unequal provisions acceptable from a

269. Bauries thinks the right to education is better construed to impose fiduciary duties of loyalty and due care on state legislatures. See Bauries, *Education Duty*, *supra* note 15, at 741–52. As such, judicial enforcement should be directed not at “the specific adjectives contained in a state’s education clause but at the general goal these terms attempt to reflect—a system that educates the people as the beneficiaries of a public educational trust.” *Id.* at 756. To that end, “courts should limit initial review to process, rather than substance” and consider whether “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, 763. As Bauries concedes, “such a deferential approach will make plaintiff victories significantly rarer,” but he maintains “challenge[s] to an entire legislative scheme based on the substantive terms of a state’s education clause should meet a high burden.” *Id.* at 763.

270. See generally THE “INEQUALITY” CONTROVERSY: SCHOOLING AND DISTRIBUTIVE JUSTICE (Donald M. Levine & Mary Jo Bane eds., 1975).

271. See Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 395–96 (2012); 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, 545 (1998).

272. See Bauries, *Conceptual Convergence*, *supra* note 14, at 303–304 & n.15 (“Much of the scholarly work in existence focuses on the justiciability and remediability of ‘education rights,’ or on the quantitative and qualitative entitlements that school children should have pursuant to the state constitution’s education clause.”); Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 108 (2008) (“We think it is fair to construe [the education] clauses [in state constitutions in 1868] as in effect guaranteeing individuals a right to some kind of government *provision* of a public-school education.” (emphasis added)).

moral standpoint provided that all children have enough educational opportunities.

Apart from moral conviction, however, our sense of a just provision of educational opportunities is frequently informed by beliefs about the kinds of measures “necessary to *protect* children from unfairness in the competition for postsecondary admission and jobs and from suffering potential dignitary harms” on account of social inequalities.²⁷³ That is, when pressed to rationalize abstract notions of educational justice, we speak in terms of the right to education’s protection function. Indeed, as previously observed, state courts have seemingly justified decisions finding school finance schemes unconstitutional by explaining that equal or adequate educational opportunities are essential to *protecting* children’s life chances, citizenship, and dignity and, in so doing, protect the rights, benefits, and opportunities of everyone in a democratic capitalist society.

Although the protection function influences our sense of distributive justice in education, it has not been the exact focus of much scholarly attention, perhaps because it is so lofty, but more likely because it has been obscured. If, as previously explained, Supreme Court precedent and the text of state constitutions obfuscate the protection function, what grounds it in the adjudication of the right to education? Without overtly addressing protection as a distinct function, scholars have looked primarily to due process and equal protection guarantees as sources for an implied right to education in the U.S. Constitution or to reinforce the right’s standing in state constitutions. Other constitutional collaterals have been proposed—the First Amendment’s Free Speech Clause, the implied right to vote, the Privileges and Immunities Clause, the Citizenship Clause, the Ninth Amendment²⁷⁴—but due process and equal protection are the two most frequently nominated, and rightfully so. Together, liberty and equality represent the values, norms, and interests that the right to education is meant to protect.

A. *Liberty Through Educational Adequacy*

Taking the form of a privilege conferring parents and guardians discretion over a limited range of choices (e.g., public versus private education), the right to education secures liberty in a negative sense—

273. 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, 611 (2006) (emphasis added); see Enrich, *supra* note 13, at 167; Liu, *supra* note 7, at 345–46 (endorsing educational adequacy as essential to ensuring children’s citizenship rights and equal dignity).

274. See FARBER, *supra* note 8; Bitensky, *supra* note 6; Liu, *supra* note 7; Millonzi, *supra* note 7.

freedom from.²⁷⁵ But when the right takes its distinctive form as a claim-right held by children, it functions to protect liberty in a positive sense—*freedom to be*.²⁷⁶ The link between education and positive liberty is most palpable in state constitutions that express the right to education as a safeguard of democracy.²⁷⁷ Several courts have so construed the right even absent explicit language in the state constitution.²⁷⁸ The link is also implied in *Rodriguez* and *Plyler*, as previously discussed.²⁷⁹ In either respect, the notion is that education is part of the state’s “formative project” in cultivating children with capabilities *to be* responsible citizens who can fortify their own liberties and, in turn, the liberties of others.²⁸⁰

Beyond education for citizenship, a few state constitutions explicitly emphasize the economic importance of education to “commerce, trades, [and] manufactures”²⁸¹ as well as “vocational,”²⁸² “mining,”²⁸³ “agricultural,”²⁸⁴ “scientific,”²⁸⁵ and “industrial”²⁸⁶ improvements. Where state constitutions do not declare such purposes explicitly, courts have explained that education is essential to preparing “students to compete for and perform in their future career pursuits” and thereby “contribute to the economy.”²⁸⁷ Again, the idea being that the state has some obligation to

275. See ISAAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 121–22 (1969).

276. *See id.*

277. *See* Savit, *supra* note 230, at 1293–94 (reciting language of fifteen state constitutions that “endorse the view that education’s importance is bound up in the participatory nature of democracy”).

278. *See, e.g.*, *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 812 (Ariz. 1994); *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1017 (Colo. 1982); *Sheff v. O’Neill*, 678 A.2d 1267, 1289 (Conn. 1996); *McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206 (Ky. 1989); *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 785–86 (Md. 1983); *McNair v. Sch. Dist. No. 1*, 288 P. 188, 190 (Mont. 1930); *Robinson ex rel. Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995); *DeRolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 150–51 (Tenn. 1993); *Brigham v. State*, 692 A.2d 384, 393 (Vt. 1997); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979).

279. *See supra* Part I.B.3.

280. *See* JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 115 (2013); *see also* Foley, *supra* note 10, at 515–20; Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 *IND. L. REV.* 467, 469, 474–75, 480–81, 485–91 (2014); Liu, *supra* note 7, at 344–48.

281. MASS. CONST. pt. 2, ch. V, § II; N.H. CONST. pt. 2, art. 83.

282. KAN. CONST. art. 6, § 1.

283. NEV. CONST. art. 11, § 1.

284. IND. CONST. art. 8, § 1; NEV. CONST. art. 11, § 1; *see also* MASS. CONST. pt. 2, ch. V, § II; N.H. CONST. pt. 2, art. 83.

