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ARTICLES

A COMMON LAW CONSTITUTIONALISM FOR THE RIGHT TO EDUCATION

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I. INTRODUCTION

In education, "rights talk" is ubiquitous.[1] The idea of a constitutional "right to education" gradually entered our common parlance over the long history of the common school movement,[2] followed by litigation over school desegregation,[3] gender discrimination,[4] and disability discrimination,[5] and has become cemented there through the past few decades of state constitutional school finance litigation.[6] Beginning with *Brown v. Board of Education*[7] and the few cases preceding it,[8] we gradually have come to understand that each person has the right not to be excluded from public education or discriminated against within it. Through state constitutional equality litigation, we expanded these rights against exclusion, and in some states against

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[1] Mary Ann Glendon coined this term as part of her seminal monograph on the perversion of civil and political discourse through the overly casual rhetoric of rights. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991).

[2] *See infra* notes 28–32 and accompanying text (discussing the common school movement).

[3] The most comprehensive history of the *Brown v. Board of Education* decision and the cases immediately leading up to it and following it is Richard Kluger's. *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976). More recent examinations of this history give greater treatment to the early cases brought by Latino plaintiffs, which arguably paved the way for the *Brown* decision, but were left out of the *Brown* Court's opinion. *See* Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1422–23, 1469 (2004); Kristi L. Bowman, Note, *The New Face of School Desegregation*, 50 DUKE L.J. 1751, 1752–53 (2001).

[4] *See, e.g.*, Isabelle Katz Pinzler, *Separate but Equal Education in the Context of Gender*, 49 N.Y.L. SCH. L. REV. 785, 792–96 (2004–2005) (reviewing the history of constitutional litigation over gender equality in schooling).

[5] *See, e.g.*, Edwin W. Martin et al., *The Legislative and Litigation History of Special Education*, *in* 6 THE FUTURE OF CHILDREN 25 (1996).

[6] *See, e.g.*, R. Craig Wood, *Constitutional Challenges to State Education Finance Distribution Formulas: Moving from Equity to Adequacy*, 23 ST. LOUIS U. PUB. L. REV. 531 (2004) (examining the history of state constitutional school finance litigation).

[7] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[8] *See* McLaurin v. Oklahoma State Regents, 339 U.S. 637, 637 (1950) (invalidating segregation in a public institution of higher education in Oklahoma); Sweatt v. Painter, 339 U.S. 629, 629 (1950) (invalidating segregation in public law schools in Texas); Sipuel v. Bd. of Regents, 332 U.S. 631, 631 (1948) (invalidating the exclusion of a non-white student from a public law school in Oklahoma); Mendez v. Westminster, 64 F. Supp. 544, 551 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947) (en banc) (invalidating the race-based exclusion of Mexican-American students from public schools in California).

discrimination, to socioeconomic status.[9] And as the state-level tide has turned in the direction of educational adequacy litigation and has focused its attention directly on the education clauses in state constitutions,[10] the rhetoric of education rights has taken center stage.[11]

A close look at the numerous cases presenting ostensible state constitutional "education rights" claims, however, reveals a mismatch between rhetoric and reality. In some education clause cases, courts cite the fact that children have a "right to education" under the state constitution merely as a basis for rejecting motions to dismiss for non-justiciability—a conception of the right as a means of acquiring "generalized grievance" standing and nothing more.[12] In a few others, the existence of a "fundamental right to education," modeled on federal equal protection jurisprudence[13] provides the basis for holding against the state on an educational equality claim based on the equal protection or "uniformity" provisions of the state constitution.[14] In all such cases, though, both the evidence presented and the remedies the courts order

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[9] *See, e.g.*, Serrano v. Priest (*Serrano II*), 557 P.2d 929, 957–58 (Cal. 1976) (invalidating California's school finance system for allowing and maintaining systemic inequalities based on local property wealth as being in violation of the state constitution's equality provisions).

[10] Each state in the United States has a provision in its constitution requiring, or at least admonishing, the legislature to fund a system of public schools. *See* John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2356 n.13 (2004). For a detailed analysis of these provisions and the ways in which state supreme courts have interpreted them, see generally Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301 (2011).

[11] *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989) (invalidating Kentucky's entire legislative scheme for education funding and governance due to broad inadequacies, in violation of the state constitution's education provisions, and holding that each child in Kentucky has a fundamental right to education); *Serrano II*, 557 P.2d at 951 (holding similarly as to California's public school financing system, but terming education a "fundamental interest").

[12] *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, 752 (2010).

[13] In these states, courts adopt the test from *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), which asks whether a right is "explicit or implicit" in the Constitution to determine whether the right is fundamental and therefore necessitates strict scrutiny in an equal protection challenge. Unlike the Court in *Rodriguez*, which held that education is not a right explicitly or implicitly provided for in the United States Constitution, these state courts easily cite the state constitution's education clause and come to the opposite conclusion. *See infra* notes 68–69 and accompanying text (discussing "lockstepping" in educational equality cases under state constitutions).

[14] *See* Bauries, *supra* note 10, at 302–03.

focus on the state education system as a whole, rather than on any individual student rights-holders.[15] Thus, other than as a means of surmounting threshold obstacles to relief, an *individual* right to education under state constitutions is more rhetoric than reality.[16]

Considering this fact, this Article makes two claims, one descriptive and the other normative. The Article's central descriptive claim is that individual rights to education have not been realized under state constitutions because the currently dominant structure of education reform litigation prevents such realization. In state constitutional education clause claims, both pleadings and adjudication generally focus on the equality or adequacy of the system as a whole, rather than on any particular student's educational resources or attainment.[17]

Part II traces the roots of the currently dominant systemic approach, and finds these roots in federal institutional reform litigation.[18] This systemic focus leads to a systemic, rather than an individual, approach to remediation, which ultimately subverts any individual interests or rights that might have given rise to the claims in the first place.[19] The systemic approach also sets up judicial-legislative conflicts over statewide policymaking that need

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[15] *See infra* notes 117–20, 136–39, 149–62 and accompanying text (discussing remedies in education clause litigation).

[16] *See infra* notes 127–32, 168–77 and accompanying text (discussing the devaluation of education rights by virtue of failing to individually remediate education clause claims).

[17] *See infra* notes 117–20, 136–39, 149–62 and accompanying text (discussing remedies in education clause litigation).

[18] Scholars use different, and interchangeable, terms to describe the species of litigation that presents claims brought against public agencies or institutions alleging systemic violations of individual constitutional rights, which are typically remedied through a court-superintended reform (by injunction or consent decree) of the institution itself. *See* Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1357 n.1 (1991). The most common interchangeable terms used to describe this litigation are "public law litigation," *e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284, 1288–89 (1976); "structural reform litigation," *e.g.*, Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979); "institutional litigation," *e.g.*, Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 466 (1980); and "institutional reform litigation," *e.g.*, Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1994 (1999) (reviewing MALCOLM M. FEELEY & EDWARD RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998)). I find "institutional reform litigation" to be the most descriptively accurate, so I employ it throughout this Article.

[19] *See* Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 734–35 (2012) (discussing the subversion of individual rights in systemic adjudication of educational adequacy claims).

not arise, and these inter-branch conflicts sometimes prevent judicial review of education claims altogether.[20] State courts' responses to these conflicts have made the systemic approach the largest obstacle currently preventing state courts from recognizing individual rights to adequate education under state constitutions.

Parts III and IV move from the descriptive to the normative, arguing that an individual constitutional right to education, if it exists, can and should be defined through individual enforcement. The central normative claim is that, rather than attempting enforcement through broad, systemic injunctions and declaratory judgments—as state courts have in every case thus far—state courts should individually adjudicate individual educational adequacy claims. The theoretical and operational grounding for such an individualized approach lies in common law constitutionalism. A common law constitutionalist approach to the right to education will allow courts to address claims of right incrementally, developing the law carefully and gradually, rather than in broad strokes, as courts develop the law today. Following this argument, Part V addresses some important considerations for courts beginning to employ the common law constitutionalist approach, and Part VI builds from these considerations to make the case that an individual-rights approach to enforcing education obligations may do more to advance reform of state education systems than the current systemic approaches, while also minimizing inter-branch conflict in the states.

II. SYSTEMIC LITIGATION AND EDUCATION REFORM

This Part discusses the ways in which we have attempted to define and enforce "education rights" thus far and shows that these strategies have established a regrettable path dependence in state court litigation over ostensible affirmative rights to education. The path in question was blazed through the use of institutional reform litigation in federal courts to secure racial equality in education. When education reform litigation moved to the state courts and began pressing the requirements imposed by state constitutional education clauses, it remained on the systemic institutional reform litigation path. Being on that path has caused

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[20] *Id.*

courts to issue rulings that at best subvert, and at worst completely ignore, potential individual rights to education.

A. EDUCATION RIGHTS AND INSTITUTIONAL LITIGATION

Although education has been part of the American constitutional tradition since before the Founding,[21] the concept of "education rights" or "the right to education" is of far more recent vintage.[22] The drafters and adopters of about half of the early state constitutions chose to recognize education in some form as a function of the state.[23] But, as John Eastman has documented, few chose to textually recognize any sort of entitlement to education on behalf of individual students, and in the few states with such provisions mandating the availability of schools to "all children," the courts routinely declined to enforce the ostensible entitlement.[24]

Today, each state constitution provides for some sort of educational command—most often stated as the duty of the state to provide for an education system—and each of these commands has its roots in a history in which the public provision of education has gradually been seen as individually vital.[25] Beginning with the famous "Old Deluder Satan Act" of the Massachusetts Colony,[26] and culminating in the ratification of an "education

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[21] *See* John C. Eastman, *When Did Education Become a Civil Right?: An Assessment of State Constitutional Provisions for Education 1776–1900*, 42 AM. J. LEGAL HIST. 1, 3 n.12 (1998) (naming Pennsylvania, North Carolina, Georgia, Massachusetts, and New Hampshire as states whose constitutions contained education provisions prior to 1787).

[22] *See id.* at 33–34 (concluding there was no clear individual right to education at the end of the nineteenth century).

[23] *See id.* at 3 (stating that five of the thirteen original state constitutions mentioned education).

[24] *Id.* at 33. John Dinan's work on the intentions of state constitutional drafters provides some support for Eastman's textual and historical conclusions as well. *See* John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates*, 70 ALB. L. REV. 927, 978–81 (2007) (concluding that the state convention debates surrounding the enactments of state education clauses indicate that these clauses were not intended to create judicially enforceable rights).

[25] *See* Josh Kagan, *A Civics Action: Interpreting "Adequacy" In State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241 (2003) (discussing the effects of state constitutions' education clauses on the duties of state governments to provide "adequate" education for all children).

[26] *The Old Deluder Act*, 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 203 (Boston, William White1853) (1647) ("It being one cheife piect of ye ould deluder, Satan, to keepe men from the knowledge of ye Scriptures, as in formr times by keeping ym in an unknowne tongue, so in these lattr times

clause" in the constitution of every U.S. state,[27] we have recognized education's importance to the individual's well-being, first as a spiritual matter and then gradually as a political and citizenship matter.

Often called the "Father of the Common School," Horace Mann famously made the following argument in his Tenth Annual Report in 1845 as Secretary of Education for the Commonwealth of Massachusetts:

> I believe in the existence of a great, immortal, immutable principle of natural law, or natural ethics,—a principle antecedent to all human institutions, and incapable of being abrogated by any ordinance of man,—a principle of divine origin, clearly legible in the ways of Providence as those ways are manifested in the order of Nature and in the history of the race, which proves the *absolute right* to an education of every human being that comes into the world; and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all.[28]

Mann also said, in the same Report:

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by pswading from ye use of tongues, yt so at least ye true sence & meaning of ye originall might be clouded and by false glosses of saint seeming deceivers, yt learning may not be buried in ye grave of or ffathrs in ye church and comonwealth, the Lord assisting or endeavors., — It is therefore ordred, yt evry towneship in this iurisdiction, aftr ye Lord hath increased ym to ye number of 50 householdrs, then shall forthwth appoint one wthin their towne to teach all such children as shall resort to him to write & reade, whose wages shall be paid eithr by ye parents or mastrs of such children, or by ye inhabitants in genrall, by way of supply, as ye maior st of those yt ordr ye prudentials of ye towne shall appoint; prvided, those yt send their children be not oppressed by paying much more yn they can have ym taught for in othr towns; & it is furthr ordered, yt where any towne shall increase to ye numbr of 100 families or householdrs, they shall set up a gramar schoole, ye mr thereof being able to instruct youth so farr as they may be fited for ye university, prvided, yt if any towne neglect ye prformance hereof above one yeare, yt every such towne shall pay 5 pounds to ye next schoole till they shall prforme this order.").

[27] For a listing of the fifty state constitutional education clauses, see R. CRAIG WOOD, EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES 103–08 (3d ed. 2007).

[28] HORACE MANN, *Report for 1846—The Common School System of Massachusetts*, *in* 4 LIFE AND WORKS OF HORACE MANN 115–16 (Boston, Lee & Shepard Publishers 1891).

> The will of God, as conspicuously manifested in the order of Nature, and in the relations which he has established among men, founds the *right* of every child that is born into the world, to such a degree of education as will enable him, and, as far as possible, will predispose him, to perform all domestic, social, civil, and moral duties, upon the same clear ground of natural law and equity as it founds a child's *right*, upon his first coming into the world, to distend his lungs with a portion of the common air, or to open his eyes to the common light, or to receive that shelter, protection, and nourishment, which are necessary to the continuance of his bodily existence.[29]

Mann, then, viewed education as a natural, inherent, and inalienable right—a right in the natural-law sense of the Declaration of Independence, bestowed by one's Creator and not subject to abrogation.

Mann's ideas about schooling, its availability, its funding, and its management and structure were among the most influential in history, but his conception of the right to education did not textually catch on in nineteenth century state constitutions, or in the courts of that era. Throughout that era, legislatures were given broad discretion to provide for schools, or not provide for them, and where individual students brought claims asserting rights or entitlements to education, these claims were routinely rebuked in the courts.[30] Recognizing something that we might term a "right to education," in the sense of a legal entitlement to free educational services from the government, would require an evolution in legal practice. That evolution came with the "rights revolution of the Twentieth Century"[31] and the advent of institutional reform litigation.[32]

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[29] *See id.* at 334.

[30] *See* Eastman, *supra* note 21, at 33 ("The development of a right to education was in a sense frozen in time by this switch to equal protection analysis, and for more than a century now courts have quibbled over whether a particular kind of education . . . is truly equal to that provided others.").

[31] *See generally* MARK TUSHNET, THE RIGHTS REVOLUTION OF THE TWENTIETH CENTURY (2009); *see also* Eastman, *supra* note 21, at 1–2 (detailing other landmark cases in the wake of *Brown* that struck down segregation in non-education contexts).

[32] *See* Owen M. Fiss, *Foreword*: *The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) (pegging the beginning of institutional reform litigation as the moment that *Brown* was

There are several varieties of what might be termed "reform litigation." The most basic, and least controversial, form generally involves private law claims, typically brought as class or other aggregate actions, seeking to alter or stop dangerous or risky business behavior that creates negative externalities—for example, litigation over dangerous pharmaceuticals.[33] A primary motivation for filing such litigation is, of course, to obtain compensation for the victims of dangerously designed products, but another important reason that such cases are brought is to cause changes in the ways that products are designed and marketed.[34]

Another variety is focused on securing a general change in legal standards, usually through invalidating some positive law that is thought to infringe negative rights broadly—the recent D.C. handgun ban case, for example.[35] This form of litigation does not require much in the way of remediation.[36] Typically, a declaration that the targeted law is unconstitutional, or at most, an injunction against its enforcement, suffices to remedy the harm. Still another variety involves the enforcement of federal (and sometimes state) statutes enacted to protect individual rights against maltreatment—a Title VII class action lawsuit, for example.[37] This form seeks to reform private or public institutional behavior similarly to the first form identified here—by seeking a damage

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decided).

[33] *See, e.g.*, Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 977–98 (1993–1994) (discussing mass tort litigation challenging the manufacture and sale of dangerous pharmaceutical products).

[34] *See* R. Daynard, *Why Tobacco Litigation?*, 12 TOBACCO CONTROL 1, 1–2 (2003) (outlining the public benefits both sought and achieved through mass tobacco litigation); *cf.* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 75–82 (criticizing some forms of this litigation as anti-democratic).

[35] District of Columbia v. Heller, 554 U.S. 570, 635 (2008).

[36] *See, e.g.*, *id.* (granting a limited remedy by declaring the law at issue unconstitutional and instructing the district court to grant Heller permission to carry a handgun and the issuance of a license to carry the handgun in his home, so long as Heller is not disqualified from the exercise of Second Amendment rights).

