ALIGNING EDUCATION RIGHTS AND REMEDIES

*By Joshua E. Weishart**

Over the course of five decades and three waves of litigation, courts have approved remedies under the state constitutional right to education that demand more equitable and adequate funding of public schools. Scholars have urgently called for a "fourth wave" of litigation seeking remedies beyond money: racial and socioeconomic integration, school choice, universal preschool, and teacher tenure reform, just to name a few. Desperate for progress and to escape the incessant rut of school funding battles, advocates have, in turn, initiated lawsuits seeking a broader range of remedies. If this strategy induces a fourth wave, advocates will encounter a beleaguered state judiciary still skeptical that court-directed remedies do not invade the provinces of the other coordinate branches. State courts are unlikely to overcome these doubts until they adopt cohesive standards aligning education rights and remedies.

This Article proposes that alignment can be achieved through reasonably congruent judicial remedies and directly proportional legislative remedies. Both standards gauge whether a remedy effectuates the right to education's function to protect children from the harms of educational deprivations and disparities. Both remedial standards are configured for that purpose to operate within the boundaries set for each branch by state separation of powers principles, conferring guided deference to legislative remedies and closer scrutiny of judicial remedies. The Article briefly previews two proposed fourth-wave, injunctive remedies—integration and choice—suggesting each must overcome evidentiary deficits to satisfy the reasonable congruence standard.

INTRODUCTION

Advance. Retreat. Surrender. Tactically speaking, these are the options available to courts deciding claims brought under the state constitutional right to education. The battlefield metaphor seems misplaced, but it is hardly

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hyperbole.[1] Lawsuits challenging the constitutionality of school finance systems are often said to incite a "battle,"[2] even a "war,"[3] or at least "an old-fashioned western shootout"[4] between courts and legislatures—"an inter-branch conflict"[5] that can quickly escalate into a "tension-fraught,"[6] "constitutional showdown,"[7] which like a Russian novel, is "long, tedious, and everybody dies in the end."[8]

Just as school funding battles intensified, courts in six states surrendered. They refused to even entertain the merits of these lawsuits for fear of being ensnared in a decades-long dispute over what they deduced were political questions committed to the legislature by the constitution.[9] "The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems," remarked a skittish Nebraska Supreme Court.[10] Ceding authority to interpret and enforce the education clauses in their constitutions, however, came at a high cost: the right to education in those states has been downgraded to a nominal, nonjusticiable duty.[11] As collateral damage, millions of schoolchildren with claims under that right lack a legal remedy because the judicial branch of government is essentially closed to them, perhaps indefinitely.[12] Judicial

1. It is not uncommon to find similar descriptors of civil litigation, *see* Vincent Cardi, *Litigation as Violence*, 49 WAKE FOREST L. REV. 677, 678 (2014), but combat-themed accounts of school finance litigation are pervasive and ominous, not merely colloquial.

2. *See, e.g.*, Derek W. Black, *Education's Elusive Future, Storied Past, and the Fundamental Inequities Between*, 46 GA. L. REV. 557, 592 (2012); Joy Chia & Sarah A. Seo, *Battle of the Branches: The Separation of Powers Doctrine in State Education Funding Suits*, 41 COLUM. J.L. & SOC. PROBS. 125, 147 (2007); Joseph S. Patt, Note, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547, 575 (1999).

3. Michael J. Churgin, Peter H. Ehrenberg & Peter T. Grossi, Jr., Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1303 (1972); John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2355 (2004); Richard E. Levy, *The War of Judicial Independence: Letters from the Kansas Front*, 65 U. KAN. L. REV. 725, 728–29 (2017).

4. Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021, 1021 (2006).

5. Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 364 (2011).

6. Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 88 (2010).

7. Sanford Levinson, *Courts as Participants in "Dialogue": A View from American States*, 59 U. KAN. L. REV. 791, 816 (2011).