285. IND. CONST. art. 8, § 1; KAN. CONST. art. 6, § 1; NEV. CONST. art. 11, § 1; *see also* MASS. CONST. pt. 2, ch. V, § II; N.H. CONST. pt. 2, art. 83.

286. N.D. CONST. art. VIII, § 4; *see also* MASS. CONST. pt. 2, ch. V, § II.

287. *Umpstead, supra* note 231, at 308–09 & nn.175–85 (citing *Pinto v. Ala. Coal. for Equity*, 662 So. 2d 894, 896 (Ala. 1995); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989); *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993); *Claremont*

endow children with capabilities *to be* productive members of the economy.²⁸⁸

Being the state's civilizing engine of democracy and catalyst for economic efficiency,²⁸⁹ education has instrumental value as a public or collective good.²⁹⁰ But courts adjudicating the right to education have also recognized education's intrinsic value as a private, individual good that should be enhanced by nurturing children's capabilities *to be* autonomous generally—through personal and moral development, mutual understanding, self-knowledge, and the capacity to flourish in society.²⁹¹

The nexus between education and positive liberty has been propagated in decisions interpreting state constitutions to require educational adequacy. In the most influential of those decisions, the Supreme Court of Kentucky determined that an adequate education is one that instills “seven capacities” enabling children to, *inter alia*, “function” in society, “make informed choices” and “understand the issues” as responsible citizens, and “compete favorably” in their education and the job market.²⁹² The Kentucky decision has been “adopted or relied on in nearly every other successful state court case for . . . two decades nationwide, regardless of differences in the substantive language of the education clauses among the states.”²⁹³

Given this emphasis on inculcating capacities or capabilities, scholars inevitably noted educational adequacy's theoretical resemblance to the

II, 703 A.2d 1353, 1359 (N.H. 1997); Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 485, 487 (N.Y. App. Div. 2001); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997); Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999); Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979)).

288. See Plyler v. Doe, 457 U.S. 202, 221 (1982) (“[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.”).

289. See Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (accepting propositions that “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence [and that] education prepares individuals to be self-reliant and self-sufficient participants in society”).

290. See Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 448 n.17 (2013) (referring to education as public or collective good in a non-economic sense because in economic terms a public good is nonrivalrous and nonexcludable and “certain aspects of education do not meet these criteria”); David F. Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34 AM. EDUC. RES. J. 39, 51 (1997).

291. See Pauley, 255 S.E.2d at 877; Umpstead, *supra* note 231, at 307 & nn.161–74 (citing Pinto, 662 So. 2d at 896; Rose, 790 S.W.2d at 212; McDuffy, 615 N.E.2d at 554; Claremont II, 703 A.2d at 1359; Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978)); see also Koski & Reich, *supra* note 273, at 598 (“To be sure, education brings intrinsic benefits to the individual. Education is an absolute, not positional, good insofar as those who have education gain more skills, capabilities, and talents; they are better able to pursue their goals and make use of their freedom. Capabilities and talents acquired through education are typically understood to be noncompetitive and non-zero sum.”). See generally HARRY BRIGHOUSE, SCHOOL CHOICE AND SOCIAL JUSTICE 65–82, 121 (2000) (examining “The Case for Autonomy-Facilitating Education” and “intrinsic benefits” of education); Kai Möller, *Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights*, 29 OXFORD J. LEGAL STUD. 757 (2009).

292. Rose, 790 S.W.2d at 212.

293. Bauries, *Education Duty*, *supra* note 15, at 760.

capability approach advanced by Amartya Sen and Martha Nussbaum.²⁹⁴ Positive liberty, the freedom to be (and to do), is central to that approach. Sen describes capabilities as a person's "substantive freedoms"—i.e., real opportunities—to achieve valued functionings ("beings and doings," e.g., being educated, being well nourished, having self-respect, voting, working, taking part in the life of the community).²⁹⁵ "At the heart of the [capability approach] since its inception has been the importance of education,"²⁹⁶ as both a basic capability (enhancing real opportunities to achieve) as well as a valued functioning (an actual achievement in itself).²⁹⁷

Scholars endorsing the capability approach do not believe that justice requires equal levels of functioning—for instance, "that everyone must have [and achieve] the same education."²⁹⁸ Rather, leading capability theorists favor "equality for all in the space of capabilities" accomplished by guaranteeing a minimum threshold of capabilities.²⁹⁹ Hence, much like proponents of educational adequacy, these capability theorists have as their distributive rule some version of the sufficiency doctrine, emphasizing the importance of ensuring capabilities up to a certain threshold but presumptively negating the moral significance of inequalities above that threshold.³⁰⁰

294. See Imoukhuede, *supra* note 280, at 482–83, 489–90; Liu, *supra* note 7, at 342, 346–47; Lisa R. Pruitt, *Human Rights and Development for India's Rural Remnant: A Capabilities-Based Assessment*, 44 U.C. DAVIS L. REV. 803, 844–46 (2011); see also Melanie Walker & Elaine Unterhalter, *The Capability Approach: Its Potential for Work in Education*, in AMARTYA SEN'S CAPABILITY APPROACH AND SOCIAL JUSTICE IN EDUCATION 2 (2007); Madoka Saito, *Amartya Sen's Capability Approach to Education: A Critical Exploration*, 37 J. PHIL. EDUC. 17 (2003).

295. See AMARTYA SEN, DEVELOPMENT AS FREEDOM 18, 75 (1999); AMARTYA SEN, INEQUALITY REEXAMINED 39–40 (1992) [hereinafter SEN, INEQUALITY]; Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 169, 201–03 (1985).

296. MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 152 (2011); see also SEN, INEQUALITY, *supra* note 295, at 44 (describing education as one of "a relatively small number of centrally important" beings and doings that are crucial to well-being).

297. See Walker & Unterhalter, *supra* note 294, at 7; Imoukhuede, *supra* note 280, at 482 & n.97.

298. Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 5, 69 (2007).

299. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 316 (1999); see Rosalind Dixon & Martha C. Nussbaum, *Children's Rights and a Capabilities Approach: The Question of Special Priority*, 97 CORNELL L. REV. 549, 554 (2012) ("[Capabilities approach] is generally committed to the equal protection of rights for all up to a certain minimum threshold."); Nussbaum, *supra* note 298, at 69. "In grappling with requirements of adequacy versus equality of capabilities, Nussbaum generally advocates only adequacy in relation to socioeconomic-type rights"; regarding "education and health care, however, she suggests that 'adequacy does appear to require something close to equality.'" Pruitt, *supra* note 294, at 811 n.30 (quoting MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE 294 (2006)).

300. See Weishart, *supra* note 30, at 512 (citing Paula Casal, *Why Sufficiency Is Not Enough*, 117 ETHICS 296, 297–98 (2007)).

Surely the least objectionable construction of the right to education is one that embraces this threshold account.³⁰¹ There is simply no denying that education has “a *constitutive* presence, being central to enhancing agency and autonomy, and in the contemporary world essential for avoiding subjugation and exploitation by others.”³⁰² Thus, it takes no great leap for courts to construe the right to education in the form of a claim-right to at least an adequate education, one that functions to *protect* children by instilling basic capabilities—real opportunities to achieve or positive liberties that enable responsible citizenship, economic productivity, personal development, and self-respect.

B. *Equality Through Equal Educational Opportunity*

Taking the form of an immunity, the right to education has been understood to protect against certain types of inequalities or inequities. *Brown*'s broad declaration that “the opportunity of an education . . . is a right which must be made available to all on equal terms”³⁰³ initially held the promise of advancing substantive equality of educational opportunity. Yet, as mentioned, the Court's subsequent decisions narrowed *Brown*'s reach to forbid only de jure segregation, curbing the right to protect formal equality—via an immunity against intentional, state-imposed, racial discrimination.³⁰⁴

Following *Rodriguez*, the mantle fell to state courts adjudicating school finance challenges to give further meaning to equal educational opportunity. Early decisions retained the emphasis on securing formal equality, immunizing children from discrimination based on the wealth of the school district they happened to reside in.³⁰⁵ The remedy for unequal spending was “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.”³⁰⁶

As advocates and courts began to realize, however, there were two main defects with equality as horizontal equity or fiscal neutrality: (1) nothing prevented states from leveling down education spending overall to

301. See Enrich, *supra* note 13, at 166–83.

302. TRISTAN MCCOWAN, EDUCATION AS A HUMAN RIGHT: PRINCIPLES FOR A UNIVERSAL ENTITLEMENT TO LEARNING 62 (2013).

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

304. See Weishart, *supra* note 30, at 499.

305. See *id.* at 500.

306. William S. Koski & Jesse Hahnel, *The Past, Present, and Possible Futures of Educational Finance Reform Litigation*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 41, 46 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015) (emphasis added).

achieve it, and (2) it did not actually protect disadvantaged children who required not equal but more spending to even approximate the educational opportunities and attainment of their peers.³⁰⁷

Concurrent with legislative efforts to provide compensatory resources and services to disadvantaged children, such as Title I, the Individuals with Disabilities Education Act, and the No Child Left Behind Act, state courts gradually began to articulate a substantive brand of equal educational opportunity, conferring an immunity against inequitable (as opposed to unequal) spending.³⁰⁸ *Vertical equity*, as it is frequently termed in the literature, is “a remedial school finance scheme that aims to mitigate natural and social disadvantages by allocating greater resources to the neediest students.”³⁰⁹ The motivating principle being that

all students should have an equal chance to succeed, with actual observed success dependent on certain personal characteristics, such as motivation, desire, effort, and to some extent ability . . . [and not] on circumstances outside the control of the child, such as the financial position of the family, geographic location, ethnic or racial identity, gender, and disability.³¹⁰

This principle of “equal life chances”—similar to Rawls’s “fair equality of opportunity” and later procured by contemporary luck egalitarians—has maintained a hold on lawmakers, judges, and believers in the American Dream.³¹¹ It bespeaks a sense of fairness about the proper determinants for success in life³¹² and, even more fundamentally, about how to treat people with “equal concern and respect.”³¹³ In that regard, education is still seen as a “great equalizer,” an instrument for leveling the playing field.³¹⁴

Although the principle of equal life chances enjoys broad appeal, it is impossible to achieve. Equal chances for educational success cannot be realized “without completely neutralizing all of the differential effects of social circumstances (e.g., race, class, and gender) and natural endowments

307. See Weishart, *supra* note 30, at 501–04.

308. See *id.* at 504–07.

309. *Id.* at 481.

310. Robert Berne & Leanna Stiefel, *Concepts of School Finance Equity: 1970 to the Present, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 7, 13 (Helen F. Ladd et al. eds., 1999).

311. See Weishart, *supra* note 30, at 485–86 & nn.33–35, 488–89, 495, 532.

312. See JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY 31 (1983) (“The basic intuition is that it seems unfair that we should be able to predict eventual positions in a society merely by knowing the strata into which children are born.”).

313. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977).

314. HORACE MANN, TWELFTH ANNUAL REPORT (1948), *reprinted as* END POVERTY THROUGH EDUCATION (1848), *in* HORACE MANN ON THE CRISIS IN EDUCATION 119, 124 (Louis Filler ed., 1965).

(innate talents and (dis)abilities) on *every* child's chances."³¹⁵ There are not enough resources to accomplish such a feat, and even if there were, chances for educational success would still be unequal so long as family life remains a prevalent influence on a child's prospects—that is, so long as parents retain the liberty to raise children in diverse ways.³¹⁶

Although the underlying principle itself is practically infeasible, there can be no denying the moral and political force of school policies that promote greater vertical equity overall.³¹⁷ Allocating resources in an attempt to at least mitigate natural and social disadvantages is fairer—and shows more concern and respect—than ignoring or aggravating those disadvantages, whereas failing to demand equitable educational opportunities only serves to perpetuate political, economic, and social inequalities that erode human dignity. Hence, several state courts have construed the right to education in the form of an immunity that protects children from the detrimental effects of inequitable distributions of educational resources.³¹⁸

Despite the focus on resource *equity* in school finance litigation, for many the notion of equal educational opportunity still signifies *equality* in one important sense: racial and socioeconomic integration. Based on extensive social science evidence, James Ryan, Derek Black, and other scholars have urged school finance litigants to incorporate “an argument that racial and socioeconomic integration are necessary components of a student's constitutional right to an equal or adequate education.”³¹⁹ Alas, “only a handful of advocates have even attempted” to make that argument, which to date has prevailed in only one state court decision.³²⁰ Still, scholars continue to argue persuasively that the social equality achieved through integration is just as important, if not more important, than resource equity to student achievement.