[37] *E.g.*, Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009) (presenting a class action aimed at voiding the rejection of an employment promotion test, on the grounds that the rejection of the test was racially motivated).

award or injunction against a particular harm and trusting that such remedies will deter future illegal conduct and future harms.[38]

The most controversial variety of reform litigation has been variously termed "public law litigation," "structural reform litigation," "institutional litigation," and "institutional reform litigation."[39] This litigation typically begins with a claim brought on behalf of a representative individual or a group of similarly situated individuals—for example minority students, inmates at a particular prison, or patients at a particular hospital.[40] The claim is typically grounded on the Fourteenth Amendment of the United States Constitution, specifically the Equal Protection Clause (in the case of segregated school systems) or the Due Process Clause (in the case of prisons and hospitals).[41] The claim is also brought against an institutional defendant, which denotes a defendant that is a government institution, such as a school district, prison, or hospital, rather than a person or private corporation.[42] Most importantly, the remedy sought is an institutional one—rather than compensation to a particular harmed plaintiff, the suit seeks

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[38] A significant subset of this form involves suits explicitly brought on behalf of the federal government to assert the government's own interests in punishing lawbreakers. Referred to as "qui tam actions," these suits are thought of as "deputizing" one or a number of "private attorneys general" and incentivizing these plaintiffs (usually through a bounty payable as a percentage of the government's recovery) to bring lawsuits challenging the unlawful actions of business entities in business with the government. For a review of the law surrounding such actions, see Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989).

[39] *See* Sturm, *supra* note 18, at 1355, 1357 n.1 ("public law litigation"); Chayes, *supra* note 18, at 1284, 1288–89 (same); Fiss, *supra* note 32, at 2 ("structural reform"); Eisenberg & Yeazell, *supra* note 18, at 466 ("institutional litigation"); Schlanger, *supra* note 18, at 1995 ("institutional reform litigation"). I favor and use "institutional reform litigation" because it is the most descriptively accurate, for reasons I explain in later sections of this Article. *See supra* note 18 and accompanying text.

[40] *See* Chayes, *supra* note 18, at 1310 (noting that in this type of litigation the claims are typically based on similarly situated interests, "whether organized or unorganized").

[41] *See, e.g.*, Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 225 (1964) (holding that the school board denied the petitioners equal protection under the laws guaranteed by the Fourteenth Amendment); Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions . . . . Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.").

[42] A. David Reynolds, *The Mechanics of Institutional Reform Litigation*, 8 FORDHAM URB. L.J. 695, 695 (1979–1980).

a restructuring of the institution itself to end an ongoing harm, as well as to eliminate the vestiges of prior harms.[43]

As Abram Chayes pointed out long ago, the judge in such litigation does not so much adjudicate the claim as manage it.[44] Rarely do institutional reform claims reach a verdict on the merits. Rather, they most typically result in a negotiated settlement agreement, which the court formalizes into a consent decree, a device that effectively orders performance of the settlement agreement, thus converting any breach of the agreement into a potential contempt of court.[45] Often, rather than directly monitoring the compliance with a consent decree, the court appoints a special master to serve this function.[46]

Where institutional reform litigation does reach a judicial verdict for the plaintiffs, the result is much the same. But instead of a consent decree, the court issues a structural injunctive order against the institutional defendant requiring the cessation—and often the prospective elimination of the vestiges—of the identified constitutional harm, and the judge either assumes monitoring of the compliance with the injunction directly or appoints a special master to handle the monitoring on the ground, as is true in the consent decree situation.[47] Thus, although it involves traditional remedies such as damages and negative injunctions, institutional reform litigation takes the additional step, as it must, of using the mandatory structural injunction or its contractual equivalent, the consent decree, often placing courts in direct or indirect control of public institutions for years or even decades.[48]

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[43] *See id.* at 697 (introducing the problem of remediation in institutional reform cases).

[44] *See* Chayes, *supra* note 18, at 1300–01 (describing the processes involved in fashioning institutional reform remedies).

[45] ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT 6–7 (2003); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 HARV. L. REV. 1020, 1020 (1986); Chayes, *supra* note 18, at 1298–1302; *see also* Reynolds, *supra* note 42, at 697 ("When the relief comes in the form of a consent decree, reached through negotiations between the court and all interested groups, as it often does, there is a further assurance that an appropriate balance has been struck between the competing interests.").

[46] Chayes, *supra* note 18, at 1300–01.

[47] Sturm, *supra* note 18, at 1357 (describing remedies in public law litigation and the courts' role in their implementation).

[48] Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L. SCH. L. REV. 915, 916 (2005) (describing the development of the use of injunctions and consent decrees in public law litigation); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV.

Since the posthumous publication of Lon Fuller's comprehensive project aimed at defining adjudicatory forms and their limits[49] during a time that most would view as the apex of institutional reform litigation,[50] numerous scholars have offered both challenges to and defenses of institutional reform litigation as a legitimate adjudicatory form.[51] Fuller's article focused significant attention on the idea that courts are ill-equipped to solve what Fuller termed "polycentric problems." Polycentric problems are problems that cannot be solved themselves without also solving, or at least taking into account, multiple interrelated problems at the same time. As an illustration, Fuller offered a spider web—if one touches one strand of a spider's web, the action reverberates throughout the web, causing unpredictable effects that would initially seem unrelated to the action from the

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L. REV. 1016 (2004) (reviewing the history of institutional reform litigation). To be sure, the idea of institutional reform litigation is not without its critics, *see, e.g.*, *id.* at 1018 (citing SANDLER & SCHOENBROD, *supra* note 45, at 139–82; GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 11 (1991); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265; Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 46 (1979)), and its defenders, *see, e.g.*, *id.* (citing William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 636 (1982); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 589, 674–79 (1983)). Nevertheless, there is no doubt that these cases have indeed been heard and decided in the federal courts, and they are repeatedly cited in support of the courts' institutional competence to engage in ongoing supervision of legislative policymaking.

[49] *See generally* Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Fuller wrote and refined the bulk of the essay in the 1950s and 1960s, and he published portions of it in several outlets during the 1960s and 1970s, but the full argument was not published until after his death. *See id.*

[50] *See, e.g.*, Robert Roberts, *The Rise and Fall of the Public Law Litigation Model: Implications for Public Management*, 13 PUB. ADMIN. & MGMT. 51, 56 (2008) (tracking the history of institutional reform litigation, explaining the many developments, particularly in the 1970s, that caused the form to expand, and explaining the decline of the form beginning in the 1980s).

[51] As others have pointed out, this body of scholarship began with the work of Abram Chayes and Owen Fiss and soon expanded greatly. *See* Susan Poser, *What's a Judge to Do? Remedying the Remedy in Institutional Reform Litigation*, 102 MICH. L. REV. 1307, 1307 (2004) (reviewing SANDLER & SCHOENBROD, *supra* note 45); Schlanger, *supra* note 18, at 1994 (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998)). For representative sample of important and impactful scholarly work both challenging and defending the institutional reform litigation form, see DONALD HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); Fletcher, *supra* note 48, at 635; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Eisenberg & Yeazell, *supra* note 18, at 465; Fiss, *supra* note 32, at 1–2; Chayes, *supra* note 18, at 1281.

perspective of one who can only see the strand acted upon.[52] Also, doubling the pressure on the strand does not necessarily double the reactions throughout the web—such reactions are difficult to assess unless one can take stock of the entire web at once.

Fuller took as his starting point in defining the forms of adjudication the manner in which the individual participates in an adjudicatory decision. Fuller contended that, for a decisionmaking process to be properly called *adjudication*, it must allow for the participation of interested parties in the decision through "presenting proofs and reasoned arguments," and such participation must imply a demand on the arbiter of a certain principled rationality in coming to a decision.[53] Fuller contended that the resulting expectation of principled rationality in adjudicatory decisionmaking constrains courts from being able to make political decisions, which inherently are held to a lower standard.[54] This requirement of rationality and principle also affects the controversies brought in front of judges for resolution, in that all disagreements submitted to judges tend to be converted into claims of right of one form or another.[55]

From this foundation, Fuller proceeded to opine as to which problems are suitable for adjudication and which lie beyond adjudication's useful limits. Fuller argued that polycentric problems are particularly unsuited for adjudication because of the way that participants in adjudication, the parties and their counsel, must engage the adjudicatory process—through reasoned arguments and proofs in support of claims of right.[56] These

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[52] Since Fuller's time, chaos theorists have expanded upon this idea, developing a rich theoretical, mathematical, and even popular literature explaining the behavior of chaotic systems, which, like Fuller's spider web, act in unpredictable ways due to their sensitivity to "initial conditions"—their characteristics prior to the application of stimuli. Popular culture has come to associate chaos and polycentricity with the "butterfly effect"—the claim that a rainstorm in China, for instance, may have as one of its causes a butterfly flapping its wings in Brazil. This popular understanding is not an accurate depiction of the sophisticated chaotic models that mathematical theorists have produced, but it shares elements with Fuller's idea of polycentricity.

[53] Fuller, *supra* note 49, at 364. As Fuller argued, it would make no sense to require the presentation of proofs and reasoned arguments to a decisionmaker who is incapable of or indisposed to reasoned and rational decisionmaking based on such proofs and arguments. *Id.*

[54] *Id.* at 367.

[55] *Id.* at 369.

[56] *See id.* at 398 (describing the limitations of the adjudicatory system in resolving polycentric problems).

conventions make it unlikely that the parties will adequately bring before the court the multi-faceted features of a polycentric social problem, and as a result, the court's decision is likely to have unpredictable effects, likely leading to a failure of the remedy.[57] Where the court becomes aware that the problem it confronts is polycentric, Fuller predicted, either the court will allow the adjudicatory process's rationality and principle to become corrupted through the consideration of non-evidentiary facts, hunches, politically motivated opinions, and remedial experiments; or instead of reforming the process to fit the problem, the court will reform the problem to fit the process—thus converting a political problem of resource allocation, for example, into competing legal claims of right.[58]

Around the time that Fuller's full argument was published, Abram Chayes published his seminal work defining and defending institutional reform litigation.[59] Chayes provided the first substantial defense against what he saw as the main challenge to institutional reform litigation—the lack of democratic accountability inherent in the structural injunction and consent decree process. Chayes recognized that the process of settlement and remediation of public law harms was undemocratic, but ultimately judged that this reality, though unpleasant, was an acceptable tradeoff for institutional reform litigation's potential to address political failures.[60]

Since then, commentators have at times echoed and extended the prescient theoretical critiques of Fuller, and have at other times marshaled empirical data to make the case that institutional reform litigation does not accomplish the reform it hopes to accomplish. One of the earliest critics of institutional reform litigation, William Fletcher, precipitated later critiques and provided the theoretical grounding for more empirical analyses to come.[61] Fletcher recognized that all large-scale institutional reform litigation, to be successful, must ultimately charge the judiciary with either directing or approving the making of

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[57] *Id.* at 401.

[58] *Id.*

[59] Chayes, *supra* note 18, at 1281. Although Chayes used the term "public law litigation," this term is interchangeable with the term "institutional reform litigation," along with several other terms. *See supra* note 18.

[60] Chayes, *supra* note 18, at 1312–13.

[61] Fletcher, *supra* note 48, at 635–36.

judicially favored public policy. Fletcher saw this inevitability as dangerous to judicial legitimacy and contended that judicial remedial discretion to direct the making of public policy must be viewed as presumptively illegitimate.[62]

Ross Sandler and David Schoenbrod, in their 2004 book, *Democracy by Decree*,[63] took on the Chayesian defense of institutional reform litigation on its own terms and with the benefit of hindsight. The authors provided empirical evidence of the tendency of institutional reform litigation to involve courts, or in the consent decree situation, parties, in the making of positive social policy. Sandler and Schoenbrod showed that, as a result of the settlement of an institutional reform case through the common device of the consent decree, a court in effect sets up a "controlling group" composed of lawyers for both sides of the dispute, joined by other advocates and public officials, and that this group, rather than elected officials, effectively becomes the entity that makes policy.

The authors argued that this process is the antithesis of democratic accountability, chiefly because a typical consent decree (1) requires more than would have been required under the law violated and (2) allows a current control group to bind future lawmakers to an agreement to do more than the law requires.[64] Considering the fact that consent decrees and structural injunctions, owing to their remedial purposes, both often require more of defendants than the positive constitutional or statutory law require, and that both are difficult to modify, the authors concluded that the institutional reform litigation form subverts the democratic process, even (or especially) where the government entity in question rapidly comes into compliance with minimum legal requirements but remains under the decree afterwards.

Where Sandler and Schoenbrod focused on the observable effects of institutional reform litigation on democratic processes, Gerald Rosenberg's critique of the form was based on an examination of its effectiveness at achieving the stated goal of the institutional litigation form—reform of social systems and public

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[62] *Id.* at 637 (drawing on Fuller's concept of polycentricity).

[63] SANDLER & SCHOENBROD, *supra* note 45.

[64] *See id.* at 167–74 (describing fundamental issues in using consent decrees in cases involving government and government officials).

policy.[65] Rosenberg's *The Hollow Hope* challenged the assumptions underlying the institutional reform litigation movement, and other court-centric approaches to political reform, by showing that where courts succeed in causing fundamental social change they generally do so only with the cooperation of the political branches.[66] Where such cooperation does not exist, courts can succeed if they are supported by ongoing social movements, but where neither of these conditions is present, courts are constrained by their role (and that role's corresponding lack of "hard power"[67]) from causing social change.[68]

These critiques have generated useful responses.[69] In particular, the model of "destabilization rights" recently articulated and defended in two papers presents a novel and updated defense of the institutional litigation form.[70] This defense assumes the perpetuity of the remedial phase. Where the remedial phase is assumed to be perpetual rather than time-limited, the authors claim, it is proper to expect that the process will become a new means of policymaking, involving interested stakeholders in ongoing experimentation and correction where unforeseen problems arise—arguably addressing Fuller's challenge to the polycentricity of the problems.[71] However, rather

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[65] ROSENBERG, *supra* note 48, at 5.

[66] *Id.* at 336.

[67] *See, e.g.*, Dawinder S. Sidhu, *Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict*, 1 AM. U. NAT'L SEC. L. BRIEF 69, 73 (2011) (distinguishing "between 'hard power,' which generally constitutes the ability to attain favorable foreign policy outcomes by way of military force or economic coercion, and 'soft power,' defined as the ability to achieve those outcomes by way of attraction," and then arguing that judicial power is "soft power").

[68] *See* ROSENBERG, *supra* note 48, at 336–38 (describing the judiciary's success in causing social change in both circumstances).

[69] Although generally confirming Rosenberg's claims against institutional reform litigation resulting in judicial management of "the economic and administrative powers of the state," Matthew E.K. Hall's work calls into question Rosenberg's broader conclusion that the courts are generally ineffectual at causing reform without the assistance of the political branches or social movements. *See* MATTHEW E.K. HALL, THE NATURE OF SUPREME COURT POWER 164 (2011). Specifically, Hall establishes that, where the Supreme Court limits its role to recognizing rights that the lower courts can implement, the Court has been very successful at enabling reform without political assistance. *See id.* at 163.

[70] *See* Sabel & Simon, *supra* note 48; James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003); William S. Koski, *The Evolving Role of the Courts in School Reform Twenty Years After* Rose, 98 KY. L.J. 789 (2000) (outlining a cooperative systemic approach to reform).

[71] Sabel & Simon, *supra* note 48, at 1057.

than focusing on experimentation with remedial orders, this model focuses on remedial orders that *themselves* call for experimentation, drawing upon what the authors term "new publics"—interested stakeholders who extend far beyond the attorney-led party groups criticized as "control groups" into the communities in which reform must occur.[72]

These critiques and responses are, of course, relevant to all institutional reform litigation, and they should be part of any discussion over expanding the form to new arenas of public policy. These scholarly treatments, however, are particularly relevant to the expansion of the institutional litigation form from federal to state courts—an expansion that largely happened in the policy arena of education.

As Owen Fiss pointed out years ago,[73] federal education rights litigation is the quintessential form of institutional reform litigation. The movement for reform through large-scale systemic claims seeking institutional remedies had its genesis in the seminal education rights case *Brown v. Board of Education*.[74] *Brown* itself did not arise as a class action, and neither the *Brown* decision nor its follow-on, generally referred to as "*Brown II*," resulted in remedial orders that Fuller, Chayes, Fiss, or any other observer of institutional reform litigation would view as institutional or structural remedies. Rather, the initial *Brown* case merely resulted in a declaration that segregation violates the Fourteenth Amendment,[75] while *Brown II* merely admonished states to desegregate their schools "with all deliberate speed."[76] Neither case resulted in the kind of ongoing judicial management that would later come to characterize institutional reform litigation. However, legislative resistance to both decisions led directly to cases such as *Swann v. Charlotte-Mecklenberg Board of Education*,[77] which exemplifies the institutional reform litigation paradigm.