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

9. *See Ex parte* James, 836 So. 2d 813, 819 (Ala. 2002); Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 406–08 (Fla. 1996); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1190–93 (Ill. 1996); Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 178–80 (Neb. 2007); Okla. Educ. Ass'n v. State, 158 P.3d 1058, 1066 (Okla. 2007); City of Pawtucket v. Sundlun, 662 A.2d 40, 57–59 (R.I. 1995).

10. *Heineman*, 731 N.W.2d at 183.

11. *See* Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 942–44 (2016).

12. *But see* William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 443–46 (Pa. 2017)

restraint rather than abdication would have been more defensible, considering that the source of judges' trepidation lies not with their authority to interpret the constitution but their ability to enforce it with a remedy that the other branches would be willing and able to execute.[13]

Remedial concerns in fact prompted most courts that waded into the battle to retreat.[14] A few recoiled almost immediately, entertaining the merits of the claim but denying any violation in the face of substantial educational deprivations and disparities.[15] More courts courageously declared a constitutional violation but declined to specify a remedy or give guidance about necessary remedial action out of deference to legislative prerogatives and separation of powers.[16] This fallback position offered a false sense of security, however. In some cases, the legislatures simply held out and won the battle by attrition.[17]

Ohio's "thirteen-year battle over school financing" serves as the cautionary tale of remedial restraint cowering into full scale retreat.[18] In *DeRolph I*, the first of four decisions declaring the school finance system unconstitutional, the supreme court deferred to the legislature to devise a remedial scheme that would constitute "a complete systematic overhaul" of the system.[19] The legislature resisted. In turn, the court offered only the most general guidance regarding a remedy in *DeRolph II*.[20] The legislature's response was to enact measures that

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(setting aside as noncontrolling decades-old precedent that suggested claims under state education clause or equal protection were nonjusticiable).

13. *See* William E. Thro, *Judicial Humility: The Enduring Legacy of Rose v. Council for Better Education*, 98 KY. L.J. 717, 734 (2009) ("Because school finance issues are always justiciable, the separation of powers question focuses exclusively on the issue of remedy.").

14. *See* Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 1011 (2014) ("[S]ystemic educational reform litigation has often led to intractable conflicts between state legislatures and state courts. Where these battles are joined, the courts typically retreat.").

15. *See, e.g.*, McDaniel v. Thomas, 285 S.E.2d 156, 168 (Ga. 1981); Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758, 790 (Md. 1983); Skeen v. State, 505 N.W.2d 299, 315–16 (Minn. 1993); Scott v. Commonwealth, 443 S.E.2d 138, 142–43 (Va. 1994); Kukor v. Grover, 436 N.W.2d 568, 577 (Wis. 1989).

16. *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, 742 (2010) (identifying courts in eleven states that have engaged in such "remedial abstention").

17. *See, e.g.*, Anne M. Haynes, Note, *Tension in the Judicial-Legislative Relationship:* DeRolph v. State, 32 U. TOL. L. REV. 611, 649 (2001) ("[T]he legislature has learned that if they hold out long enough the court will surrender to practicality and the legislature will have its way (like a child having a temper tantrum who outfoxes the parent).").

18. Shadya Yazback, Note, *School Financing in Ohio Yesterday, Today and Tomorrow: Searching for a "Thorough and Efficient" System of Public Schools*, 57 CASE W. RES. L. REV. 671, 671–72 (2007).

19. DeRolph v. State (*DeRolph I*), 677 N.E.2d 733, 747 (Ohio 1997).

20. DeRolph v. State (*DeRolph II*), 728 N.E.2d 993, 1001 (Ohio 2000) (defining a "thorough and efficient" system as one in which "each and every school district has enough funds to operate" and "an ample number of teachers, sound buildings that are in compliance with state fire and building codes, and equipment sufficient for all students to be afforded an educational opportunity").