315. Weishart, *supra* note 30, at 532–33, 509–10.

316. *See id.*

317. *Cf.* William S. Koski, *Courthouses vs. Statehouses?*, 109 MICH. L. REV. 923, 927 (2011) (book review) (“Further evidence of the coming-of-age of school-finance policy research and advocacy is the agreement among the camps that additional educational resources must be allocated to students of greater need and that school-finance formulas should account for those needs.”).

318. *See* Weishart, *supra* note 30, at 505–06, 540 (discussing state court decisions employing vertical equity principles); *see also* R. CRAIG WOOD, EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES 18 (3d ed. 2007) (noting that school finance formulas in many states reflect attempts to incorporate both horizontal and vertical equity).

319. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 308 (1999); *see* Black, *supra* note 271, at 374 n.9; 386 n.80 (citing other scholars who have advanced and examined the implications of this argument).

320. *See* Black, *supra* note 271, at 375.

C. “*The Inadequacy of Equal Protection*”³²¹

Judicially imposed limitations on federal equal protection guarantees have received renewed attention in recent years.³²² Among the most frequently criticized limitations are “the rigid tiers of scrutiny” and “the requirement for a discriminatory purpose in order to prove discrimination.”³²³ State courts have contended with these limitations in adjudicating equality-based school finance challenges.³²⁴

Most of the state courts in “lockstep” with federal equal protection doctrine have applied “the rational basis/strict scrutiny dichotomy and parrot[ed] the holdings of *Rodriguez* as to the non-fundamental nature of education rights and the non-suspect nature of wealth-based classifications.”³²⁵ Others in lockstep have nevertheless “held that, under their respective state constitutions, education is a fundamental right or interest or that wealth is a suspect classification.”³²⁶ The few courts that have diverged entirely from the federal approach have done so “in counter[ing] intuitive ways.”³²⁷

Apart from the strictures of the federal doctrine, the inadequacy of equal protection is evident in “the struggle of courts to resolve how the concept of equality should be defined and measured”—and particularly whether equal protection entails “formal and substantive equality.”³²⁸ This struggle has persisted for decades in the school finance context, perplexing scholars, courts, and legislatures alike.³²⁹ If equal protection demands

321. Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1907 (2004).

322. See, e.g., Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059 (2011); Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013); Tribe, *supra* note 321, at 1907–08; Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

323. Barnes & Chemerinsky, *supra* note 322, at 1076; see also Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004).

324. See Scott R. Bauries, *Foreword: Rights, Remedies, and Rose*, 98 KY. L.J. 703, 705 (2010) (“Thus, courts were asked to determine whether education was a fundamental right in the state, or whether (real property) wealth was a suspect classification, on the way to deciding whether to apply strict scrutiny to legislative decisions allocating educational resources unequally . . .”); see also 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, 358 (2011) (“Since lawmakers know better than to employ racial classifications explicitly (or to reveal their discriminatory intent publicly), it is hard to challenge school finance laws under a racial classification theory even if they produce substantial racial inequalities.”).

325. Bauries, *Conceptual Convergence*, *supra* note 14, at 330.

326. *Id.* at 331.

327. *Id.* For instance, by “holding education to be a fundamental right but upholding their state systems under strict scrutiny or (inexplicably) rational basis review.” *Id.* (footnote omitted).

328. Barnes & Chemerinsky, *supra* note 322, at 1063–64.

329. See Enrich, *supra* note 13, at 144–55 (critiquing equality measures considered by courts and legislatures); 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,

formal equality, then it “does not protect against inadequate funding, provided that inadequacy is equally shared.”³³⁰ Nor does it require (as opposed to permit) that education spending be adjusted to the needs of differently situated children,³³¹ and thus it fails to protect those who need it most.

If, however, equal protection demands substantive equality on the order of vertical equity, then it poses implementation and management problems.³³² “For once a court agrees to impose a remedy based upon vertical equity, upon what basis should it rely to authorize or limit *how much* more money a low-income school or student should receive than an affluent one?”³³³ Answering that question seems to turn on “determining what set of knowledge and skills schools should teach to each student” and “what types of supplemental assistance students with special needs require[] and how much that assistance will cost.”³³⁴

1203–11 (2003) (examining scholarship defining equal educational opportunity as horizontal equity, vertical equity, “effective equality,” and fiscal neutrality).

330. Darby & Levy, *supra* note 324, at 360; *see also* Imoukhuede, *supra* note 280, at 498 (“The primary weakness of the Equal Protection Clause as the Court is currently interpreting it, is that rights may be violated, so long as they are violated equally.”).

331. *See* Henry Ordower, *Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted*, 7 FLA. TAX REV. 259, 294 (2006) (“The Court has never held that equal protection requires vertical equity . . .”); *see also* Tico A. Almeida, *Refocusing School Finance Litigation on At-Risk Children: Leandro v. State of North Carolina*, 22 YALE L. & POL’Y REV. 525, 553 (2004) (“While normatively appealing, few courts have proven willing to find a constitutional mandate for extra resources for the students with the greatest needs.”). *But see* Preston C. Green & Bruce D. Baker, *Circumventing Rodriguez: Can Plaintiffs Use the Equal Protection Clause to Challenge School Finance Disparities Caused by Inequitable State Distribution Policies?*, 7 TEX. J. C.L. & C.R. 141 (2002).