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[72] *Id.* at 1022–28.

[73] Fiss, *supra* note 32, at 2; *see also* Liebman & Sabel, *supra* note 70.

[74] 347 U.S. 483 (1954).

[75] *See id.* at 495 ("Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

[76] Brown v. Board of Education (*Brown II*), 349 U.S. 294, 301 (1955).

[77] 402 U.S. 1 (1970). This was the first case in which the Supreme Court approved a district-wide school busing remedy.

Though there were some dissenters, and though even some supporters expressed misgivings, by the late 1960s and early 1970s, a rough consensus had developed that institutional reform litigation was a useful and effective tool available to reformers seeking to alter a constitutionally unacceptable status quo relating to the delivery of public services. Thus, it is completely understandable that, when litigation over education rights shifted its focus from racial equality to socioeconomic equality in the early 1970s, reformist attorneys strategically selected the institutional reform litigation model as the way to organize their suits.

B. EQUILIBRATION AND DEVOLUTION

In his scholarship of constitutional adjudication, Daryl Levinson has developed the influential idea of "remedial equilibration."[78] The idea is that, as courts engage in the adjudication of rights claims, a process develops by which the remedies that the courts order, over time, come to constitute the practical content of the rights enforced. This process at times gives a right more content than its text would readily denote and at times less content than it would seem the text demands. The direction often depends on the court's perception of its own institutional capital.[79]

As an example, Levinson describes the desegregation era of institutional reform litigation, where the *Brown* Court ordered no action on the part of state legislatures or school districts, but merely declared that *de jure* segregation was illegal.[80] This decision was followed closely by *Brown II*, in which the Court went one step further and ordered the lower courts in the *Brown* cases to issue orders that the plaintiff students be admitted to the white-enrolled schools "with all deliberate speed."[81] This latter remedy was directed squarely at remedying *de jure* segregation and led to an early understanding that the Equal Protection Clause provided no protection against *de facto* school segregation, such as that

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[78] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

[79] *Id.* at 876–78 (describing the desegregation era of institutional reform litigation).

[80] *Brown*, 347 U.S. at 495.

[81] *Brown II*, 349 U.S. at 301.

which might result from the combination of historical housing patterns with residential school zoning.[82]

But the *Brown* rulings were not followed locally. In fact, they were widely flouted. This recalcitrance led directly to judgments and remedies requiring school districts to fully *integrate* their school systems.[83] As Levinson points out, during this period it was unclear at best whether the equal protection right was really only a right against *de jure* segregation, or was rather a right to an integrated school system as a matter of fact.[84] Looking at the remedies, which often included the forced busing of students from one part of a district to another to achieve racial balance in district schools,[85] one would be at pains to conclude that the right to equal protection protected only against *de jure* segregation. This was the phenomenon of remedial equilibration at work—the remedies ordered in institutional reform cases challenging segregation effectively altered the scope of the right to equal protection to prohibit *de facto* segregation, or even to require school *integration*.

In time, political pressures and membership changes caused the Court to draw back on the use of broad consent decrees and structural injunctions. This began with *Milliken v. Bradley*,[86] in which the Court prevented Detroit's structural injunction from reaching surrounding suburban school districts that could not be shown to have racially discriminated themselves.[87] And it culminated twenty years later with *Missouri v. Jenkins*,[88] in which the Court rejected a structural injunction directed at making the Kansas City School District more attractive as a "magnet" for suburban students outside the district.[89] In *Jenkins*, the Court held that remedies must be directed only at removing the vestiges of prior *de jure* segregation and restoring control to the district's board.[90] The Court then remanded the case to the district court for a determination of whether "partial unitary status" had been

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[82] *See generally* Paul Auster, *De-Facto Segregation*, 6 WM. & MARY L. REV. 41 (1965).

[83] Levinson, *supra* note 78, at 877–78.

[84] *Id.* at 876–78.

[85] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1970).

[86] 418 U.S. 717 (1974).

[87] *Id.* at 757.

[88] 515 U.S. 70 (1995).

[89] *See id.* at 94 (finding that the district court had acted "beyond the scope of its broad remedial power").

[90] *See id.* at 101–03 (detailing the proper standard to be used in such cases).

achieved.[91] This decision set off a wave of unitary status relief-from-judgment motions, and many structural injunctions and consent decrees ended.[92] Thus, the right to equal protection, through remedial equilibration, once again became a right to be free from *de jure* segregation—nothing more.

The *Milliken* decision coincided with another front in the equal protection wars. On this front, plaintiffs attempted to extend the reasoning of *Brown* and the other pre-*Milliken* cases from race to socio-economic status. The test case was *San Antonio Independent School District v. Rodriguez*,[93] a case which presented the claims of students from the Edgewood School District in the San Antonio area, who argued that very large disparities in funding between their own school district and the neighboring Alamo Heights School District—with greater property wealth—constituted a violation of their rights to equal protection.[94]

Success for the *Rodriguez* plaintiffs depended on their convincing the Court to hold either that education was a fundamental right under the United States Constitution, or that wealth was a suspect classification. Either of these holdings would have meant that strict scrutiny would have been applied to the disparities in funding, and Texas would likely have lost on that test.[95] Unfortunately for the plaintiffs, the Court rejected both theories, applied rational basis review, and upheld the Texas school funding system based on the asserted state interest in preserving local control of educational decisionmaking.

The Court's stated concerns in rejecting the extension of strict scrutiny to education or wealth clearly illustrate how the content of a right becomes bound up with concerns over its remediation:

> Thus, we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local

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[91] *See id.* at 101 (declaring that the state's goal is to achieve "partial unitary status as to the quality educational programs").

[92] *See generally* Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1105–09 (1990).

[93] 411 U.S. 1 (1973).

[94] *See generally* Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and Its Aftermath*, 94 VA. L. REV. 1963 (2008).

[95] *Id.* at 1970.

> problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.[96]

In the case of *Rodriguez*, such remedial concerns effectively removed both education and wealth from the scrutiny of the Equal Protection Clause, effectively converting *Brown* from an "education rights" decision to a decision about racial equality that only happened to arise out of the public schooling context.

The *Rodriguez* decision, however, did not foreclose litigation on the right to adequate education, or even the right to equal educational opportunity. Rather, the *Rodriguez* Court's holdings that education was not a federal fundamental right, and that wealth would not be considered a suspect classification for federal equal protection purposes, effectively moved this litigation into state courts under state constitutions.[97] State constitutionalists would place these new state cases into the tradition of the "New Judicial Federalism," an independent state constitutionalism exemplified by judicial interpretations of state documents that diverge from federal interpretations of similar provisions in the federal document.[98]

From this early time, state constitutional education reform litigation has typically been framed and approached as a state-based form of the federal institutional reform litigation that led to

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[96] *Rodriguez*, 411 U.S. at 41.

[97] Indeed, this move was one that Justice Marshall directly encouraged in his dissent to *Rodriguez*. Sutton, *supra* note 94, at 1971.

[98] *See generally* G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997).

Rodriguez[99]—essentially a state-level bite at the equal protection apple.[100] State-court suits based on educational inequality among state school districts, accordingly, initially resembled the *Rodriguez* suit in most ways. Like the *Rodriguez* plaintiffs, state court plaintiffs systemically challenged the inequality of state statutes providing for the ways in which money could be raised for schools.[101]

Traditionally, as in Texas during the *Rodriguez* period, schools have been funded largely through property taxation, and the argument in state constitutional equal protection litigation was that this system of funding violated the constitutional rights of those students in school districts with low property wealth.[102] Simplified, the argument was that if District *A* has half the total property wealth and the same number of students as District *B*, then a particular level of tax "effort"[103] in District *A* will yield half the revenue, and thus half the funding per pupil, as the same level of tax effort in District *B*.[104] Plaintiffs in these suits typically sought greater "horizontal equity" through greater centralization of funding.[105] That is, they sought to make the levels of local

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[99] *See* Sabel & Simon, *supra* note 48, at 1022–28 (discussing school finance litigation in the states among the traditional forms of "public law litigation").

[100] Indeed, judicial federalism was initially predicated on the desire to achieve rights protections under state constitutions that the Burger Court was unwilling to recognize. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) ("Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.").

[101] *See generally* Sutton, *supra* note 94 (analyzing the state court plaintiff's challenge to state education finance statutes that led to unequal funding for certain school districts).

[102] WOOD, *supra* note 27, at 65–66.

[103] In property taxation, the concept of "tax effort" refers to the millage rate charged to each property owner as a yearly ad valorem tax on the property. Millage is expressed in thousandths of a dollar, as compared to total property value. Thus, a millage rate of ten would require that the homeowner pay a tax equal to one percent of the total property value each year (ten one-thousandths equals one one-hundredth of a dollar). For a home with a value of $100,000 in a district with a school tax rate of ten mills, then, the tax for the year would be $1,000.

[104] *See* WOOD, *supra* note 27, at 15–18 (explaining the relationship between a district's tax revenues and school funding).

[105] *Id.* at 66.

education funding independent of local property wealth by increasing the state role in the funding of education.

Several of these state-level efforts succeeded, but these successes were accompanied by several state-level failures.[106] As it had in the federal decision in *Rodriguez*, the question typically came down to whether (1) wealth was a suspect classification, or (2) education was a fundamental right, for equal protection purposes.[107] But as to result, the states split roughly evenly on one or both of these questions, and in general, states deciding these questions in the affirmative issued judgments in favor of the plaintiffs, while states deciding in the negative issued judgments in favor of the state defendants.[108] Invariably, where plaintiffs succeeded, legislative changes were required.[109] In enacting the required legislation, state legislatures sometimes sought the advice of the expert witnesses who had testified in the cases, but no courts actually ordered any particular policies to be enacted

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[106] *See* Bauries, *supra* note 10, at 328–33 (outlining the successes and failures during the "equality" wave of state constitutional litigation).

[107] WOOD, *supra* note 27, at 65–67.

[108] Bauries, *supra* note 10, at 328–33.

[109] Some states attempted—largely unsuccessfully—to impose "Robin Hood" methods on their wealthier districts, whereby the states "recaptured" a portion of the money raised locally over and above a state-determined baseline funding level and redistributed the recaptured funds among the poorer districts. *See generally* Maurice Dyson, *The Death of Robin Hood—Proposals for Overhauling Public School Finance*, 11 GEO. J. ON POVERTY L. & POL'Y 1 (2004) (analyzing the various changes proposed to eliminate or severely curtail the use of "Robin Hood" financing in one Texas school district). Other states created "minimum foundation" programs that guaranteed a certain basic level of funding from state and local taxation to each district, allowing localities to supplement with additional local taxation. WOOD, *supra* note 27, at 19–39. This remedy at least created an equal baseline, but it did nothing to rein in the spending of wealthy districts, and thus wide inequalities persisted. Still other states created "sliding scale" funding, whereby the legislature or state education department established a required expenditure level per pupil (often including in this number variations based on "vertical equity" to reflect the additional cost of educating students with special needs through "weighting"). *Id.* Then, the state required a certain local tax effort from each district. Where districts were able to raise enough funds to cover the required per pupil expenditure level through local taxation, state subsidies were minimal, and local spending was capped at or near the state-established level. *See generally* Carolyn D. Herrington & Virginia Weider, *Equity, Adequacy and Vouchers: Past and Present School Finance Litigation in Florida*, 27 J. EDUC. FIN. 517 (2001) (detailing Florida's education finance scheme, which uses a sliding scale). Where local efforts were insufficient, the state provided funds from sales, income, or excise taxes to make up the difference. *Id.* This latter approach eliminated the "Robin Hood" problem and created a system with smaller variations in spending levels, but it left some wealthier districts feeling unduly limited. It also left the state open to the challenge that the established statewide expenditure level per pupil was itself inadequate.

and only one equality-of-funding case resulted in a pre-judgment consent decree.[110]

Thus, the systemic approach to education finance litigation grew out of the nature of the claims initially filed—particularly their similarity to the rejected federal equal protection claims—and it initially yielded successes in some states, leading to confidence that where reformers had failed in federal court, they could succeed in state courts on similar arguments. A successful argument that the system itself was based on unconstitutional discrimination against those with lower property wealth required a system-wide elimination or reformation of laws based on such discrimination.[111]

However, unlike in desegregation litigation, where remedies focused on the district, harms to education finance equity could be remedied only through state-level policymaking directed toward eliminating the effects of local property wealth on per pupil funding. Because state legislatures stand in a co-equal status to state supreme courts, this systemic remedial requirement caused state courts to be very restrained in their orders, often providing state legislatures with encouragement, rather than direction.[112] Thus, these equality claims and remedies were inherently systemic and collective, similar to typical institutional reform litigation claims, but on an even broader, statewide scale, and with less directive remediation.

Later, when equal protection arguments began to lose favor with state courts, reformers began to move away from pure equal protection arguments and emphasized instead the quality-based terms of state constitutional education clauses, arguing for educational adequacy.[113] Although the theory of educational adequacy, as a non-relative entitlement, differed from the theory of educational equality, as a relational or comparative protection,

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[110] *See* Md. State Bd. of Educ. v. Bradford, 875 A.2d 703, 709–10 (Md. 2005) (describing the 1995 consent decree in the ongoing case).

[111] *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 939–40, 958 (Cal. 1976) (ordering the restructuring of California's state school financing system).

[112] *See, e.g.*, Robinson v. Cahill, 287 A.2d 187, 217 (N.J. 1972) ("Nothing herein shall be construed as requiring the Legislature to adopt a specific system of financing or taxation. The Legislature may approach the goal required by the Education Clause by any methods reasonably calculated to accomplish that purpose consistent with the equal protection requirements of law.").

[113] *See* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMPLE L. REV. 1151, 1157–62 (1995).

the structure and the framing of the cases remained systemic.[114] Opponents of this newly dominant theory contended that state courts were ill-suited to pass judgment on the statewide priority-setting appropriations decisions of elected legislatures, notwithstanding that courts may be suited to evaluate legislatively created inequalities.[115] However, when defendants in educational adequacy cases began to press the courts with these separation of powers arguments, both courts and scholars cited the fact that both federal and state courts in institutional reform litigation over desegregation and school finance equality had exhibited the competence to engage in the review and management of legislative policymaking,[116] thus justifying the continuation of the systemic approach as the cases transitioned from equality-dominant to adequacy-dominant.

C. REFORM LITIGATION AND PATH DEPENDENCE

Today, the influence of the federal institutional reform litigation model on state constitutional education litigation is quite clear.[117] The most common plaintiffs in educational adequacy suits are not individuals, but groups of school districts and advocacy organizations,[118] and the most common relief requested is

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[114] *See* William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1640 (1989) (describing the systemic focus of education finance litigation as adequacy suits began to emerge).

[115] *E.g.*, Joshua Dunn & Martha Derthick, *Adequacy Litigation and the Separation of Powers*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 322 (Martin R. West & Paul E. Peterson eds., 2007).

[116] *See, e.g.*, Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1535 (2007) (advocating for participatory judicial review based on judicial competence to manage large-scale institutional reform litigation remedies); 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, 1057–58 (1993) (same); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989) (same); George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543 (1994) (same).

[117] In addition to litigants approaching it as institutional reform litigation, commentators have prominently analyzed it as such. *See, e.g.*, Sabel & Simon, *supra* note 48, at 1022 (describing and defending state education litigation as a type of institutional reform litigation).

[118] *See, e.g.*, Sonja Ralston Elder, *Enforcing Public Educational Rights via a Private Right of Action*, 1 DUKE F.L. & SOC. CHANGE 137, 143–44 (2009) ("In more than 80 percent of [cases filed by 2009], a school district or nonprofit organization was a named plaintiff. In

declaratory or injunctive and directed at state-level policymakers for statewide application, rather than for the remediation of individual harms.[119] The implicit (and sometimes explicit) goal of most plaintiffs is to achieve what the plaintiffs achieved in the seminal 1989 Kentucky case, *Rose v. Council for Better Education, Inc.*,[120] wherein the state supreme court invalidated the entire state system of education and issued a declaration laying out guidelines for the state legislature to remake the system from scratch. This desire to remake the entire system has its roots in the line of precedent stretching back to *Brown*, and the state court suits are plausibly seen as the result of path dependence on the federal institutional reform model.

Legal scholars have for some time been interested in the idea of path dependence—roughly defined as the tendency of actors in a system to follow a path once blazed. Oona Hathaway, for example, has persuasively demonstrated that the system of precedent and stare decisis in law is an inherently path-dependent process.[121] She has also shown, however, that such path dependence, though at times usefully constraining, can become costly over time, and that courts should remain attentive to this phenomenon and be willing to relax the rules of stare decisis when the costs of tradition outweigh its benefits.[122] A normatively undesirable form of path dependence in the law, therefore, might be exemplified where courts follow a path of past practices blindly, with little or no reflection as to whether the path is a sound one.