fell far short of a complete overhaul.[21] Political and economic pressures in the interim meant the court would have to contend with a fractious legislature anxious "to tighten its belt in the face of shrinking revenues."[22] In *DeRolph III*, the court thus abandoned its demand for a complete overhaul but nevertheless ordered the legislature "to substantially increase the base funding amount per student."[23] The state balked. Just fifteen months later, the court vacated *DeRolph III* and its injunctive remedy, declared that the system remained unconstitutional in *DeRolph IV*, yet "relinquished its jurisdiction over the matter, effectively waiving the white flag and washing its hands of the dispute."[24]

Undoubtedly, "battle fatigue" set in.[25] "The Ohio Supreme Court's decisions were greeted with proposals to strip the courts of jurisdiction over school funding cases, ignore the Court's orders, or even to impeach one or more of the justices."[26] Here too there was collateral damage, not as much as from judicial abdication, but "judicial restraint" arguably provided only modest gains in improving "the education of the generation of children who attended [Ohio] schools during that period."[27] Similarly, millions more children will be impacted by the sudden retreat of the Texas Supreme Court which most recently excused a $5 billion decrease in school funding—a move that "doubled down on how deferential it is to the legislature."[28]

The few courts that have advanced resolutely into battle exercised less judicial restraint, specifying a remedy or giving guidance about remedial measures to cure the constitutional violation.[29] The paradigm example here is the New Jersey Supreme Court which "has been the most aggressive of any in enforcing education rights and duties."[30] Its battle has been waging in one form

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21. William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1166–67 (2004).

22. *Id.* at 1167.

23. *Id.* at 1167–68 (citing DeRolph v. State (*DeRolph III*), 754 N.E.2d 1184, 1189–90, 1214–16 (Ohio 2001)).

24. *Id.* at 1169–70 (citing DeRolph v. State (*DeRolph IV*), 780 N.E.2d 529, 529–32 (Ohio 2002)).

25. Larry J. Obhof, DeRolph v. State *and Ohio's Long Road to an Adequate Education*, 2005 BYU EDUC. & L.J. 83, 140 (2005).

26. *Id.* at 85.

27. Sonja Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 778 (2007); *see also* Bill Bush & Shannon Gilchrist, *20 Years After DeRolph Decision, Some School Districts Gained, Some Lost*, COLUMBUS DISPATCH (Sept. 22, 2017, 6:10 AM), http://www.dispatch.com/news/20170922/20-years-after-derolph-decision-some-school-districts-gained-some-lost [https://perma.cc/ RDS8-5MG6].

28. Albert Kauffman, *The Texas Supreme Court Retreats from Protecting Texas Students*, 19 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 145, 151, 164, 168 n.173 (2017).

29. *See* Bauries, *supra* note 16, at 742–43, 742 n.225 (counting courts in seven states that entered or approved entry of "policy-directive remedial orders, ranging from requiring the legislative body in the state to commission a third-party study to determine the cost of providing an adequate education system, to mandating the actual appropriation of additional state funding for education").

30. Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 453 (2016).

or another since the early 1970s. "If Ohio's struggle seems exhausting, New Jersey endured the legal equivalent of the Thirty Years' War."[31] Make that a Forty Years' War, provoking more than twenty decisions in which the court has taken the state to task for failing to adequately and equitably fund schools. The court has rebuffed the argument that the court should defer to the legislature's plenary power and not order budget appropriations to remedy violations.[32] "Like anyone else," the court has reiterated, "the State is not free to walk away from judicial orders enforcing constitutional obligations."[33]

Yet the court then enabled the legislature to stray considerably from that direction. Limiting its holding to certain school districts, the court ordered $500 million in cuts be restored to those districts while effectively excusing another "$600 million in cuts to [other] disadvantaged districts."[34] The ruling perhaps signals the court's "substantial shift away from its more aggressive stances of the past" in denying "the full remedy that just a few years earlier the court had seemingly mandated."[35]