332. *See* Koski, *supra* note 329, at 1206; *see also* Robinson *ex rel.* Robinson v. Cahill, 303 A.2d 273, 283 (N.J. 1973) (“We hesitate to turn this [school finance] case upon the State equal protection clause. The reason is that the equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis upon which the State must act.”); *McInnis v. Shapiro*, 293 F. Supp. 327, 335 (N.D. Ill. 1968) (rejecting school finance challenge seeking vertical equity distributions based on children’s needs because it could not discern “‘discoverable and manageable standards’ by which a court can determine when the Constitution is satisfied and when it is violated” (footnote omitted) (quoting Reynolds v. Sims, 377 U.S. 533, 557 (1964))).

333. Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1205 (2011); *see also* Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 891 (2006) (suggesting “obvious rejoinder” to question of how much more spending vertical equity would require is “much, much more”).

334. Ryan & Saunders, *supra* note 249, at 472; *cf.* Helen F. Ladd, *Reflections on Equity, Adequacy, and Weighted Student Funding*, 3 EDUC. FIN. & POL’Y 402, 411 (2008) (noting one of the “thorny problems of implementation . . . is that the appropriate weights should in principle vary with the outcome standard”); Robert K. Toutkoushian & Robert S. Michael, *An Alternative Approach to Measuring Horizontal and Vertical Equity in School Funding*, 32 J. EDUC. FIN. 395, 397–98 (2007) (observing limitation of vertical equity metrics is that some “do not have specific targets that can be used to determine whether vertical equity has been reached”).

D. *The Inequity of Due Process*

Substantive due process has also been sidelined by its elusiveness.³³⁵ “Nearly fifty years after the Supreme Court revived the doctrine, its historical origins and precise meaning—to say nothing of its relationship to the constitutional text—remain as obscure as ever.”³³⁶ In spite of, or perhaps because of, its obscurity, the doctrine garnered renewed interest following *Lawrence v. Texas*.³³⁷ Some commentators even suggested that *Lawrence* illuminated a path toward the recognition of a federal right to education.³³⁸ No doubt we can expect similar exploration following *Obergefell* given the Court’s reliance on substantive due process in recognizing the fundamental right of same-sex couples to marry.³³⁹

The notion that substantive due process underpins an affirmative, liberty-based right to education is not new; it has been suggested for decades.³⁴⁰ Substantive due process is triggered by state compulsory education laws that restrict not only children’s negative liberties³⁴¹ but profoundly shape their positive liberties as well.³⁴² Educational deprivation causes “social economic, intellectual, and psychological” harms that may

335. See Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999) (“There is no concept in American law that is more elusive or more controversial than substantive due process.”).

336. Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 *TEX. L. REV.* 275, 276 (2014) (footnote omitted).

337. Aaron J. Shuler, *From Immutable to Existential: Protecting Who We Are and Who We Want To Be with the “Equalerty” of the Substantive Due Process Clause*, 12 *J.L. & SOC. CHALLENGES* 220, 316–17 (2010) (“*Lawrence* provoked a torrent of scholarship, a significant portion of which discussed the liberty/equality analysis Justice Kennedy conducted under the substantive due process rubric.” (footnote omitted)); see *Lawrence v. Texas*, 539 U.S. 558 (2003).

338. See Brunell, *supra* note 10, at 345–46 (“*Lawrence* represents a sea change in the Court’s substantive due process analysis, and as a result, decisions such as . . . *Rodriguez* are no longer on firm footing.”); Imoukhuede, *supra* note 280, at 468 (“Ironically, *Lawrence*, which is a negative-rights and liberty-based holding, can serve as the template for recognizing the positive right of access to public education.”); see also Note, *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 *HARV. L. REV.* 1323, 1327 (2007) (“[A]lthough substantive due process rests on a shaky foundation, recent Supreme Court decisions not only have reaffirmed its legitimacy, but also might have expanded its scope.” (footnotes omitted)).

339. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599–2602 (2015).

340. See Bitensky, *supra* note 6, at 579–96; Gillespie, *supra* note 10, at 1018; Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 *TEX. L. REV.* 777, 823–28 (1985).

341. See Ratner, *supra* note 340, at 824–25 (“State mandated school attendance laws deprive students of their basic liberty interests in freedom of movement and freedom of association.” (footnote omitted)); Note, *supra* note 338, at 1330–31 (“Compulsory education laws infringe on a student’s undeniably broad liberty interests by precluding the student from pursuing activities that would otherwise be possible and by forcing a certain type of instruction upon the student.”).

342. Cf. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . to engage in any of the common occupations of life, [and] to acquire useful knowledge . . .”).

be fairly attributed to the state's denial of an adequate education.³⁴³ Under federal substantive due process precedent, the threat of these state-created dangers imposes an affirmative duty on states to protect children from such harms.³⁴⁴ Alternatively, under another line of federal precedent, failing to provide an adequate education bears no reasonable relation to the express purpose of infringing children's liberty interests in order to educate them and thus violates substantive due process.³⁴⁵

Federal precedent aside, nothing of course "precludes the states from interpreting [the substantive due process provisions of] their own constitutions to provide an affirmative state duty of protection."³⁴⁶ Yet few state courts have given substantive due process serious consideration.³⁴⁷ As a basis for challenging educational disparities, it has been rejected in at least two states.³⁴⁸ And, although it has been reserved as a potential basis for a constitutional violation in other states, the predicates for such a violation would have to be the absolute denial of a minimally adequate education³⁴⁹ or arbitrary and capricious school funding distributions.³⁵⁰

Even if *Lawrence* and now *Obergefell* give the substantive due process argument new tread, it is unlikely to gain much traction in education cases. The problem with substantive due process is not that the doctrine itself is too elusive or that the Court's precedents cannot support its application. Ultimately, the problem vis-à-vis the right to education is that "substantive due process decisions typically rest essentially or entirely on claims of

343. Cf. *Plyler v. Doe*, 457 U.S. 202, 221–22, 252 (1982).

344. See Note, *supra* note 338, at 1333–34 (discussing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989)).

345. See *King v. State*, 818 N.W.2d 1, 66 (Iowa 2012) (Appel, J., dissenting); Note, *supra* note 338, at 1336–37 (citing *Youngberg v. Romeo*, 457 U.S. 307 (1982)).