State constitutionalists have identified a particular form of normatively undesirable path dependence practiced by state courts and labeled it "lockstepping." Lockstepping refers to the practice in state courts of unreflectively adopting rights doctrines that the federal courts have developed over time and applying these doctrines to state constitutional provisions that appear to provide

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the remaining eight cases in which all plaintiffs were individual students, the suits were filed as or treated as class actions rather than individual suits.").

[119] *See, e.g.*, Thro, *supra* note 114, at 1640 & n.7 (describing the majority of cases as "declaratory judgment actions of two distinct varieties," actions seeking declarations of inequality and actions seeking declarations of inadequacy).

[120] 790 S.W.2d 186 (1989).

[121] Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 602–04 (2001).

[122] *Id.* at 660–61 (suggesting that in certain scenarios the court should "relax the doctrine of stare decisis" and "reconsider the issue with a more critical eye toward precedents").

for similar rights.[123] Some state constitutionalists have also been interested in a more subtle form of lockstepping than the lockstepping of *doctrine*. This form is the lockstepping of *conceptions of rights* from federal to state courts, and it is most easily seen in the context of state constitutional rights that do not have federal analogues, such as the right to education.[124] "Conceptual convergence," as I have termed it, should concern us if it means that state courts, in adjudicating unique state constitutional rights, are unduly constraining their own interpretations or approaches, especially unwittingly, by trying to fit their conceptions of unique state constitutional rights to existing conceptions of distinct federal constitutional rights.

The movement of institutional education reform litigation from federal court, where it succeeded to a point in policing systemic inequalities, to state courts, where it is currently employed to police overall inadequacies in funding, is also a form of convergence or lockstepping—a lockstepping of adjudicatory forms from one rights system to another. But is this movement an undesirable form of lockstepping? For several reasons, it appears to be. First, the rights (assuming for now that "rights" are in fact at issue in state constitutional education litigation) are different in nature. If a right to education exists under state constitutions, the right is a positive right,[125] whereas the entire institutional reform apparatus of the federal courts was constructed to enforce negative rights.[126]

Second, the sorts of rights at issue in state constitutional education litigation, when approached systemically, require affirmative action on the part of the state legislature for vindication. Accordingly, the claims ask the courts to determine whether the legislature has engaged in appropriate action to benefit the plaintiffs and other students in the state—in short, whether the legislature has done enough, usually meaning

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[123] *See* Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1505–06 (2005) (describing lockstepping with the label "unreflective adoptionism").

[124] *See* Bauries, *supra* note 10, at 335 (describing this theory in the education context through analysis of *Robinson*).

[125] *See generally* Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989).

[126] *See supra* notes 39–48 and accompanying text (discussing the kinds of claims generally at issue in federal institutional reform litigation).

whether it has appropriated enough funds to maintain an adequate educational system. A litigation approach that asks the state judiciary to pass judgment on whether the state legislature has appropriated sufficient statewide funds for a public benefit makes inter-branch confrontation very likely.[127] In fact, it is hard to imagine such a claim being remediated in any other way than the judicial direction (either explicit or implicit) of public policymaking.

Third, and most importantly, the nature of an education clause claim gives rise to all of the dangers that Fuller warned us of when courts attempt to solve polycentric problems through judicial orders, particularly the problem of courts turning resource allocation problems into claims of collective "right."[128] Indeed, state courts have recognized these problems, but their responses to these problems have created another problem, a paradox truly unique to state courts—the *subversion* of positive rights through their *purported enforcement*. The next section explores this problem.

D. SYSTEMIC REMEDIES AND INDIVIDUAL POSITIVE RIGHTS

As introduced above, if an individual constitutional right to an adequate education exists, it is a positive or affirmative right.[129] As David Currie explained years ago, positive rights are entitlements to government services, whereas negative rights are immunities from government action.[130] The claims presented in educational adequacy litigation are founded on constitutional provisions that are stated affirmatively—that *guarantee* certain things to the people from their government, rather than *forbidding* certain government actions against individuals. And the harm is a failure to do something, or more commonly the failure to do *enough* of something.

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[127] *See* Joshua Dunn & Martha Derthick, *Adequacy Litigation and the Separation of Powers*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 322, 324–36 (Martin R. West & Paul E. Peterson eds., 2007) (discussing the "plain" challenge that the separation of powers poses for educational adequacy lawsuits on a systemic level).

[128] Fuller, *supra* note 49, at 401.

[129] *See generally* Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989).

[130] *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 874 (1986) (distinguishing between positive remedies for negative rights violations and positive constitutional rights themselves).

The upshot of this distinction is that, if a court determines that a positive right has been violated, then the violation must be due to lack of sufficient action to fulfill the positive right. Naturally, the remedy would be the judicial compelling of the withheld action through mandamus or injunction. But where claims are systemic, this natural conclusion creates a significant separation of powers problem, in that the natural remedy for a systemic violation is the judicial ordering of the making of positive social policy, a function clearly reserved to the legislature in each state.[131] Courts have responded to this problem by either avoiding the rights question altogether or merely "talking rights"[132] without actually enforcing rights.

Federal institutional reform litigation is focused at a base level with the protection of individual rights, usually rights to equal protection or due process, and its systemic focus comes from the fact that many rights-holders are harmed in identical ways, for example through a district-wide policy of school segregation.[133] State constitutional educational adequacy litigation, in contrast, focuses directly on systemic legislative duties, rather than aggregate violations of individual rights.[134] Rights generally are discussed in two contexts. The first is as a means of responding to an objection based on non-justiciability. The second is as a means of adding rhetorical force to the court's ultimate decision.

1. Individual Education Rights and Generalized Standing. In school finance adequacy litigation, individual students sometimes participate as parties or witnesses, but the claims generally do not focus on the educational entitlements of these individual students.[135] The student parties are there mostly to establish standing, not to seek their own individual remedies. And as a result, judicial remedial orders are never directed at curing individual students' educational inadequacies, even where those individual inadequacies are in evidence.[136]

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[131] Dunn & Derthick, *supra* note 115, at 324–25.

[132] *See generally* GLENDON, *supra* note 1.

[133] *See supra* notes 21–76 and accompanying text (discussing institutional reform litigation).

[134] Bauries, *supra* note 12, at 736–37.

[135] *See* Elder, *supra* note 118, at 138.

[136] *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989) (following an extensive analysis of both district-level and student-level inadequacies and a judgment of unconstitutionality, stating, "We decline to issue any injunctions, restraining orders, writs of prohibition or writs of mandamus.").

In response to objections based on the political question doctrine, or asserting that claims present only generalized grievances rather than live controversies, courts sometimes declare that state residents have a "right to education." However, even where courts declare this "right to education" to be violated, their decisions always consist either of statewide or regional injunctions, or declarations of unconstitutionality.[137] Thus, the "right to education" in these states seems to be nothing more than the standing of an individual to assert a generalized grievance concerning the systemic adequacy of the state education system.

In fact, at least one state court has explicitly adopted this conception as its interpretation of the "right to education" in a systemic suit. In *Claremont School District v. Governor*, the New Hampshire Supreme Court declared:

> The right to an adequate education mandated by the constitution is not based on the exclusive needs of a particular individual, but rather is a right held by the public to enforce the State's duty. Any citizen has standing to enforce this right.[138]

This interpretation allowed rights-based language to give rise to a justiciable system-wide claim, which ultimately resulted in a systemic order directed at the legislature,[139] but the same interpretation also subverted any individual entitlement to an

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[137] *See, e.g.*, Campbell Cnty. Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) (after declaring that education is a "fundamental right," ordering the state to redesign the statewide school system entirely); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 201 (Ky. 1989) (stating, "[O]ur citizens are given a fundamental right to education in our Constitution," but going on to issue a system-wide declaratory judgment).

[138] Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1381 (N.H. 1993).

[139] The court stated its decision as follows:

> Given the complexities of our society today, the State's constitutional duty extends beyond mere reading, writing and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas. We are confident that the legislature and the Governor will fulfill their responsibility with respect to defining the specifics of, and the appropriate means to provide through public education, the knowledge and learning essential to the preservation of a free government.

Id.

adequate education that might otherwise have been derived from the New Hampshire Constitution's education clause.

2. The Rhetorical Force of "Fundamental" Rights. In another group of cases, state supreme courts, engaging a "lockstepped" equal protection analysis, have come to the conclusion that education is a "fundamental right."[140] Declaring a right to be "fundamental" in equal protection analysis allowed some early state courts to apply strict scrutiny to unequal funding burdens on local school district residents, regardless of whether wealth was also held to be a suspect classification.[141] However, designating a right as "fundamental" does not settle the question whether the right in question is an individual entitlement standing alone or a relational right to equal treatment, and it certainly does not settle the question whether, if it is an entitlement, it entitles its holder to a certain quantum of whatever the right protects.

One example will suffice to illustrate this point. The federal fundamental right to privacy requires that a state refrain from prohibiting its married citizens from using contraceptives,[142] discriminating against unmarried couples in the regulation of contraceptives,[143] or even discriminating against purchasers under sixteen years of age in permitting the sale of contraceptives.[144] What it does *not* require is any state to *provide* contraceptives to anyone. It merely protects against the state actively stopping contraceptive use, or discriminating as to who is allowed to purchase contraceptives. The way in which courts rule against these actions is through strict judicial scrutiny over any police power justifications offered by the state for legislating any such prohibition or discrimination. This is how all "fundamental rights" work in equal protection analysis—as triggers for the court to strictly scrutinize active government prohibitions against, or discrimination in the regulation of, private exercises of the right—

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[140] *See* Bauries, *supra* note 10, at 328–33 (explaining that the lockstepping that occurred in the area of educational equality litigation involved adopting both the tiered scrutiny analysis found in federal equal protection doctrine and the triggers for potential strict judicial scrutiny under that tiered system (fundamental rights and suspect classifications)); *see also supra* notes 97–116 and accompanying text (discussing equal protection analysis in state courts after *Rodriguez*).

[141] *See* Bauries, *supra* note 10, at 333–34 (highlighting state courts' focus on educational adequacy instead of equality, and individual claim-rights against legislatures).

[142] Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

[143] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[144] Carey v. Population Servs. Int'l, 431 U.S. 678, 697–99 (1977).

not as requirements that government act affirmatively to fulfill a person's right. In other words, in equal protection analysis, fundamental rights are presumptive immunities against government action, not entitlements.

In educational adequacy suits (which *do* involve claims that the government must affirmatively act to fulfill individual entitlements), courts initially were faced with the question whether the state constitution guaranteed each individual an educational entitlement of a certain quality. Eliding the distinction between positive and negative rights, the courts in these later educational adequacy cases at times have begun with the "fundamental rights" language of the early lockstepping equal protection decisions and declared the question settled,[145] and at other times have conflated the positive rights question with the lockstepped equal protection analysis.[146] Doing so, while ignoring the analytical context of "fundamental rights" doctrine as it has developed in equal protection law, simply converted negative equality rights to positive adequacy rights with little or no independent analysis of the state constitution's language for whether it established a positive individual entitlement. Considering that state courts in suits against coordinate branches of government already have a built-in institutional legitimacy problem to overcome,[147] failing to appropriately justify these newly declared rights was a mistake.[148]

The use of "fundamental rights" in the realm of positive educational entitlements, once coupled with the systemic nature of

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[145] *See, e.g.*, Conn. Coal. for Justice in Educ. Fund., Inc. v. Rell, 990 A.2d 206, 235 (Conn. 2010) (concluding from the finding in an earlier equality case that the "fundamental right to an education" must have some substantive qualitative content).

[146] *See, e.g.*, Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1358–59 (N.H. 1997) ("Second, and of persuasive force, is the simple fact that even a minimalist view of educational adequacy recognizes the role of education in preparing citizens to participate in the exercise of voting and first amendment rights. The latter being recognized as fundamental, it is illogical to place the means to exercise those rights on less substantial constitutional footing than the rights themselves. We hold that in this State a constitutionally adequate public education is a fundamental right.").

[147] Dunn & Derthick, *supra* note 115, at 324 (referring to the separation of powers problems in educational adequacy litigation as "plain").

[148] *See* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1020–21 (2007) (examining the use of written and published reasoning in legal opinions to foster the perceived legitimacy of a judicial opinion, and explaining that, to achieve "legal legitimacy," a judicial opinion must contain "a full and candid exposition of the Court's reasoning").

educational adequacy claims, made it inevitable that state courts would overreach. If the right to adequate education is both positive and "fundamental," then a restrained or deferential judicial declaration of what that right requires statewide seems inappropriate, and so the courts addressing the merits of educational adequacy claims have reached for lofty expressions and statute-like lists of "minimal" requirements for the statewide school system.

For example, the Kentucky Constitution's education clause states, "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state."[149] In its path-breaking decision in 1989, after holding that education was a "fundamental right,"[150] the Kentucky Supreme Court held that the word "efficient" in this clause means:

> (1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.
> (2) Common schools shall be free to all.
> (3) Common schools shall be available to all Kentucky children.
> (4) Common schools shall be substantially uniform throughout the state.
> (5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.
> (6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.
> (7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.
> (8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.

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[149] KY. CONST. § 183.
[150] Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 201 (Ky. 1989).

> (9) An adequate education is one which has as its goal the development of the seven capacities recited previously.[151]

By themselves, most of these items seem reasonable interpretations of the words "efficient system of common schools," which can reasonably be read to contain a mandate of equal treatment. However, Subsection (9) on the list cross-references another portion of the same opinion, where the court expands on the "capacities" that must be part of an "efficient" education system's curriculum:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[152]

Whatever the merits of this exhaustive list, it strains credulity that the list is made a mandated curricular framework by the words, "efficient system of common schools." Adding to this problem, the Kentucky Supreme Court's declaration of these requirements (and its declaration that the current system did not

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[151] *Id.* at 212–13.
[152] *Id.* at 212.

meet them) did not direct any relief to any student.[153] The court's declaration operated instead as a general legislative-type pronouncement, rather than as the resolution of an adverse claim.

The effect of stating the requirements of the system in this way was profound. The Kentucky decision has been cited or relied on in nearly every state education clause case since. Some state supreme courts have even adopted the Kentucky court's exact formulation verbatim as the correct interpretation of *their own* state constitutions. For example, in Massachusetts, which has a state constitutional education clause that could not be more textually and historically distinct from Kentucky's,[154] after engaging in a thoughtful analysis of the intent of the colonial drafters, the semantic meaning of the specific words of the education clause, and the structure of the Massachusetts government, the court articulated a set of "guidelines" for the legislature to follow in designing the education system.[155] These guidelines were a verbatim recitation of the seven curricular capacities articulated in *Rose* by the Kentucky Supreme Court.[156] The Massachusetts Court likewise did not issue an individual remedial order.

Many other states have issued declaratory "guidelines" for prospective state legislation without ordering relief for any individual. Some of these states, such as Massachusetts[157] and New Hampshire,[158] adopted the Kentucky court's test wholesale.

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[153] *Id.* at 215 ("We decline to issue any injunctions, restraining orders, writs of prohibition or writs of mandamus.").

[154] *Compare* KY. CONST. § 183 ("The general assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.") (ratified in 1891), *with* MASS. CONST. Pt. II, Ch. 5, § 2 ("Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns . . . .") (ratified in 1780 and still the oldest continuously functioning constitutional document in the world).

[155] McDuffy v. Sec. of Exec. Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993).

[156] *See id.* (quoting the Kentucky formulation as a set of guidelines for the legislature's redesign of the state education system).

[157] *See supra* note 154 and accompanying text (discussing the Massachusetts Supreme Court's adoption of the Kentucky guidelines).

[158] Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997).

Others, such as New York[159] and South Carolina,[160] derived their own lists of guidelines which greatly resembled those articulated in *Rose*. Later courts sometimes adopted guidelines from courts other than Kentucky's. For instance, the Connecticut Supreme Court adopted as its standard the guidelines developed by the New York Court of Appeals, despite some textual differences between the two states' constitutions.[161] The Kentucky court itself relied on the earlier pronouncements of the West Virginia Supreme Court in interpreting that state's constitution, which requires a "thorough and efficient" education system, as compared with Kentucky's "efficient system" command.[162]

It is damaging to the legitimacy of independent state constitutionalism that these declarations exist. They illustrate an activism in reading state constitutional terms that would never be tolerated at the federal level, and they accordingly call into question the judicial federalism project.[163] Undergirding the judicial federalism project is the idea that state courts can be trusted to develop independent interpretive doctrines of constitutional rights as "real" courts, based on the unique text,

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[159] Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995).