The New Jersey Supreme Court is not alone in bearing the scars of battle. In an unprecedented move, the Washington Supreme Court was forced to impose contempt sanctions ($100,000 per day) on the legislature for its repeatedly failure to devise a remedial school finance plan as ordered.[36] It remains to be seen whether those sanctions will ensure full compliance.[37] In Kansas, the "War of Judicial Independence" culminated in a "well-financed effort to unseat four Supreme Court justices," with all four nevertheless winning their retention elections.[38] In the buildup to that effort, the legislature purported to strip the court of authority to enjoin funding and to appoint chief judges, threatened to change the means of judicial selection to exert more control over the process, and imposed deadlines for issuing appellate decisions.[39] "None of these measures, however, has deterred the Kansas courts, which have avoided or invalidated each of them."[40] Moreover, the Kansas Supreme Court has continued invalidating the state's school finance scheme, most recently concluding it is both inequitable and inadequate.[41]

Still, the collateral damage to schoolchildren—although mitigated in states where courts have advanced rather than surrendered or retreated—accrues

31. Madeline Davis, Note & Comment, *Off the Constitutional Map: Breaking the Endless Cycle of School Finance Litigation*, 2016 BYU EDUC. & L.J. 117, 132 (2016).

32. Abbott *ex rel.* Abbott v. Burke (*Abbott IX*), 20 A.3d 1018, 1024 (N.J. 2011).

33. *Id.*

34. Black, *supra* note 30, at 455.

35. *Id.*

36. *See* Contempt Order at 9–10, McCleary v. State (*McCleary II*), 269 P.3d 227 (Wash. Aug. 13, 2015) (No. 84362-7); Continuing Contempt Order at 11, McCleary v. State (*McCleary III*), 269 P.3d 227 (Wash. Oct. 6, 2016) (No. 84362-7).

37. Continuing Contempt Order at 44, McCleary v. State (*McCleary IV*), 269 P.3d 227 (Wash. Nov. 15, 2017) (No. 84362-7).

38. Levy, *supra* note 3, at 725–26.

39. *Id.* at 729–34.

40. *Id.* at 746.

41. Gannon v. State (*Gannon V*), 402 P.3d 513 (Kan. 2017).

steadily. For instance, like many states, Kansas faces a severe teacher shortage with teacher pay in some rural areas ranking the lowest in the country.[42] The shortage comes more than a decade after the Kansas Supreme Court first held the state's school finance scheme unconstitutional.[43] Washington receives an "F" in a recent school funding fairness report measuring the state's "effort" on education spending in relation to its economic productivity, and the state ranks near the bottom on teacher wage competitiveness.[44] The low rankings come almost forty years after the Washington Supreme Court reaffirmed the state's "paramount duty" to make "ample provision" for the education of its children.[45]

Surveying the battlefield, the impression is that state courts are losing ground even as a few remain vigilant. Whether they take a defensive or offensive tactical posture, it is evident that no court wishes to die on the last proverbial hill marked 'remedy.' Active-duty courts now approach school funding lawsuits "with increased caution, an eye toward the perceived efficacy of their work, and greater concern over the prospect of constitutional quagmire vis-à-vis recalcitrant state legislatures."[46] All the while, courts angle for the quickest "judicial exit strategy" when it comes to the remedy.[47] If past is prologue, these battles inevitably will end with a whimper not a bang, driven by the inertia of appeasement and political expediency. Courts simply "grow tired of superintending funding schemes."[48] Yet any resulting peace in defeat is without honor; the tacit or explicit terms of surrender demand that courts abdicate their authority to enforce an affirmative constitutional right. Therefore, "the practical effect of judicial disengagement and under-enforcement is to undermine and retract previously established education rights and duties themselves."[49]

The looming devaluation of the state constitutional right to education has provoked a sense of urgency for a new battle plan. Some scholars have implored plaintiffs to "find a way to recharacterize both the right and the remedy so that

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42. Celia Llopis-Jepsen, *Rural Kansas Teacher Pay Ranks Lowest in U.S., Adds to Hiring Challenges for School Districts*, KCUR 89.3 (June 23, 2017), http://kcur.org/post/rural-kansas-teacher-pay-ranks-lowest-us-adds-hiring-challenges-school-districts#stream/0 [https://perma.cc/M8KN-MPSR]; *see also* Black, *supra* note 30, at 424–25, 443–44.