346. Robert Deichert, Note, *Honoring the Social Compact: Arguing for A State Duty of Protection Under the Connecticut Constitution*, 33 CONN. L. REV. 1069, 1079 (2001).

347. See David V. Abbott & Stephen M. Robinson, *School Finance Litigation: The Viability of Bringing Suit in the Rhode Island Federal District Court*, 5 ROGER WILLIAMS U. L. REV. 441, 478 (2000) ("Some plaintiffs have attempted to rely on substantive due process claims in school finance cases, but so far with little success.").

348. See *Lewis v. Spanolo*, 710 N.E.2d 798, 812 (Ill. 1999); *King*, 818 N.W.2d at 31–34; see also *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778, 794 (R.I. 2014) (concluding complaint that alleged inadequacies in school funding formula failed to present facts to demonstrate violation of substantive due process).

349. See *Montoy v. State*, 62 P.3d 228, 235 (Kan. 2003); *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1150 (Okla. 1987).

350. See *Leandro v. State*, 488 S.E.2d 249, 258 (N.C. 1997); cf. *Citizens of Decatur for Equal Educ. v. Lyons-Decatur Sch. Dist.*, 739 N.W.2d 742, 762 (Neb. 2007) (rejecting substantive due process claim because appellants "failed to show that a heightened level of scrutiny applies to the school district's decisions or that those decisions were not rationally related to a legitimate government purpose").

noncomparative right.”³⁵¹ As the Court has put it: “‘Due process’ emphasizes fairness between the State and the individual dealing with the State, *regardless of how other individuals in the same situation may be treated*. ‘Equal protection,’ on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.”³⁵²

Consequently, a liberty-based right to education grounded solely in substantive due process could tolerate wide disparities in educational opportunities among students provided that each individual student has what the state deems to be an adequate share.³⁵³ Indeed, this is one of the main criticisms leveled against adequacy—that, because it is, at least in theory, not “comparative or relational,”³⁵⁴ it permits significant advantages in the competition for college admissions and jobs (i.e., positional goods) to be conferred on students who receive more than the adequate level of educational opportunities.³⁵⁵ In short, adequacy encased in due process licenses and exacerbates a great inequity.

E. Due Process and Equal Protection for the Right to Education

Much has been written about the erratic yet enduring relationship between equality and liberty in the constitutional jurisprudence of equal protection and substantive due process.³⁵⁶ Even more will be written regarding their “synergy” given its professed significance to the Court’s

351. Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387, 478 (1985); see also Raleigh Hannah Levine & Russell Pannier, *Comparative and Noncomparative Justice: Some Guidelines for Constitutional Adjudication*, 14 WM. & MARY BILL RTS. J. 141, 147 (2005).

352. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) (emphasis added).

353. Cf. Arthur E. Wise, *Minimum Educational Adequacy: Beyond School Finance Reform*, 1 J. EDUC. FIN. 468, 477 (1976) (“A substantive due process interpretation [of the right to education] would mean only that protection needs to be provided up to a certain level.”).

354. Koski & Reich, *supra* note 273, at 589.

355. See *id.* at 607; Weishart, *supra* note 30, at 521–22.

356. See, e.g., RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 73 (1996); David E. Bernstein, *Bolling, Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L.J. 1253 (2005); Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491 (2002); William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000); James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211 (1993); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817 (2014); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007); Shuler, *supra* note 337; Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988); Tribe, *supra* note 321; Richard B. Wilson, *The Merging Concepts of Liberty and Equality*, 12 WASH. & LEE L. REV. 182 (1955); Yoshino, *supra* note 322.

reasoning in *Obergefell*.³⁵⁷ It may be counterproductive to expect one direction-of-fit or elaborate theory that can account for all of the intricacies and nuances of the evolving relationship between these doctrines, as the Court itself seems to acknowledge in *Obergefell*.³⁵⁸ And yet the tortuous saga of the right to education suggests that the makeshift bonds of liberty and equality can fasten in the adjudication of a constitutional claim-right-immunity imparting a protection function.

That function was the primary justification for state constitutional rights to education³⁵⁹ and has been the prevailing rationale for the putative federal right to education. Although the latter was last given effect more than thirty years ago in *Plyler*, the Court continues to express the constitutional importance of protecting children from economic and stigmatic harms, as it did most recently and prominently in *Obergefell*.³⁶⁰ Perhaps most importantly, the protection function theoretically links the two strands of the right to education held by children—the claim-right to an adequate education and the immunity of equal educational opportunity.

Separately, equality and adequacy as distributive principles have been suboptimal in serving the protection function.³⁶¹ Together, they have made more progress.³⁶² Still, “it is difficult to find a consistent relationship between [them] in the law [because] decisions in this area often are far from models of clarity, and doctrines within a state can and do change over time.”³⁶³ Moreover, equality and adequacy intertwined can lose their sustaining power in the face of legislative resistance and remaining doubts about the judiciary’s role in enforcing the right.³⁶⁴ “At least three state

357. See 135 S. Ct. 2584, 2603 (2015).

358. See *id.* (“The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.”).

359. See ZACKIN, *supra* note 169, at 72–73 (examining history of state constitutional education provisions and observing that such provisions were often justified as means to protect children from effects of poverty and to protect republican forms of government).

360. See 135 S.Ct. at 2600 (“A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”).

361. See Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS L. REV. 1835, 1844 (2007) (“[N]either the equality nor the adequacy ‘wave’ of litigation has produced the desired results even on the heels of ostensible judicial victory.” (footnote omitted)); Ryan, *supra* note 263, at 1229–30 (observing difficulties that equity and adequacy decisions each present.).

362. See Jensen, *supra* note 13, at 27 (“[T]he largest group, in terms of sheer numbers of successful plaintiffs [in school finance litigation], has used a hybrid [equality and adequacy] approach.”).

363. Richard Briffault, *Adding Adequacy to Equity*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 25, 31 (Martin R. West & Paul E. Peterson eds., 2007).