[160] Abbeville Cnty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999) ("[P]roviding students adequate and safe facilities in which they have the opportunity to acquire: 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and 3) academic and vocational skills.").

[161] Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 254 (Conn. 2010). *Compare* CONN. CONST. art. VIII, § 1 ("There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation."), *with* N.Y. CONST. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.").

[162] *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 210 (Ky. 1989) ("The court continued by recognizing areas in which each child educated in the system should develop to full capacity: 1) literacy; 2) mathematical ability; 3) knowledge of government sufficient to equip the individual to make informed choices as a citizen; 4) self-knowledge sufficient to intelligently choose life work; 5) vocational or advanced academic training; 6) recreational pursuits; 7) creative interests; 8) social ethics. Support services, such as good physical facilities and instructional resources, and state and local monitoring for waste and incompetency were considered to be implicit in the definition of 'a thorough and efficient system.' " (quoting *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979))).

[163] Judicial federalism, or as it is sometimes called, the "New Judicial Federalism," denotes an independent state constitutionalism exemplified by judicial interpretations of state Constitutions that diverge from federal interpretations of similar provisions in the Federal Constitution. *See* Tarr, *supra* note 98, at 1097 (describing New Judicial Federalism as "the increased reliance by state judges on state declarations of rights to secure rights unavailable under the United States Constitution").

history, and structure of state constitutions, as well as the unique populations that ratified each document and currently live under it.[164] Already judicial federalism has been called into question effectively on the grounds of lack of distinctiveness in its discourse on rights analogous to rights found in the Federal Constitution.[165] It would be a shame (from a perspective favoring the value of independent state constitutionalism) if the discourse on provisions *without* federal analogues were to become similarly impoverished because courts were reluctant to limit themselves to speaking as courts speak—through resolving disputed claims of right based on the unique terms of each state's document and the facts applying to the parties involved in the dispute.

3. "Legislative Holdings" and Fiduciary Legislative Duty. The use of the systemic declaration in many of these cases gives rise to the concern that state courts, even where they restrain themselves from ordering specific spending and taxation increases, are in fact acting more legislatively than judicially. Declaratory judgments such as the one issued by the Supreme Court of Kentucky read like legislation. Lawrence Solum has ably questioned whether courts of last resort ought to be in the business of issuing what he terms "legislative holdings"—statements in judicial opinions, usually beginning with the words, "We hold that," and placing prospective requirements on legal actors beyond what the resolution of the facts of the case require.[166] Solum sees these sorts of pronouncements as problematic because they amount to judicial overreach.[167]

But there is another problem with legislative holdings—one unique to the realm of affirmative legislative duties, such as the duty to provide for an education system. As to such affirmative duties, state legislatures stand in a fiduciary capacity to the state

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[164] *Id.* at 1098.

[165] *See generally* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992) (attributing the status of state constitutional law today to the failure of state courts to develop a coherent discourse of state constitutional law). Nevertheless, the movement to encourage state courts to develop independent state constitutional jurisprudence continues, and it is therefore important that this movement not be undercut by state court overreach.

[166] Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 188 (2006).

[167] *Id.*

polity, with duties of care and loyalty.[168] Such duties require clear lines of accountability because, notwithstanding the potential for judicial review, the political process is the principal check on the legislature's performance of its duties to the people. However, the common use of the declaratory judgment that holds the system unconstitutional and makes a broad, legislative pronouncement as to what substantive elements the state system must contain absolves the legislature of these obligations and instead allows the legislature to point its collective finger at the courts any time it does what inevitably must be done—raise taxes to provide for a desirable public benefit.

In the short term, this political cover can be a good thing—it certainly was in Kentucky after *Rose*.[169] But over time, if the judiciary's practice is to examine the entire state education system, to pass judgment on that system, and then to articulate policy goals that must be pursued in remaking the system, then this practice is likely to lead to a kind of "legislative learned helplessness,"[170] a situation in which the legislature does not truly engage the legislative process with due care until it gets guidance from the court as to how it must proceed to avoid a constitutional problem. Systemic judicial review can be focused on process, rather than product, to minimize this problem,[171] but a better way to avoid it—one that preserves the traditional judicial function better—would be to avoid systemic judicial review altogether wherever possible.

Framing educational adequacy cases systemically and naming the state, the executive branch, or the legislature as the defendant sets up an obvious inter-branch conflict.[172] Any decision holding

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[168] *See generally* Bauries, *supra* note 19 (examining the fiduciary duties that state constitutions place on state legislatures).

[169] *See* Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 343 (1991) ("The case caused the legislature to fashion new tax legislation which resulted in increased revenues of over one billion dollars. Without the impetus of the court it is doubtful that any new tax funds would have been found, and certainly few, if any, new funds would have been allocated to the public schools. The court provided the legislature with both the nerve and the rationale to raise taxes, equalize school funding, and make other necessary changes.").

[170] *See* Scott R. Bauries, *American School Finance Litigation and the Right to Education in South Africa*, 27 S. AFR. PUB. L. 409 (2012) (developing the idea of legislative learned helplessness in a comparative context).

[171] Bauries, *supra* note 19, at 762–64 (detailing a process-based form of systemic review founded on the idea of the legislature as the fiduciary of the people).

[172] Dunn & Derthick, *supra* note 115, at 351.

the state school system unconstitutional due to an inadequacy in funding portends the judiciary ordering the legislature to increase educational appropriations, and therefore, to raise taxes or cut other spending. Few observers would see this as a legitimate role for the judiciary, but where the constitutional flaw is the failure of the legislature to provide *enough* of a statewide public benefit, this mandated appropriations remedy is the natural choice. Understanding this inevitability, state courts choosing to enter the fray over affirmative legislative duties most often prudently choose to issue declarations that the constitutional requirement has not been met, rather than directive remedial orders to provide for the funding that has not yet been provided.

But not all state courts have been similarly restrained. Some state courts, such as Florida's,[173] have responded to the inevitable institutional conflict with complete—one might say undue[174]—restraint, refusing to rule at all on education rights claims.[175] Others opt to confront the inter-branch power struggle head on and issue systemic injunctions ordering statewide or regional expenditure increases.[176] The exemplar for this approach is New Jersey, where the courts have been locked in an institutional conflict with the legislature and executive branch spanning forty years and nearly thirty separate decisions of the New Jersey Supreme Court.[177] Nevertheless, though each of these approaches is distinct from the others, all are decidedly *systemic* approaches to enforcing (or declining to enforce) the obligations of a state constitution's education clause. None of these approaches leads to the individual remediation of any individual rights violations. This systemic approach to enforcement therefore subverts the very idea of an *individual* right to adequate education.

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[173] *See* Coal. For Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 407–08 (Fla. 1996) (dismissing an educational adequacy suit as a non-justiciable political question).

[174] *See, e.g.*, Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 594–97 (2004) (terming these sorts of pre-merits dismissals "judicial abdication").

[175] *See* Bauries, *supra* note 12, at 740–41 (noting that, in most of these cases, courts lockstep the federal political question doctrine, holding that the state constitution's education clause lacks "judicially manageable standards" for adjudication and remediation).

[176] *See id.* at 741–42 (discussing directive systemic remediation cases).

[177] *See* Bauries, *supra* note 10, at 334–36 (discussing the New Jersey saga, which remains ongoing at this writing).

Accepting these conclusions does not require accepting that positive rights to adequate education do not exist, or that they cannot exist, or that state courts are not competent to examine the question. But it does mean that state courts never *have* seriously examined the question whether their state constitutions establish positive individual rights to adequate education. State courts can, and should, engage this question seriously and on its own merits, but as shown above, they cannot accomplish this task through systemic institutional reform litigation. Rather, to seriously engage the important question whether state constitutions provide for individual positive rights, state courts must reject the current approach and its systemic adjudication of polycentric problems in their entirety, and begin to embrace individual entitlement claims for individual remedies. The next section considers a constitutional methodology that can usefully undergird such individual claims.

III. A COMMON LAW STATE CONSTITUTIONALISM

Rather than the systemic institutional reform litigation approach that reformers have used thus far to enforce an ostensible "right to education," another approach would be both more effective and more protective of individual rights, along with both judicial and legislative prerogatives. This approach is derived from the common law theory of constitutional interpretation, first fully developed by David Strauss.[178] "Common law constitutionalism," as it is now generally called, refers to an incrementalist adjudicatory process that takes seriously the constraining forces of both *tradition*[179] and *convention*.[180] The constraint of tradition generally counsels for adherence to incrementally developed precedent, along with a willingness to discard or alter such precedent only in the face of persistent evidence of changing societal norms or a principled argument for manifest error in the prior precedent.[181] The constraint of

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[178] David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

[179] *Id.* at 891–92.

[180] *Id.* at 906–07.

[181] *Id.* at 934–35. An example of the first basis would be the Supreme Court's gradual move away from *Lochner v. New York*, 198 U.S. 45 (1905), and the constitutional freedom of

convention generally counsels for adherence to constitutional text as a primary, but not always completely dispositive, source of meaning.[182] Neither of these constraints is absolute, but overcoming either requires principled reasons best reflected in a judicial opinion rendered in the context of a live controversy.[183]

At this point, to avoid confusion, it is necessary to distinguish *common law constitutionalism* from the *constitutional common law*. Constitutional common law, as developed by Henry Monaghan, describes a body of doctrine that assists the courts in enforcing the terms of the Constitution.[184] This body of doctrine mostly consists of judicially developed, prophylactic rules, such as the *Miranda* doctrine, which Congress could alter significantly were it to choose to do so.[185] In short, constitutional common law describes a discrete body of rules, not a method of adjudication. In contrast, common law constitutionalism describes a methodology of adjudication of constitutional issues.[186] This methodology takes its form from the methodologies that common law courts employ to make law in areas such as contracts, torts, and property. But common law constitutionalism does not denote any body of rules itself.[187] Thus, common law constitutional methods might result in the courts developing rules that Henry Monaghan would recognize as constitutional common law,[188] but it might also result in the courts issuing less politically negotiable interpretations of constitutional text.

It is also important to distinguish my argument here for using common law constitutionalism as a method of interpreting state constitutions from a related—and important—argument recently developed at length by Helen Hershkoff, a frequent and

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contract. An example of the second would be the Court's rejection of *Plessy v. Ferguson*, 163 U.S. 537 (1896), in *Brown v. Board of Education*, 347 U.S. 483 (1954).

[182] Strauss, *supra* note 178, at 995.

[183] *Id.* at 984, 997.

[184] Henry Monaghan, *The Supreme Court 1974 Term-Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

[185] *See id.* at 2 (discussing the *Miranda* doctrine as an example of constitutional common law).

[186] *See generally* Abigail R. Moncrief, *Common-Law Constitutionalism, The Constitutional Common Law, and the Validity of the Individual Mandate*, 92 B.U. L. REV. 1245 (2012) (illustrating the difference between common-law constitutionalism and constitutional common law by evaluating the purported constitutionality of the individual mandate).

[187] *See id.* at 1246 (distinguishing the method of creating the rules from the rules created).

[188] *Id.*

distinguished commentator on state constitutional rights enforcement.[189] Hershkoff argues—quite persuasively—that state constitutional rights provisions, even the more "aspirational" provisions such as those protecting rights to welfare, education, and health care, should influence the development of the traditional common law of torts, contracts, property, and agency in the states.[190] As this Article does, Hershkoff's article favors an incremental approach to law development, but Hershkoff's focus is on developing the traditional common law as a body of doctrine by taking account of constitutional values,[191] whereas the focus of this Article is on the direct enforcement of the state constitutional provisions that contain those values. In other words, the focus here is on the common law method, rather than the common law itself.

The common law process involves the adjudication of the rights of specific individuals on narrow issues, rather than the issuance of broad, legislative-type judicial declarations that attempt to flesh out the entire, settled meaning of a constitutional scheme.[192] This focus on claim-by-claim law development makes common law constitutionalism the perfect vehicle for deriving content from vaguely stated positive rights provisions in state constitutions.

As others have pointed out, the chief challenge in enforcing the education clauses of state constitutions is the "inherently nebulous" nature of the quality-based terms in each clause.[193] A

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[189] *See generally* Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521 (2010).

[190] *See id.* at 1533, 1582 (suggesting that common-law development of state constitutional socio-economic provisions can indirectly influence the development of private laws); *see also* Judith S. Kaye, *Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L.J. 727, 729 (1992) (calling for a renewed focus on state common law as a complement to state constitutional law).

[191] Hershkoff, *supra* note 189, at 1582.

[192] *See* Strauss, *supra* note 178, at 894 (describing the traditionalist constraint as one directed at recognizing the common-law virtues of "humility, the limits of human reason, and distrust of abstract argument," all virtues better served through incrementalist decisionmaking on the claims of identifiable individuals than broad-scale systemic claims, which tend toward the abstract and theoretical); Moncrief, *supra* note 186, at 1247 (describing Strauss's book-length articulation of his theory thus: "A court announces a constitutional rule in the course of deciding a case, sees how that rule works in the world beyond its doors, and then makes adjustments slowly and carefully through case-by-case elaboration and with due respect for precedent.").

[193] Clayton P. Gillette, *Reconstructing Local Control of School Finance: A Cautionary Note*, 25 CAP. U. L. REV. 37, 37 (1996); *see also* Bauries, *supra* note 12, at 714 (noting

common response to objections to the justiciability of education clauses based on the lack of judicially manageable standards is that courts interpret vague and subjective terminology in the Federal Constitution all the time.[194] This claim is certainly true. The words "due," "cruel," "unusual," "speedy," and "unreasonable" are all just as vague, subjective, and lacking in a generally accepted meaning as "thorough," "efficient," "suitable," and "adequate," so why should we have a problem with state courts interpreting the latter if we have no problem with federal courts interpreting the former?

The answer is that we should not have a problem with either. Interpretation is the quintessential element of the judicial role, and judges should be very careful (and ordinarily should have reasons in addition to the vagueness and subjectivity of a term) when they choose not to engage in this element of their role.[195] However, the methodologies a court engages when it interprets vague terms such as "unreasonable" or "sufficient," should differ from the methodologies the court is willing to employ where the text is clear and admits of only one meaning. The common law constitutionalist methodology recognizes this truth, and illustrates its operation through the partial constraint of *convention*, in the form of constitutional text.[196] It is appropriate for a court to make a one-time, legislative pronouncement of the meaning of a clear provision (or a provision for which clear, contemporaneous evidence of its meaning exists), as such a pronouncement does not present a real risk of judicial error, and settling that a word means just what it says serves the interests of efficiency and predictability.

In contrast, where terminology is vague, subjective, and elusive in its natural meaning, courts should be much more cautious—humble, even.[197] An incrementalist approach is best suited to

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Gillette's recognition of the "inherently nebulous" nature of state constitution education clauses).

[194] *See, e.g.*, State v. Campbell Cnty. Sch. Dist., 32 P.3d 325, 335–36 (Wyo. 2001) (offering the Due Process Clause and the Equal Protection Clause as examples of the courts' ability to deal with "amorphous" terminology).

[195] *Cf.* Baker v. Carr, 369 U.S. 186, 226 (1962).

[196] *See* Strauss, *supra* note 178, at 906 (describing how the constraint of convention dictates that when text is relatively clear it should be followed without much interpretation).

[197] *See* William E. Thro, *Judicial Humility: The Enduring Legacy of* Rose v. Council for Better Education, 98 KY. L.J. 717, 722–23 (2010). Thro places the *Rose* court in the

nebulous text because nebulous text inherently presents the court with a much higher possibility of error in interpretation than clear text. And because judicially announced constitutional law tends to be, for lack of a better word, "sticky"—an error in a decision that purports to announce the entire meaning of a vague provision might be an error that persists for a very long time.[198]

Borrowing an apt example from Lawrence Rosenthal, imagine that the Court, acting in a maximalist fashion, fixed the meaning of "due" in the Due Process Clause in 1900 as requiring personal service to hale any civil or defendant into court (an accurate reflection of the state of the law in 1900).[199] Now, consider that issuing a parking ticket to an individual is a form of haling that person into court, and that parking tickets are almost never served on individuals personally because it would be administratively impossible and cost-prohibitive to do so.[200] Administering parking tickets would therefore be unimaginable under a strict "personal service" rule, but in 1900 the very idea of parking tickets and the ubiquity of automobiles would have been unimaginable, so this problem would not have been anticipated.[201] As a result, an approach that fixed the meaning to some determined original, widely-understood, semantic meaning would have eventually resulted in chaos in large cities. The Court, and the law, have been better served by an incremental approach to due process because such an approach has forestalled the danger of false certainty in a highly contextual area of policy.