43. Montoy v. State, 102 P.3d 1160 (Kan. 2005).

44. BRUCE D. BAKER ET AL., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 17, 26 (7th ed. 2018), http://www.edlawcenter.org/assets/files/pdfs/publications/Is_School_Funding_Fair_7th_Editi.pdf [https://perma.cc/ZXB8-UP9C].

45. Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 76 (Wash. 1978).

46. William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1899 (2017).

47. *See* Randall T. Shepard, *State Constitutional Remedies and Judicial Exit Strategies*, 45 NEW ENG. L. REV. 879, 896 (2011) ("[T]he remedy should set the stage for closing out the litigation on some foreseeable timetable if all issues before the court have been resolved.").

48. James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1260 (2008).

49. Black, *supra* note 30, at 462, 463–66 (contending that under-enforcement also (1) "deprives marginalized stakeholders of a role in the education decisionmaking process and reinforces the status quo," (2) "excuses the state from justifying an override of its constitutional education duties," and (3) reorders "preferences in direct opposition to constitutional text and precedent in many states").

they cannot be boiled down to a demand for increased funding."[50] That proposal echoes a crescendo of erstwhile calls for a new, "fourth wave" of litigation.[51] At the risk of mixing metaphors, school finance "battles" have generally proceeded in "three waves," all of which have focused on more equitable or adequate school funding.[52] Fourth-wave proponents suggest that, because funding-based remedies and guidance set the stage for inter-branch conflicts, plaintiffs should focus "beyond dollars" on remedies that will get "a better reception in courts."[53] Notably, a few "courts have already begun to explore a handful of legally and politically plausible nonmonetary alternatives."[54] Apart from litigation strategy, scholars have also reasoned that "because money alone is not the problem, money alone cannot be the solution."[55]

Equally true is that not every problem in education amounts to a constitutional violation and not every solution to education warrants a constitutional remedy. So, as the calls for fourth-wave remedies reach fever pitch in desperate times, we should consider whether past and future remedies align with education rights. Otherwise, we risk continuing on the choppy path of the past three waves, which could further undermine the right and educational justice. To steer clear and perhaps ease inter-branch tensions, courts need to adopt standards that serve the "two basic functions" of constitutional remedies: (1) to provide "redress" for constitutional violations and (2) support "structural"

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50. Simon-Kerr & Sturm, *supra* note 6, at 121; *see* Jared S. Buszin, Comment, *Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy*, 62 EMORY L.J. 1613, 1616 (2013) ("[E]ducation reform litigants should shift their attention to challenging local policies that cause an inequitable or inadequate distribution of skill-based education inputs."); Julie Zwibelman, Note, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 529–30 (2001) (proposing that school finance litigation should broaden its scope to include "racial integration and enforceable, results-driven education reform").

51. *See generally* Christopher E. Adams, Comment, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613 (2007); David G. Hinojosa, *"Race-Conscious" School Finance Litigation: Is a Fourth Wave Emerging?*, 50 U. RICH. L. REV. 869 (2016); Lauren Nicole Gillespie, Note, *The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989 (2010); Kevin Randall McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867 (1998).

52. Each wave represented a different constitutional theory of liability: first wave equality under the Fourteenth Amendment's Equal Protection Clause; second wave equity under state constitution equal protection and education clauses; and third wave adequacy, also under state constitution education clauses. *See generally* William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 222–32, 238–49 (1990). For critique of the wave metaphor, see *infra* note 157.

53. *See* Koski, *supra* note 46, at 1900.