364. See *id.* at 44 (“[T]he adequacy theory tends to stretch the limits of the institutional competence and power of courts that define adequacy as ‘equity plus’ by embroiling them in efforts to

supreme courts [adopting adequacy and vertical equity have] backed down and accepted state actions (and inactions) that arguably fell short of both adequacy and equity.”³⁶⁵ In the final analysis, the difficulty lies in vague education clauses in state constitutions that do not fix standards for mutually enforcing equality and adequacy.³⁶⁶

Pairing the right to education with either substantive due process or equal protection separately would not yield acceptable standards. Equal protection compelling vertical equity through the right to education’s immunity form would disable legislative actions that result in resource inequities yet fail to impose any affirmative duty on the state to meet a qualitative educational threshold. As previously discussed, a singular focus on vertical equity would thus render the right to education an unmanageable and inadequate protection.³⁶⁷ Indeed, in most states where equal protection guarantees were deemed coextensive with the state constitution’s education clause and plaintiffs initially prevailed, courts have since abandoned enforcement altogether³⁶⁸ or, more often, embraced the need for a qualitative educational threshold, i.e., adequacy.³⁶⁹

Conversely, substantive due process paired with the right to

define an ‘adequate’ education, to appraise the sufficiency of state measures to oversee and finance local provision of such an education, and to force state legislatures to give a greater priority to education than the legislators themselves would prefer.”); Ryan & Saunders, *supra* note 248, at 472 (“Expanding the remedy [of vertical equity and adequacy] risks diluting [their] impact by spreading resources too thinly and thus compromising their effectiveness. . . . Defining what constitutes an adequate education . . . [and] determining what types of supplemental assistance students with special needs require . . . [may] strain the competency of the courts.”).

365. Briffault, *supra* note 363, at 46 (referencing Arkansas, Massachusetts, and Ohio); *see also* Koski & Reich, *supra* note 273, at 570 (“[T]he vertical-equity-minded remedies of the *Abbott* litigation [in New Jersey] have been only seldom and half-heartedly deployed in other cases.”).

366. *See generally* Bauries, *Common Law Constitutionalism*, *supra* note 15, at 997 (“The education clauses in state constitutions . . . constrain courts to a certain set of possible interpretations, even though no state constitutional education clause appears to explicitly mandate a particular conclusion as to the nature or the quantum of the educational entitlements it sets up.”); Bauries, *Education Duty*, *supra* note 15, at 729–31, 755, 762; Koski, *supra* note 317, at 932–33; Koski, *supra* note 329; William S. Koski, *The Evolving Role of the Courts in School Reform Twenty Years After Rose*, 98 KY. L.J. 789, 799 & n.30 (2009–2010).

367. *See* DUNCAN MACRAE, JR. & JAMES WILDE, POLICY ANALYSIS FOR PUBLIC DECISIONS 66 (1979) (contending that vertical equity is difficult to apply because “[n]ot only do we have to identify reasons for treating people unequally, but we must also decide how unequally they should be treated”); Koski, *supra* note 329, at 1206 (“As a judicial standard . . . vertical equity would pose a serious problem for manageability on a case-by-case basis.”); Ryan & Saunders, *supra* note 249, at 476; *supra* note 332–334 and accompanying text.

368. *See Ex parte James*, 836 So. 2d 813, 817–19 (Ala. 2002).

369. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 495 (Ark. 2002); *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 227 (Conn. 2010); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); *State v. Chafin*, 376 S.E.2d 113, 121 (W.Va. 1988); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995). Courts in California, Tennessee, and Vermont are the exception because they construed their equal protection guarantees more in line with horizontal equity or fiscal neutrality than with vertical equity. *See Serrano v. Priest*, 557 P.2d 929, 953 (Cal. 1976); *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 738 (Tenn. 1995); *Brigham v. State*, 692 A.2d 384, 390, 397 (Vt. 1997).

education's claim-right form would impose an affirmative duty on the state to meet a qualitative threshold yet otherwise tolerate resource inequities and social inequalities. Again, as discussed, the noncomparative nature of substantive due process would therefore abide and potentially magnify educational disparities.³⁷⁰ Although no appellate court has utilized substantive due process in finding a violation of a state constitutional right to education, the experience of state courts that have endorsed adequacy suggests that at some point disregarding inequalities simply becomes indefensible. Hence, courts have not enforced "some absolute notion of adequacy, where disparities in resources are ignored" but rather have demanded "substantial equality."³⁷¹

Coalesced within the right to education's immunity-claim-right structure, substantive due process and equal protection together could offset their respective limitations and ameliorate the right's enforcement standards to synchronize the protection of children's liberty and equality interests. Tethered to the right to education's claim-right form, substantive due process exerts leverage in the demand for a qualitative adequacy threshold—whether explicitly or implicitly required by the state constitution or not³⁷²—to protect children's negative liberties (freedom from educational deprivation) and positive liberties (freedom to be responsible, productive, autonomous citizens). The substantive standards could alleviate some of the manageability concerns by providing a "baseline of adequacy"³⁷³ from which the vertical equity required by equal protection can be measured and adjusted.³⁷⁴

370. See *supra* notes 353–354 and accompanying text; see also Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1001 n.98 (1979) ("[S]ubstantive due process . . . speaks to substantive liberties, without direct regard to the inequality of their distribution."); Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 281 (1987) (contending that inequalities perpetuated by economic substantive due process led to its demise).

371. Ryan, *supra* note 263, at 1237 (internal quotation marks omitted).

372. Cf. Chris Lott, *The Methodological Middle Ground: Finding an Adequacy Standard in Alaska's Education Clause*, 24 ALASKA L. REV. 73, 88 n.113 (2007) (observing that some states with "the strongest education clauses have failed to find a constitutional standard of adequacy while other states with weaker Education Clauses have found a constitutional promise of adequacy" (citation omitted)).