The existence of a constitutional claim based on a positive entitlement increases the danger of false certainty. Matters of positive social policy, such as the provision of sufficient education, are essentially and continuously contested. What may be the common wisdom of today will become the discredited mistake of the past tomorrow. Class sizes are a good example of this constant

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category of "judicially humble" courts, but this categorization is based on the court's *remedial* restraint. It is my hope that the argument presented here will focus more attention on the court's *interpretive* restraint, and therefore humility, at the earlier (and I argue more important) phase of settling on a meaning for the constitution's words.

[198] *See* Solum, *supra* note 166, at 156–58 & n.8 (pointing out that the Supreme Court is loath to reexamine existing precedents, even where these precedents are clearly wrong).

[199] *See* Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 12, 20–21 (2007).

[200] *Id.* at 13.

[201] *Id.* at 12.

back-and-forth.[202] At times, the education policy scholarship has identified small class sizes as an important driver of student achievement, while at other times the research has questioned the value of small class sizes.[203] If a state court were to issue a systemic declaratory judgment stating that the state constitution's education clause requires small class sizes for all of the state's children in the early grades, for example, the decision would then tie the hands of the legislature to explore other approaches based on contrary research. Because it often takes years, or even decades, to bring a systemic school finance challenge to the point of state supreme court review,[204] such a decision would be unlikely to be reconsidered quickly, and a judicial mistake might end up defining educational practice for a generation or more.

Still, the language, though nebulous, is there, and it should be subject to interpretation, so total abstention would seem to be an overcorrection for the increased error potential. The better path is the incrementalist one described by common law constitutionalism. Incrementally determining the meaning of vague terminology greatly reduces the danger that wrongheaded, overzealous, or politically pandering judicial declarations will enshrine as permanent constitutional law the imperfect common wisdom of one era. And as it turns out, in the cases generally cited as evidence of the judiciary's ability to deal with vague and nebulous terminology—those under the Due Process Clause and the Cruel and Unusual Punishments Clause for example—courts generally follow a common law constitutionalist methodology, adding nuance to the interpretation of the relevant terms case-by-case, in the context of real facts affecting real individuals.[205]

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[202] *See generally* ALAN B. KRUEGER, ERIC A. HANUSHEK & JENNIFER KING RICE, ECON. POLICY INST., THE CLASS SIZE DEBATE (Lawrence Michel & Richard Rothstein eds., 2002) (discussing the positive and negative consequences of having smaller class sizes).

[203] *See id.*

[204] *See* Elder, *supra* note 118, at 143 (pointing out that adequacy cases often take years to resolve).

[205] *See, e.g.*, Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 922–32 (2001) (describing the incremental development in the law of cruel and unusual punishment that led to exempting the mentally retarded from the death penalty); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1047–82 (1984) (discussing the ebb and flow of procedural due process doctrine through the incremental development of lines of precedent in challenges to administrative action).

In such cases, decisions are more likely to be based on small constitutional moves, rather than grand constitutional declarations. If an error is made through such interpretation, the earlier case can be distinguished on its facts, or the minor point of interpretation that made the difference in the earlier case can be limited or overruled more easily than a broad legislative pronouncement from the bench purporting to solve an entire polycentric social problem all at once. As one scholar pithily observes, if judges adhere to incremental, fact-bound judging and observe the rules of precedent, then over time, the law will "work itself pure."[206]

Employing a common-law-derived process to the development of state constitutional education clauses would finally make possible the long-delayed consideration, and perhaps the recognition, of individual positive constitutional entitlement rights to adequate education. The next Part considers how the courts might employ a common law constitutionalist methodology to recognize and define such rights.

IV. DEFINING THE RIGHT TO EDUCATION

This Part makes the case that the interpretation of education rights provisions in state constitutions will best succeed through the rights claims of individuals, rather than through systemic adjudication, declaratory judgments, and structural injunctions. The argument aims to engender a movement in state constitutionalism relating to positive rights away from the undesirable alternatives of total abstention or definition by broad declaration, and toward definition by incremental enforcement and experimentation. The key to this move is the adoption by state courts of a common law approach to constitutional interpretation and adjudication.

A. COMMON LAW CONSTITUTIONALISM AND EDUCATION RIGHTS

To begin the discussion, let us assume a different framing for an educational adequacy case. Assume that, instead of a case being filed—to much media fanfare—by an educational advocacy

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[206] Solum, *supra* note 166, at 191 (quoting the future Lord Mansfield, then Solicitor General, in *Omychund v. Barker*, 26 Eng. Rep. 15, 23 (Ch. 1744)).

group or an organized group of school districts, the case is filed by one individual student. This student would claim that her own affirmative individual right to a certain quality of education has been denied in the absolute sense (not the relative sense familiar to individual equality claims). To justify adjudicating such a claim, a court must first recognize an actual individual entitlement-based right to education. As discussed above, due to the systemic reform focus of educational adequacy litigation, this recognition has not yet occurred, other than rhetorically, in any state court, nor has any state supreme court seriously considered the question.[207]

How, then, would common law constitutionalism deal with the question? First, like most constitutional approaches, the common law approach would begin with the text. Constitutional text, as Strauss explains, may have two distinct roles in the method of the common law. In one role, the text may simply provide the answer to a constitutional question.[208] For example, some state constitutions contain provisions that demand specific actions on the part of the government. The actions might be procedural, such as the Louisiana Constitution's command that the legislature negotiate with the state board of education in determining education funding levels each year.[209] Or they might be substantive, such as the Florida Constitution's requirement that the state provide sufficient education funding to limit class sizes to certain specified numerical ranges.[210]

Provisions such as these should be enforced precisely as written,[211] much the same way that the age requirements for public office are applied under the United States Constitution.[212] The text is clear, and it admits no room for interpretation. Whether we think it normatively right or wrong for the legislature to negotiate with the executive branch as to appropriations, the

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[207] *See supra* Part III.

[208] Strauss, *supra* note 178, at 911–12.

[209] *See* Scott R. Bauries, *State Constitutional Design and Education Reform: Process Specification in Louisiana*, 40 J.L. & EDUC. 1, 42 (2011) (describing this requirement and the process of negotiation it demands).

[210] *See* Scott R. Bauries, *Florida's Past and Future Roles in Education Finance Reform Litigation*, 32 J. EDUC. FIN. 89, 103 (2006) (describing this requirement and the popular constitutional amendment process that led to its adoption).

[211] *See* Bauries, *supra* note 209, at 36 (arguing for this sort of strict application in Louisiana); Bauries, *supra* note 210, at 98–100 (arguing for strict application in Florida).

[212] Strauss, *supra* note 178, at 906.

Louisiana Constitution clearly and unambiguously commands it. Similarly, whether we agree with the policy research that has identified class size as an important driver of educational outcomes, or whether we agree with the research questioning that conclusion,[213] the Florida Constitution demands that class sizes be kept at certain levels—clearly and explicitly.

But the other role through which the text constrains interpretation applies more broadly to constitutional law. Most constitutional provisions are written vaguely, and this vagueness allows much room for judicial interpretation. Education clauses certainly serve as an example of this vagueness, as do the Due Process Clause[214] and the Commerce Clause.[215] Education clauses make commands on state legislatures to "make adequate provision," "establish," "provide for," "maintain," "encourage," or even "cherish" a public school system, which might be described using such modifiers as "thorough," "efficient," "complete," or "high quality," among others.[216] These sorts of commands cannot simply be enforced on their own terms because the terms do not admit of a generally accepted meaning.[217]

But there is still text in each of these provisions, so what is the text's role if it does not specify a direct answer to a constitutional question? As Strauss explains, the text in these clauses (and indeed in most constitutional clauses) functions to "limit[ ] the set of acceptable answers" to constitutional questions.[218] The education clauses in state constitutions, in other words, 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.

For example, if an education clause states that it is "the duty of the state" to set up and maintain an educational system, then a court may not interpret the text as merely a power-granting

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[213] *See generally* KRUEGER, HANUSHEK & RICE, *supra* note 202.

[214] U.S. CONST. amend. XIV, § 1.

[215] U.S. CONST. art. I, § 8, cl. 3.

[216] *See* Bauries, *supra* note 10, at 321–25 (reviewing the language of state constitutional education clauses); WOOD, *supra* note 27, at 103–08 (listing the text of each state constitution's education clause).

[217] *See, e.g.*, Clayton P. Gillette, *Reconstructing Local Control of School Finance: A Cautionary Note*, 25 CAP. U. L. REV. 37, 37 (1996) (referring to these terms as "inherently nebulous").

[218] Strauss, *supra* note 178, at 911–12.

provision.[219] Providing for education (in whatever way the state constitution is interpreted to require) must be held to be mandatory on the state. Similarly, if an education clause states that education must be provided for "all children," then an interpretation that allows a state to exclude, for example, disabled children or foreign-born children is not permitted.[220] But neither of these constraints mandates just how much education must be provided.

With this point in mind, courts must begin their inquiries with the text of the state constitutional education clause. The first question that must be asked is whether an education clause's language forecloses an interpretation that derives from the clause individual rights to education. This is what it means for the text to "limit[ ] the set of acceptable answers."[221] Much semantic variation exists among the education clauses of the fifty state constitutions, but all education clauses either mandate or encourage the establishment of a state education system for the benefit of the state populace.[222] Although state education clauses generally use the language of duty, rather than right, to set forth their requirements or admonishments, almost none foreclose an individual rights interpretation.[223] A Hohfeldian view of the duties established in state constitutional education clauses, for

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[219] *See* Bauries, *supra* note 10, at 359 (arguing that, if nothing else, education clauses foreclose a state legislature's decision *not* to legislate on education).

[220] Of course, the Federal Constitution would also invalidate such interpretations. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 229–30 (1982) (invalidating, under the Equal Protection Clause of the Fourteenth Amendment, a Texas law that denied public education to the children of undocumented immigrants); Pa. Ass'n for Retarded Children v. Pennsylvania, 343 Fed. Supp. 279, 302 (E.D. Pa. 1972) (holding that excluding disabled children from public education violates the Equal Protection Clause).

[221] Strauss, *supra* note 178, at 912.

[222] Bauries, *supra* note 19, at 719–25 (comparing the education clauses of representative states).

[223] The one possible exception is Alabama's, which explicitly disclaims any individual entitlement to education. *See* ALA. CONST. art. XIV, § 256 ("[N]othing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense . . . ."). The trial court in *Coalition for Adequacy and Fairness in Education v. Hunt* purported to declare the amendment to the Alabama Constitution that resulted in the adoption of this language unconstitutional and reinstate the prior constitutional language, which was mandatory and duty-based. *See* Opinion of the Justices, 624 So. 2d 107, 147 (Ala. 1993) (trial court opinion reproduced in advisory opinion of state supreme court recognizing a prior declaration of unconstitutionality by the same judge based on the racist origins of the amendment, which was adopted by segregationists to circumvent *Brown v. Board of Education*). As this issue was never appealed, it is unclear whether this disclaimer language is operative.

example, could support an interpretation that these duties are the "jural correlatives" of individual claim rights.[224] Thus, a judicial interpretation of an education clause that locates within it an individual right to education is not outside "the set of acceptable answers" to the question of what the education clause means.

This conclusion does not mean, of course, that the individual rights interpretation is sound. Courts in different states will come to different conclusions on this question, no doubt. No state court has yet conducted a thorough analysis of this question, despite much rhetoric in the school finance cases claiming that state residents have a "right to education." Once courts begin to directly address the individual rights question, it is likely that, in at least some states, courts will come to the conclusion that a true individual right to adequate education may be derived from the duty established in the education clause. In such states, then, how should the content of that right be defined? The next section addresses this question.

B. DEFINING THE RIGHT BY ENFORCING IT

Common law constitutionalism denotes an incremental, iterative approach to the development of constitutional law. This approach relies on "smaller," more fact-bound judgments in individual cases, as opposed to the "settle everything at once" decrees more common in institutional reform cases. It frees judges to develop constitutional law in light of the facts on the ground and the remedies that will be required to redress harms to particular individuals. Yet, it also limits judges through the common law constraints of tradition and convention. Due to these features, a common law state constitutionalism may be employed to *define* education rights by *enforcing* education rights, individual by individual.

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[224] Only the Washington Supreme Court has ventured into Hohfeldian analysis thus far. *See* McCleary v. State, 269 P.3d 227, 247–48 (Wash. 2012) ("Flowing from this constitutionally imposed 'duty' is its jural correlative, a correspondent 'right' permitting control of another's conduct. Therefore, all children residing within the borders of the State possess a 'right,' arising from the constitutionally imposed 'duty' of the State, to have the State make ample provision for their education." (quoting *Seattle Sch. Dist. v. State*, 585 P.2d 71, 91 (Wash. 1978))). But the court did not take its correlativity analysis down to the level of the individual student as a potential rights holder entitled to an individual remedy. For an overview of the Hohfeldian approach, as applied to state constitutional school finance litigation, see Bauries, *supra* note 10, at 306–21.

First, the individual claim of the violation of educational adequacy rights must be decoupled from the familiar and universally rejected idea of the "educational malpractice" tort.[225] Although federal constitutional litigation under the Due Process Clause often is characterized as "constitutional tort" litigation, and some state court systems have lockstepped this terminology, common law tort duty analysis has no place in constitutional law, even the law of constitutional torts. In federal constitutional tort cases, the "duty" is established by the text of the Constitution and its interpretive glosses, and a constitutional tort consists of a federal or state official's deliberate violation of the duty.[226] In state common law tort litigation, in contrast, the question of whether to recognize a duty is almost always a question of public policy and the foreseeability of harm, not the adherence to an external constitutional standard.[227]

State courts have universally rejected the educational malpractice tort based on the concerns that this policy question generates. First, deciding when a teacher has exercised "reasonable care" in her teaching, along with whether the failure to exercise such care is a factual and proximate cause of a failure to learn, is likely not judicially manageable. Too many aspects of teaching are subjective and complex, and disagreement exists among pedagogues as to which teaching techniques are effective and which are not.[228] A good amount of teaching, some pedagogues say, is dependent on the personality or innate talent of a teacher.[229] If this is true, then courts are correct to be concerned

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[225] Periodically, and usually in response to new statutory requirements or new data on effectiveness, scholars have attempted to revive the idea of the tort of educational malpractice, *see, e.g.*, Ethan Hutt & Aaron Tang, *The New Education Malpractice Litigation*, 99 VA. L. REV. 419, 425 (2013) (advocating a tort-based remedy for children against school officials who negligently retain ineffective teachers), but these efforts thus far have not dislodged the judiciary from its strong aversion to recognizing the tort.

[226] *See* Daniels v. Williams, 474 U.S. 327, 332 (1986) ("Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.").

[227] *See, e.g.*, W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1890 (2011).

[228] *See generally* PHILLIP W. JACKSON, THE PRACTICE OF TEACHING (Teachers College 1986) (reviewing some of the debates).

[229] *See, e.g.*, Stephen Rushton, Jackson Morgan & Michael Richard, *Teacher's Myers-Briggs Personality Profiles: Identifying Effective Teacher Personality Traits*, 23 TEACHING &

about determining whether an individual teacher has exercised due care in teaching when a student's lack of educational attainment might be related to factors having nothing to do with the effort or care a teacher has exhibited, but may simply be a matter of innate talent (or lack thereof). Second, even if these matters can be the subject of judicial determination, the establishment of a tort for which the "injury" is bad educational attainment places responsibility for a systemic failure on one tiny cog in the system, a seemingly arbitrary allocation of fault.[230]

Individual educational adequacy claims alleviate these concerns. Educational adequacy as a state constitutional matter does not depend on the due care of a particular teacher. The right to an adequate education runs against the state, and to the extent that the fulfillment of this right has been delegated, against the school district.[231] Litigants in school finance cases, accordingly, do not focus their claims on the behavior of individual teachers, but instead on the state legislature's or the local school district's funding decisions. This difference in focus overcomes the judicial manageability objection to claims against individual teachers. Where an individual claims a violation of the right to an adequate education, the claim will depend not on the professional behavior of an employee not charged with the state's duty to provide an

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TEACHER EDUC. 432 (2007); Jeremy A. Polk, *Traits of Effective Teachers*, 107 ARTS EDUC. POL'Y REV. 23, 23 (2006). *But see* JAMES W. STIGLER & JAMES HIEBERT, THE TEACHING GAP: BEST IDEAS FROM THE WORLD'S TEACHERS FOR IMPROVING EDUCATION IN THE CLASSROOM, at xiii (Free Press 1999) (challenging this widely-stated claim).

[230] Ethan Hutt and Aaron Tang recently proposed reconfiguring educational malpractice claims with schools and school districts as defendants—basically, as negligent employment or retention claims—and evaluating the reasonableness of a given teacher's professional conduct based on "value-added" scores. Hutt & Tang, *supra* note 225, at 425–26. Leaving aside for a moment the heated, and at present unresolved, debates regarding the usefulness and accuracy of the value-added model of teacher evaluation, *see, e.g.*, Preston C. Green III, Bruce D. Baker & Joseph Oluwole, *The Legal and Policy Implications of Value-Added Teacher Assessment Policies*, 2012 BYU EDUC. & L.J. 1, it is possible that their approach may be reconcilable with the common-law constitutionalist method advanced here. In particular, if the statistical models they favor prove workable, fair, and accurate, the evidence they generate can be used in part to illustrate a state constitutional violation in a state that favors an "input" standard. *See infra* notes 232–43 and accompanying text (discussing the need for state courts to develop, through common-law reasoning, conceptions of adequacy based on inputs, outputs, or both). Based on the many unaddressed critiques of the validity of value-added modeling, I and many others would have real concerns were it to form the basis of litigation based on educational outcomes.

[231] *See supra* notes 10–14 and accompanying text (discussing the ubiquitous practice in state constitutions to impose educational duties on the state or the legislature).

adequate education, but with the state (or its local government delegate) itself. Educational adequacy is not a tort duty, but a constitutional duty with strong fiduciary elements, and this duty rests on the state and its appendages, not the individual teacher.[232]

Still, the courts in individual adequacy cases will have to grapple with judicial manageability. Where the state constitution provides for an individual right to an adequate education, the courts will have to work out just what an "adequate education" means for an individual student. As in systemic school finance cases, this will initially become a question of whether the education clause mandates adequate inputs, adequate outcomes, or some combination of the two.[233] It is not the purpose of this Article to work out the answers to these questions *ex ante*. Rather, it is sufficient at this point to note that the important question of whether a state constitution's education clause mandates adequate resources or adequate outcomes, or some combination of the two, will have to be resolved in individual cases, just as it has been part of the systemic cases thus far.

However, if courts begin to address these questions in the context of actual plaintiffs with actual individual stories to tell, and more importantly, individual harms to be remedied, it is likely that the courts' answers will be more realistic than those of courts addressing the entire system's adequacy because individual claims will inherently impose on judicial decisionmaking the constraints of causation and remediation.

First, in an individual educational adequacy claim, the plaintiff will bear some burden to prove causation of the alleged constitutional harm, and the need to prove such causation will require both the parties and the court to settle on what must be "caused." In the current systemic reform environment, cases are presented as "facial," as opposed to "as-applied," challenges.[234] A

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[232] *See* Bauries, *supra* note 19, at 705 (proposing that legislatures in constitutional democracies owe the public fiduciary duties of due care and loyalty). Indeed, under well-settled principles of agency law, the teacher's fiduciary duty, like the fiduciary duties of all employees, runs to her employer, the school district. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. g, illus. 17 (2006) ("As agents, all employees owe a duty of loyalty to their employers."); Combs v. PriceWaterhouse Coopers LLP, 382 F.3d 1196, 1200 n.2 (10th Cir. 2004) (explaining that employees, as agents, owe fiduciary duties to their employers).

[233] Hutt & Tang, *supra* note 225, at 443.

[234] William E. Thro, *School Finance Litigation as Facial Challenges*, 272 EDUC. L. REP. 687, 688 (2011).

facial challenge to a statute's constitutionality does not require any proof of causation of harm because the statute itself shows the constitutional harm on its face.[235] However, educational adequacy claims challenge political prioritization and appropriations decisions, each of which may have been incidentally helpful to some, incidentally harmful to others, and benign to still others. For example, it would be highly implausible (but certainly not impossible) to claim, in a systemic education finance adequacy suit, that *all* of a state's students have been deprived of the adequate educational opportunities to which they are entitled. But where a claim alleges that insufficient resources have been provided for the education system, this is exactly the claim made.

Individual claims of educational inadequacy, in contrast, will be in the nature of "as-applied" challenges—indeed, they could not proceed in any other way, as there is no way to examine a school funding statute's face and understand whether a particular individual student receives an adequate education through it. Thus, individual adequacy cases will require that a causal link be drawn between the state of education for the individual in question and state or local funding decisions because these claims will depend on the *fact* of inadequate educational resources or outcomes for each individual claimant.

In systemic education finance litigation, courts seem to have assumed that lack of money *ipso facto* causes inadequacy of educational outcomes or opportunities, and that state legislative schemes are *ipso facto* the reason for all inadequacies in local resources.[236] Because of these two tacit assumptions, the courts have not had to do the hard work of deciding whether the constitution mandates inputs or outputs, but instead have often conflated the two.[237] A causation requirement would put the

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[235] Nicholas Q. Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1238 (2010).

[236] *See* Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, *in* COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN 60–61 (Eric A. Hanushek ed., 2006) (describing the disappearance of causation as a legal element of education adequacy claims); R. Craig Wood & David C. Thompson, *Politics of Plaintiffs and Defendants*, *in* MONEY, POLITICS, AND LAW: INTERSECTIONS AND CONFLICTS IN THE PROVISION OF EDUCATIONAL OPPORTUNITY 44 (Karen DeMoss & Kenneth K. Wong eds., 2004) (stating, in education finance adequacy suits, "Generally, it is unclear how the state aid distributional formula led to the failure of these children to achieve.").

[237] *Cf.* James Ryan, *Standards, Testing, and School Finance Reform*, 86 TEX. L. REV. 1223, 1226 (2008).

question front and center. Individual litigation would inevitably impose such a causation requirement, as individual claims do in other areas of constitutional law having to do with resource allocation.[238]

One way in which courts may choose to address such a causation requirement is through burden shifting. If it is a simple lack of resources that must be "caused," then a burden-shifting causation battle will likely involve the state attempting to convince the court that local mismanagement of funds caused resources to be inadequate, while the district attempts to convince the court instead that the funding provided by the state was inadequate to secure appropriate resources even in a world of perfect fiscal management. If what must be "caused" is a bad educational outcome, then the battle will involve the state attempting to show that factors other than a lack of resources caused the individual student not to achieve.

For instance, an individual plaintiff who proves that he or she attended an accredited public educational institution and was not a habitual truant, but failed to achieve an adequate education, might be presumed to have been denied the necessary resources that would have enabled such achievement. The state might then rebut this presumption with proof that it provided the necessary resources, perhaps by producing evidence of comparator students of similar ability in the same school district who did achieve at desired levels. Through the litigation of several cases in this way,

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[238] *See* Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 603 (2001) ("A court would be hard-pressed to find that the enrollment patterns were caused by the centric nature of the school, and without causation there is no constitutional claim."); Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 858 (1983) ("All claims of unconstitutional discrimination require findings of both a discriminatory purpose and a causal connection between the discriminatory action and the alleged injury."); *cf.* Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) ("[W]e hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions."); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 23 (1971) ("Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools.").

a state's courts will gradually settle on facts that indicate abridgment and fulfillment of the education right[239]

Second, individual claims would call for individual remediation. For example, if a court finds that, by virtue of state action or inaction, a student-plaintiff has not been provided the opportunity to access high school mathematics instruction that meets the adequacy standard, then the court can remedy this deprivation by ordering the state to waive tuition for the student's remedial community college studies in mathematics. If the plaintiff is younger, the same principle can apply to tutoring, after-school programs, and other specific instructional measures. In the extreme case, even private school reimbursement could be ordered, as it is in extreme situations under the Individuals with Disabilities Education Act (IDEA).[240]

Importantly, these types of remedies could never succumb to the familiar criticism of "judicial legislation," as they would be tailored specifically to compensate the individual litigant who brought the case and whose rights were found to be individually violated. Remedies might include additional instruction, changes in classroom settings, and other individual accommodations (perhaps even the "voucher remedy" that has thus far eluded plaintiffs),[241] but the courts will have to ask, as to each proposed remedy, whether it deserves to be part of the fabric of the state's constitutional rights jurisprudence, keeping in mind the natural operation of remedial equilibration.

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[239] Derek Black has made a forceful argument identifying problems with causation as the primary driver of judicial reticence in equal protection jurisprudence having to do with schools and its remedies. Derek Black, *Civil Rights, Charter Schools, and Lessons to be Learned*, 64 FLA. L. REV. 1723, 1757–67 (2012). The approach suggested here, which depends inherently on the claims being transformed from systemic claims to individual claims, attempts to address Professor Black's concerns, but the approach suggested here also, admittedly, leaves the systemic causation problem for another day.

[240] *See* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009) (holding that a public school may be required to reimburse parents of a disabled child whose educational placement was inadequate to meet the child's needs, where the parents unilaterally placed the child in a private school). Although the IDEA is a statute, and therefore affords sub-constitutional rights, its guarantee of a "free and appropriate public education" is somewhat similar to that which is required in most state constitutional education clauses. *See* 20 U.S.C. § 1401(9) (2012) (defining a "free and appropriate public education"). For an argument that educational adequacy claims should be modeled on the procedures for securing rights under the IDEA, see Elder, *supra* note 118, at 137.

[241] *See, e.g.*, Greg D. Andres, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795 (1995) (discussing the remedy of vouchers in school finance cases under state constitutions).

Regardless of whether state courts adopt burden shifting or some other method of proof, and regardless of the individual remedies chosen to remediate proven harms, the courts will have to come to terms with the effects of such judicially derived or adopted standards on individual students and on future claims. Courts currently are detached from this inquiry by virtue of their systemic focus, and this detachment leads them to make broad pronouncements of what the education system should provide or achieve statewide, stating goals that are often inherently impossible to achieve,[242] or that give short shrift to local realities. More focused attention on the individuals and the remedies to which they are entitled—missing from the current system-focused judicial approaches—would have the salutary effect of causing courts that derive standards of educational adequacy to consider whether such standards are realistic as a constitutional "floor," or whether they set an unreasonable or aspirational set of goals.[243] In time, the constraint of tradition, in the form of the rules of precedent, will allow the law of educational adequacy to settle on results that provide relief without unrealistically burdening the system, and most importantly, without requiring courts to assume a legislative posture.

V. COMMON LAW CONSTITUTIONALISM CAVEATS

So far, this Article has made the case that incremental, common law constitutional adjudication is a more constitutionally sound way to develop meaning for the vague terms of education clauses than broad, systemic pronouncements. Below, this Article posits that an incrementalist approach may also be a better way to foster systemic reform than systemic institutional reform litigation. But first, it is necessary to address some considerations that apply to the use of common law constitutionalism as an alternative to systemic institutional reform litigation.

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[242] *See, e.g.*, William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL'Y 525, 548 (1998) (writing of the Kentucky Supreme Court's decision in *Rose*, stating, "If [the Kentucky] standard is taken literally, there is not a public school system in America that meets it."). The Kentucky formulation has been cited or adopted in numerous other cases, most of which resulted in declaratory judgments against the state.

[243] There is evidence that courts concocting their own standards of education adequacy do not consider whether they are realistic. *Id.*

A. JUDICIAL ACTIVISM AND COURTS CHECKING COURTS

A forceful objection exists to the effect that common law constitutionalism, like the common law itself, is no less vulnerable to judicial activism or overreach than systemic adjudication. Considered in light of the additional fact that individual adjudication is less publicly "visible" than systemic adjudication, it is necessary to also recognize that, to be successful, common law constitutionalism requires a certain vigilance. If interpretations of constitutional text are to be arrived at incrementally, and through small constitutional moves, then later courts—and especially lower courts—must respect the main pillar of strength holding up the common law method—the rules of precedent.[244] Strauss describes the rules of precedent as part of the constraint of tradition, which calls on courts to respect what has been subjected to analysis and has been the subject of agreement, or at least compromise, in the past.[245] Strauss does not directly address the specifics of the traditional constraint of precedent, but implicit in his argument is that courts following a common law constitutionalist methodology must observe the distinction between holding and dicta.[246]

After digesting the discussion above, this conclusion should be somewhat obvious. An incrementalist judicial method can quickly be converted to a maximalist legislative method if decision-issuing judges and justices feel empowered to make binding pronouncements that go beyond the facts of the cases they decide. This power can only come from later and lower courts crediting unnecessarily broad rulings as holdings and adhering to such pronouncements unreflectively as "settled law." One goal of the common law methodology is for constitutional interpretation to occur with greater finality and frequency in the lower courts, where it is most insulated from the political pressures of Supreme Court (and especially state supreme court) practice, and where it

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[244] *See, e.g.*, Patricio A. Fernandez & Giacomo A.M. Ponzetto, *Stare Decisis: Rhetoric and Substance*, 28 J.L. ECON. & ORG. 313, 328 (2010) (demonstrating that the rules of precedent make the common law both more stable and more flexible).

[245] Strauss, *supra* note 178, at 908.

[246] *See, e.g.*, Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 220–21 (2010) (arguing that faulty attention to judicial statements—what courts say—as opposed to actual holdings—what courts do, leads to the elevation of dicta to binding precedent); Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 953 (2005) (developing a new test for determining the actual holding of a case and applying the test to several familiar constitutional law cases).

is most focused on the rights of specific individuals. But such finality demands judicial adherence to the responsibility to resolve the issues in the instant case, not the hypothetical next case. Adhering to the rules of precedent—the main one being the distinction between holding and dicta—will foster this lower-court constitutionalism.

An incrementalist approach depends on judicial humility and restraint. Allowing for legislative holdings to become binding precedent destroys the features of the common law method and reinstates the chief problem of systemic adjudication today—the tendency of state courts to essentially amend the state constitution in broad strokes through declaratory judgments that require nothing, but please and aggrandize court-watchers and activists much, and accordingly cause the courts to "pay no price" and take no risk for their alterations of the status quo.[247] If common law state constitutionalism is to succeed, and if lower courts are to do the bulk of constitutional interpretation case by case, then the rules of precedent must be observed.

B. THE LITIGATION FLOOD

A possible advantage of the systemic institutional reform approach is that it ostensibly resolves a constitutional issue statewide in one decision, thus preventing courts from being flooded with individual claims. This advantage would be quite persuasive were it true that systemic cases bring relief to individual rights holders, but as the discussion above shows, this is not the case. Nevertheless, a broader objection might be made to the manageability of the many cases that may be brought in a state's courts if the courts are to recognize an enforceable, individually remediable right to adequate education. Given the state of education in the United States, it is easy to imagine the long line of plaintiffs that will form once a state supreme court recognizes an enforceable individual right to education. In short, there may be a "flood of litigation," as courts often fear.

In answer to this objection, it is worth asking whether all floods are bad simply because they are floods, or whether only certain

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[247] *See* Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1263 (2006) (describing one of the problems with dicta as being that, in uttering dicta, the court "pays no price," and therefore is less likely to be careful in its reasoning).

kinds of floods are worthy of our concern. In the words of Prosser and Keeton, speaking of fears that recognizing the tort of intentional infliction of emotional distress will flood the courts with claims:

> But this is a poor reason for denying recovery for any genuine, serious mental injury. It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation," and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds. That a multiplicity of actions may follow is not a persuasive objection; if injuries are multiplied, actions should be multiplied, so injured persons may have recompense.[248]

Particularly in constitutional law, it is nonsensical to deny plaintiffs access to the courts on the basis that government has acted broadly to deprive people of their rights. Simply put, some floods are not destructive, but necessary and beneficial, in the same way that the yearly floods of the Nile River are necessary to fertilize the soil.

Remedial equilibration theory also provides a response to this objection. The requirement that courts adjudicate the rights of many individuals and remediate violations of those rights with individually tailored remedies will itself tamp down on judicial adventurism in defining the rights themselves.[249] Over time, realism will replace aspiration and political pandering in defining the minimum requirements of an adequate education as the pressures of remediation filter back to place constraints on the expansion of the content of the rights. This process of constraint and equilibrium will provide state legislatures the space they need to engage the legislative process outside the supervision of the courts. If judicial interpretations become more tethered to both text and fiscal reality, and state legislatures begin to embrace

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[248] PROSSER & KEETON, THE LAW OF TORTS § 12 (W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen eds., 5th ed. 1984).

[249] *See supra* note 168 and accompanying text (discussing the tendency of state judiciaries to over-define education clause terms due to the lack of remedial constraints inherent in declaratory judgment practices in constitutional law).

their own duties to implement state constitutional requirements with due care and in good faith,[250] then an initial "flood" of claims may prove salutary.

C. COMPARED TO WHAT?

The most basic of all evaluative public policy questions is "Compared to what?" Social scientists generally lodge this question as a challenge to any claim that a particular policy solution works, and it puts the promoter of the solution to his proof, so to speak, in requiring the promoter to justify the proposed solution as one that actually improves upon the status quo. This Article has, to this point, justified common law constitutionalism on theoretical and operational grounds against the comparator of systemic adjudication. What remains is to justify the common law constitutionalist approach to the interpretation of education rights on the grounds of its potential to achieve the kind of systemic reform that systemic institutional reform litigation seeks. The next Part addresses this question.