373. Ryan & Saunders, *supra* note 249, at 472.

374. See Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 637 n.66 (1983) ("[S]tandards of substantive due process . . . provide the substance by which equalities and inequalities are determined."); see also Colleen Fahy, *Education Funding in Massachusetts: The Effects of Aid Modifications on Vertical and Horizontal Equity*, 36 J. EDUC. FIN. 217, 231 (2011) (noting that measuring vertical equity requires identifying spending targets in relation to "the level of spending needed to insure adequacy for each student category [though probably] the best that can be done is to measure a state's performance against its own goals"); 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) (suggesting that for purposes of vertical equity "one possibility is to define educational need as the difference between where students should be performing academically and the level at which they are currently performing [or] assess the necessary structural and instructional changes required for students to access a common

Equal protection, in turn, pivots the analysis to educational disparities. First, it guarantees vertical equity in the distribution of educational opportunities. As a result, equal protection will necessitate “funding to compensate for differences in regional costs and student needs” and thus “tend to focus disproportionate resources on [disadvantaged] students” to afford them a meaningful opportunity to meet the adequacy threshold.³⁷⁵ Second, it intercedes when the disparities between children at the threshold and children above it become objectionable. That is, when such disparities imperil equal liberty by undermining children’s capabilities “to function as equal citizens and compete for admission to higher education and high-quality jobs” on comparable terms.³⁷⁶ This would implicate both substantive due process, requiring adequacy thresholds to be set higher to diminish positional advantages held by those above the threshold, and equal protection, requiring adjustments in the distribution of educational opportunities to ensure vertical equity necessary to meet the higher thresholds.³⁷⁷ In short, equal protection translates the adequacy required by substantive due process into a relational or comparative demand.³⁷⁸

Hence, adjudicating the right to education “stereoscopically—through the lenses of both [due process and equal protection]—can have synergistic effects, producing results that neither clause might reach by itself”³⁷⁹ or that the right to education can have unassisted.

Inasmuch as the Equal Protection and Substantive Due Process Clauses “further[] our understanding” of the “central precepts” of liberty and equality entailed by the “right to marry,”³⁸⁰ they can do the same for the right to education. It may be fair to characterize the resulting amalgamation as an “equality-based and relationally situated theory of substantive

curriculum and foundational learning experiences”); Meaghan Field, Note, *Justice as Fairness: The Equitable Foundations of Adequacy Litigation*, 12 SCHOLAR 403, 409 (2010) (“[I]n cases where the resources were provided in full and educational equality remained out of reach, adequacy suits allow plaintiffs to recalibrate the resources, measuring what is needed by how far the performance fell short of equity and asking for more.”).

375. Weishart, *supra* note 30, at 539–40 (internal quotation marks omitted); *cf.* William S. Koski, *Achieving “Adequacy” in the Classroom*, 27 B.C. THIRD WORLD L.J. 13, 21–22 (2007) (“In modern adequacy cases, the most evident manifestation of needs-based rights comes in the methods used in costing-out an adequate education, that is, attaching a price tag to the resources necessary for all children to reach specified educational outcomes.”); Koski, *supra* 329, at 1235 (suggesting that when “legislatures or courts talk about adequacy for a particular student or narrowly defined class of students . . . they [are] talking about what the student *needs* in order for the education to be adequate for their *needs*”).

376. Weishart, *supra* note 30, at 537–38.

377. *Cf. id.* at 534, 539–40.

378. *Cf.* Ladd, *supra* note 334, at 416 (suggesting potential “compromise between equity and adequacy . . . is to focus on adequacy as the primary goal, to permit some disparities above the adequate level, but to limit the magnitude of those disparities, particularly those funded from public revenue”); Weishart, *supra* note 30, at 528.

379. Karlan, *supra* note 356, at 474.

380. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–04 (2015).

liberty.”³⁸¹ Or, to put it less eloquently, the right to education would remain a mutant of sorts, an aberration in the constitutional order. Yet reconstituted with its constitutional cognates, the right to education could be more responsive, adaptive, and sustainable.

CONCLUSION

Irony is not argument, but it can have the same therapeutic effect. I conclude with two ironies. First, had it not been for *Rodriguez*, the right to education might never have been apprehended as a Hohfeldian claim-right. That is, had the Court recognized a federal constitutional right to equal educational opportunity implicating only the Equal Protection Clause, then state courts likely would have similarly construed state rights to education (assuming those courts had reason to interpret state constitutions at all given the supremacy of the federal right). Hence, the right to education held by children might have been formulated solely as an immunity. Instead, *Rodriguez* prodded state courts to focus on the education provisions in state constitutions and therein perceive the right in its form as not only an immunity to equal educational opportunity but a claim-right to an adequate education.

Second, rather than promote *Brown* as the standard-bearer for the right to education, early state court advocates might have fared better parlaying its oft-criticized companion, *Bolling v. Sharpe*,³⁸² decided the same day. Although it has been condemned as a politically contrived opinion,³⁸³ the Court’s conspicuous reflection in *Bolling*—that “the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive”³⁸⁴—certainly bears scrutiny. The question that remains, left unanswered by *Obergefell*, is precisely what

381. Tribe, *supra* note 324, at 1898. Alexandra Natapoff perceived a version of this amalgamation in an article addressing the underenforcement of criminal laws in urban areas. Natapoff proposed that the right to education could serve as a model for dealing with the underenforcement problem, observing that

the dual commands of the Due Process and Equal Protection Clauses, as well as the language of most state constitutions, have shaped the education debate into a dual inquiry of adequacy and equality. The former represents a due process or minimal entitlements type of challenge: Has the state provided an adequate minimum threshold of education? The second is a comparative inquiry reflecting equality demands: Has the state provided equal access to education as between jurisdictions or groups?

Natapoff, *supra* note 266, at 1769–70.

382. 347 U.S. 497 (1954).

383. See Bernstein, *supra* note 356, at 1253, 1257–61.

384. *Bolling*, 347 U.S. at 499.

type of scrutiny.³⁸⁵ Together, substantive due process and equal protection guarantees can have synergistic effects, but precisely how they should be balanced, if at all, in adjudicating the right to education bids further research and consideration.³⁸⁶ Nevertheless, I suspect that the lodestar for the analysis is the right's protection function in securing children's liberty and equality.

385. *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting) (noting majority opinion seemingly fails to follow "anything resembling [the] usual framework for deciding equal protection cases," i.e., tiered scrutiny).

386. See Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 442-44 (2000) (contending that traditional substantive due process and equal protection analysis would be ill-suited for adjudicating constitutional right to education and suggesting some alternatives).