VI. INDIVIDUAL CLAIMS AND SYSTEMIC EDUCATION REFORM

Systemic institutional reform litigation aimed at improving the quality of educational systems in the states has had, at best, a mixed record of success. While it is certainly true that plaintiffs have won judgments against states on their claims of educational inadequacy, evidence is scant and conflicting as to actual improvements in the education systems of states in which plaintiffs have achieved these victories. Observers from both the legal and public policy communities have documented this mixed record in terms of educational expenditures and outcomes.[251] In

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[250] *See* Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699, 731 (2013) (outlining the duties of judges as fiduciaries of the people).

[251] *See, e.g.*, ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS 143–70 (2009) (making the case that school finance litigation has not been successful); Elder, *supra* note 118, at 142–43 (documenting similar expenditure increases and decreases in both states where plaintiffs won victories in adequacy suits and states where plaintiffs lost their cases). *But see* Michael A. Rebell & Bruce D. Baker, *Assessing 'Success' in School Finance Litigations*, EDUC. WK. (July 8, 2009), http://www.edweek.org/ew/articles/2009/07/08/36rebell.h28.html?qs=Assessing+Success+in+School+Finance+Litigation (questioning Hanushek's and Lindseth's methodology, and documenting positive results from targeted expenditure increases in New Jersey).

addition to the disputes over its success, systemic educational reform litigation has often led to intractable conflicts between state legislatures and state courts. Where these battles are joined, the courts typically retreat,[252] the individual judges suffer political defeat,[253] or the values they protect through their decisions suffer a similar political fate.[254] Courts cannot win these head-to-head battles with legislatures, but systemic litigation makes such confrontations inevitable.

In the area of positive constitutional entitlements, courts are on their best institutional footing where they seek to signal to the legislature that individual rights are being violated, putting the legislature on notice of the potential for further judgments and the need for reform, while refraining from directing the legislative product.[255] Such signaling shares space with arguments for tort

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[252] *See, e.g.*, Londonderry Sch. Dist. SAU #12 v. State, 958 A.2d 930, 932–33 (N.H. 2008) (dismissing the latest appeal in the ongoing *Claremont Sch. Dist. v. Governor* litigation, on the assumption that the state legislature has tried to address the unconstitutionality of the state education system in "good faith"); State *ex rel.* State v. Lewis, 789 N.E.2d 195, 202–03 (Ohio 2003) (releasing jurisdiction of the ongoing *DeRolph v. State* litigation, while continuing to hold that the state education system is unconstitutional).

[253] *See, e.g.*, Bronson D. Bills, *A Penny for the Court's Thoughts? The High Price of Judicial Elections*, 3 NW. J.L. & SOC. POL'Y 29, 31–32 (2008) (detailing the ouster of one of the justices who concurred in *Guinn v. Legislature*, 71 P.3d 1269 (Nev. 2003), *overruled in part by Nevadans for Nev. v. Beers*, 142 P.3d 339, 348 (Nev. 2006), in which the Nevada Supreme Court ordered the state legislature to ignore a recently imposed supermajority requirement in the state constitution in favor of the substantive requirement to fund the state's schools).

[254] *See* Joseph T. Henke, *Financing Public Schools in California: The Aftermath of* Serrano v. Priest *and Proposition 13*, 21 U.S.F. L. REV. 1, 22–23, 22 n.87 (1986) (reviewing the legislative response to *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (*Serrano II*), specifically A.B. 65 (1977), the bill designed to implement the courts' orders). Proposition 13 sharply limited the California state and local governments' ability to raise taxes for school funding. *See* Bauries, *supra* note 209, at 22–27 (detailing the *Serrano* litigation and its legislative and popular constitutional amendment aftermath).

[255] *See, e.g.*, David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 774 (2009) (explaining that courts help to remedy an information asymmetry between the public and the legislature by providing recognizable, authoritative, and public signals as to whether the legislature has acted unconstitutionally and if so, to what extent the people should be alarmed about it); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1049–59 (2008) (discussing the Supreme Court's signaling, through procedural rulings, its view of substantive questions); *id.* at 1071 (documenting Congress's substantive and prophylactic response to one such signal sent by the Court through its procedural rulings in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)); Philip C. Kissam, *Alexis de Tocqueville and American Constitutional Law: On Democracy, the Majority Will, Individual Rights, Federalism, Religion, Civic Associations, and Originalist Constitutional Theory*, 59 ME. L. REV. 35, 63 (2007) (describing the Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995) as a "federalism signal to Congress");

law grounded in the deterrence rationale.[256] Theorists defending a deterrence-based model of tort law in both small and large-scale litigation have shown that judgments in favor of plaintiff lead to positive changes in organizational risk management and legal compliance.[257] Direct injunctive orders from courts to the organizations at issue are not required for these positive changes to occur. Rather, organizational self-interest promotes good behavior in response to judgments.[258]

An example of this signaling in another context is the Florida federal court case of *Debra P. v. Turlington*.[259] The plaintiff in *Debra P.* challenged the denial of her high school diploma based on her failing score on the SSAT II, an early high-stakes graduation test of basic skills.[260] She contended that her poor performance on the test was traceable to her having spent the majority of her schooling years in the segregated (and vastly under-resourced) schools for black children in Hillsborough County, which had then only recently been desegregated by court order. [261]

The plaintiff initially won an injunctive moratorium on the use of the test after the district was unable to prove that the content

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Comment, *What Lies Ahead for ERISA's Preemption Doctrine after a Judicial Call to Action is Issued in* Aetna Health Inc. v. Davila, 43 HOUS. L. REV. 150 (2006) (speaking of the Court's decision finding ERISA preemption over a sympathetic state-law claim in Aetna Health Inc. v. Davila, 542 U.S. 200 (2004), "Although this 'dialogic function' between the judiciary and Congress is present to some degree in every Court decision, it is most apparent in *Davila* because the Court's ruling sent a message to Congress that the Court's hands are tied, leaving it up to Congress to fix the problem."); Levinson, *supra* note 78, at 906–07, 906 n.203 (discussing "the expressive or signaling function of constitutional decisions" as a means to alter congressional behavior in the procedures that it follows in enacting statutes); *see also* Henry P. Monaghan, Comment, *The Sovereign Immunity "Exception*," 110 HARV. L. REV. 121–22 (1996) (speculating that a dubious limitation placed on congressional power and grounded in state sovereignty would operate as a symbol, causing Congress to take special care to protect state sovereignty when enacting future legislation, and that this limitation could consequently "work as a catalyst for political and social change"). Professor Bobbitt's well-known concept of the "cueing function" of Supreme Court decisionmaking is akin to the idea of constitutional signaling. *See* Phillip K. Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 757 (1980).

[256] *See, e.g.*, Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 199 (2012).

[257] *See* Margo Schlanger, *Operationalizing Deterrence: Claims Management (In Hospitals, a Large Retailer, and Jails and Prisons*, 2 J. TORT L. 1, 2 (2008).

[258] *See id.* at 4.

[259] 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part*, *vacated in part*, 664 F.2d 397 (5th Cir. 1981).

[260] *See id.* at 246–47 (placing an injunctive moratorium on the use of Florida's high-stakes graduation test, pending the state's demonstration of its curricular validity).

[261] *Id.* at 246, 251 n.12.

tested on the SSAT II was actually taught in the segregated schools that she had attended. After the court initially enjoined the use of the test, the state engaged in a comprehensive curriculum audit, and the court later responded to the state's audit by declining to apply the injunction to students who never attended de jure segregated schools.[262] However, state officials saw in the initial decision the potential for future such judgments and, in response, the state reformed testing and curriculum alignment throughout the state.[263]

Since shortly after the 1984 decision in favor of the state, each district in Florida has been mandated to map its curriculum to state standards every year.[264] No court ever ordered this action prospectively for the entire state. Rather, the state officials likely saw the judicial results of its prior lack of prudent action in documenting curricular coverage in one case, and concluded (wisely) that it would be better to document that alignment of statewide curriculum to statewide exams than to fight the same evidentiary battle in every future case related to graduation testing. Thus, an initial victory on behalf of an individual plaintiff and a few others similarly situated caused the state for the first time to really examine and evaluate the alignment between what was taught and what was tested on state exams—a good practice by anyone's estimation—and the effects of the decision still drive educational practices in Florida today.

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[262] *See* Debra P. v. Turlington, 730 F.2d 1405, 1416 (11th Cir. 1984) (affirming the district court's dissolution of the injunction after the state established, based on a curriculum audit, that the content of the graduation test was now being taught in Florida's schools).

[263] *See* Florida Department of Education, Office of Assessment, History of Statewide Assessment Program: A Chronology of Events: 1978–1989, at 8, *available at* http://www.fldoe.org/asp/hsap/hsap7889.asp (last visited June 6, 2014) (outlining the extensive curricular and testing reform activities undertaken in response to the 1979 and 1984 rulings in the *Debra P.* litigation, which included ongoing validation of test items, alignment of curriculum and instruction, and legislative action in directing the development of the Florida "Standards of Excellence," the progenitor of the Florida "Sunshine State Standards," the current curriculum guide to Florida schooling).

[264] *See* FLA. STAT. § 1003.42 (2013) ("Each district school board shall provide all courses required for middle grades promotion, high school graduation, and appropriate instruction designed to ensure that students meet State Board of Education adopted standards in the following subject areas: reading and other language arts, mathematics, science, social studies, foreign languages, health and physical education, and the arts."); FLA. ADMIN. CODE ANN. r. 6A-1.09401 (2011) (mandating the use of the "Next Generation Sunshine State Standards" as the basis for assessment and curriculum for all school districts in the state).

The *Debra P.* decision signaled to both the Florida Legislature and Department of Education the need to make curricular and instructional changes statewide to ensure that any student denied a diploma for failure to pass the state's exit exam had a demonstrable opportunity to learn the material tested on it. *Debra P.* therefore illustrates how the constitutional signaling function of judicial decisions tailored to individuals and classes of individuals can cause systemic reform without mandating it.[265] This signaling function allows legislative actors to respond to judicial orders tailored to individuals by voluntarily changing systemic elements likely to lead to future litigation and judgments. In this way, the signaling function avoids the inevitable separation of powers problems that result from the prospect of judges directing the legislature to make broad, systemic policy changes. Indeed, separation-of-powers never came up at all in the *Debra P.* cases, and this is not surprising, since the court's orders never were directed at any coordinate branch of government.

Of course, *Debra P.* was a case about negative rights arising out of the Fourteenth Amendment, not the positive entitlements that state constitutional education clauses provide, so a skeptic might view the effects of that case as not transferrable to the positive entitlement context. Experience over the past thirty-five years under the IDEA[266] addresses this concern. As commentators have pointed out, the leverage achieved by a few thousand lawsuits and administrative due process proceedings in changing special education practices nationwide for over 6,000,000 disabled children served by the system each year is truly remarkable.[267] Simply put, the realistic prospect of being sued successfully and being required to remedy individual deprivations of the "free and appropriate public education" that the IDEA requires causes local

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[265] *See* Law, *supra* note 255, at 755 ("[A] misbehaving government faces a loss of political support if its conduct is identified and publicized by a court armed with little more than a reputation for competence and integrity.").

[266] 20 U.S.C. §§ 1400–1482 (2012).

[267] *See, e.g.*, Elder, *supra* note 118, at 157 ("Even though there have been thousands of lawsuits filed under the IDEA over the past several decades, the fact that millions of children have been helped by the law indicates that it effectively leveraged the threat of litigation to ensure that every child's rights are upheld." (footnotes omitted)); *see also* Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After* Buckhannon Board & Care Home Inc. v. West Virginia Department of Health & Human Resources, 65 OHIO ST. L.J. 357, 360 (2004) (relating that, in a recent year, "about 11,000" due process hearings were held).

school districts, and sometimes state governments, to act to improve the system on their own.

The same would likely be true of individual adequacy suits. By focusing on the individual deprivation of an entitlement, a court can give both local district and statewide policymakers important signals concerning what is and is not adequate education. In deciding an individual case and ordering remediation of any harms, a court can therefore both afford relief to the individual actually harmed without treading into the legislative territory of making policy for the state itself, and by doing so, also signal to the coordinate branches at the level of state policymaking that changes to the system might be a better path than continued individual litigation and remediation. Because the judicial remedies would be directed at adjudicating the rights of the harmed individuals and compensating only for identified violations to these individuals' rights, there would be no danger of judicial policymaking or invasion of the legislative province. Eventually, systemic reform would occur without any direct confrontations between the state legislature and the state judiciary, without any remedial orders to exercise the power of the purse in a particular way, and likely without the same cases coming back to the courts again and again due to legislative recalcitrance.[268]

Returning to the "litigation flood" critique, in light of this signaling function of judicial decisions, it is easy to see how beneficial an initial litigation flood may be. A state legislature, recognizing a flood of individual claims in a neighboring state, or the first signs of an impending flood in its own, would be more likely to legislate proactively. For example, some commentators have advocated addressing school finance failures through a claims system similar to that under the IDEA,[269] which was enacted in response to two seminal equal protection decisions

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[268] *See, e.g.*, City of Pawtucket v. Sundlun, 662 A.2d 40, 59 (R.I. 1995) (declining to review an adequacy claim, citing the "decades-long struggle" of the New Jersey Supreme Court in addressing one school finance case that has been the subject of no less than twenty-one high court opinions, each of which admonishes the legislature for some level of non-compliance); *see also supra* notes 176–77 and accompanying text (discussing the New Jersey saga).

[269] William Koski and Sonja Elder have advocated versions of such a system in large-scale systemic reform cases. *See* William S. Koski, *Achieving "Adequacy" in the Classroom*, 27 B.C. THIRD WORLD L.J. 13 (2007); Elder, *supra* note 118, at 157–59 (advocating for the use of the IDEA due process proceeding as a model for individual school finance claims). The approach outlined in this Article makes that goal much more attainable.

favoring disabled students in the early 1970s,[270] or those under the workers' compensation systems that exist in every state, most of which were initially enacted in part due to worries over a coming litigation flood as courts began to chip away at the "fellow servant" doctrine in employment tort cases.[271] Similar to these other administrative models, a claims system as an alternative to litigation not only could be an effective way to enforce individual rights to education, but also could be a way of reforming state education systems retail, rather than wholesale.

The adoption of a claims system has thus far eluded state legislatures in the context of rights to adequate education, even though it is common knowledge that thousands of children nationwide do without adequate education every year.[272] But an initial litigation flood, predicated by judicial recognition and enforcement of an individual right to adequate education, might be exactly what is needed to enable such adoption. Importantly, however, whether to adopt such a claims system, reform the education system wholesale, or address the cases in court as they arise should be at the discretion of the state legislature. If courts stick to adjudicating individual claims rather than issuing broad declarations and systemic injunctions, such adoption would occur on the legislature's terms, not the court's.

VII. CONCLUSION

This Article takes no position on whether it would be normatively or interpretively correct for any particular state to interpret its own state constitution's education clause to provide for individual rights. That question must be addressed state by state as each case presents it, and evaluated based on the text, history, and structure of each state's constitution. Rather, the point of this Article has been to show that no state *has* enforced

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[270] *See generally* Martin et al., *supra* note 5, at 28–29 (discussing the adoption of state disability education statutes and the federal statute that became the IDEA in response to *Pa. Ass'n of Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) and *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972)).

[271] *See generally* John Fabian Witt, Note, *The Transformation of Work and the Law of Workplace Accidents, 1842–1910*, 107 YALE L.J. 1467 (1998) (reviewing the background and history of workers' compensation legislation).

[272] *See generally* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006) (noting prevalent educational inequality and its disparate impact among poor and minority students).

such an interpretation, that this is due to path dependence on federal systemic institutional reform litigation as a paradigm, and that another approach is possible.

It may be that courts in most states, once they consider the implications of an individual right to adequate education, will reject such an interpretation. It may also be that a few states will adopt such an interpretation and later find it unworkable. If so, perhaps educational adequacy litigation will revert back to the systemic variety, or perhaps it will disappear into the political process. But this Article has provided a theoretical and operational grounding on which state courts may, for the first time, actually consider and resolve the question of whether education is actually a positive individual constitutional right.

We should bring the litigation of rights to education out of the shadow of federal institutional reform litigation and refocus it on the individual rights holders under each state's constitution. By doing so, we can diffuse most—perhaps all—of the intractable inter-branch conflicts that the current style of school finance adequacy litigation creates. We likely can also achieve more certain and more stable systemic reform over time. Most importantly, though, by focusing litigation of education rights on those who actually possess those rights, we will, for the first time in education clause litigation, have the ability to link these rights with individual remedies. A common law constitutionalism is the key to making this shift, and to making the right to education a reality.