54. Simon-Kerr & Sturm, *supra* note 6, at 121.

55. Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597, 1617 (2016); *see also* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 289 (1999) ("The stronger the influence of peers on performance, the less likely it is that money will make much of a difference—and the more likely it is that changing the composition of the school will make a difference.").

norms "adequate to preserve separation-of-powers values."[56] More precisely, courts should adopt standards designed to ensure that the remedy effectuates the constitutional right's function within the boundaries set for each branch by separation of powers principles.

This Article thus proposes two separate remedial standards: *direct proportionality* and *reasonable congruence.*

The *direct proportionality* standard would govern a court's review of legislative remedies intended to cure violations of the state constitutional right to education. A legislative remedy would cure the violation if it is calculated to ensure that the equity and adequacy of educational opportunities maintain an upward, directly proportional relationship. Consistent with state separation of powers principles, this is a highly deferential remedial standard because it entails no judicial review of the legislative means or the fit between those means and the constitutional ends. Nor does it even demand the actual achievement of the constitutional ends. It does demand, however, that any legislative remedy effectuates the right's function to protect children from the harms of educational disparities and deprivations by setting equity and adequacy on a mutually-reinforcing, upward trajectory that maintains proportionality between the them.

The *reasonable congruence* standard would govern courts in contemplating or reviewing injunctive relief to cure violations of the state constitutional right to education. A court applying this standard would need to determine whether substantial evidence shows that the requested injunctive relief is reasonably calculated to set equity and adequacy on an upward trajectory. Consistent with state separation of powers principles, this remedial standard is meant to secure a reasonably close fit between the judicial remedy and the constitutional right so that courts cannot be fairly accused of crossing the line between adjudication and legislation.

The rationale for these remedial standards builds in Part I with a review of the ever-fetching (and fledgling) fourth wave. That review suggests a fourth wave has not emerged because courts continue to harbor separation of powers concerns regarding fourth-wave remedies—the very same concerns that plagued the past three waves. Part II explains this persistent struggle is due in no small measure to courts' under-theorization of the right to education and its connections with past remedies (equality, equity, and adequacy). Judges must be able to conclude that a particular remedy actually effectuates the right's function. That function, according to state constitutional text and precedent, is to protect children from the harms of educational deprivations and disparities. Past remedies have aimed to protect children from the harms of either educational disparities or depreciations, not both. But again, constitutional text and precedent already point a way forward for courts: mutually enforce equity and adequacy—ideally as an integral claim for equal liberty—which encapsulates the right's function.

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56. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787, 1790 (1991).

Part III outlines two remedial standards to effectuate that function while adhering to state separation of powers principles. Adapted from the federal "congruence and proportionality" doctrine, these standards essentially entail a highly deferential form of ends scrutiny for legislative remedies and a less deferential means-ends testing for judicial remedies. Part III concludes with a brief preview of the application of the reasonable congruence standard for two proposed fourth-wave judicial remedies, integration and choice. That preview suggests each remedy must overcome evidentiary deficits. Contrary to their perceived strengths, those deficits in effectuating equal liberty fall on the equality side for integration remedies, and the liberty side for a choice remedies.

I. THE EVER-FETCHING FOURTH WAVE

Fetch is the unobstructed distance over which wind blows in the same direction to generate a wave.[57] The greater the fetch, wind speed, and wind duration, the more intense the wave.[58] In law, as in nature, fetch helps explain why a fourth wave of litigation under the state constitutional right to education has not fully emerged. First of all, the winds have blown in different directions rather than behind a single remedy. An assortment of remedies have been proposed seeking interventions beyond (though often implicating) equitable and adequate funding: racial or socioeconomic integration,[59] improved standards,[60] accountability measures,[61] compensatory services,[62] institutional remedies,[63]

57. *In re* Katrina Canal Breaches Consol. Litig., 647 F. Supp. 2d 644, 675 (E.D. La. 2009).

58. *Id.*

59. Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373 (2012); Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE F. FOR L. & SOC. CHANGE 47 (2009); Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1355–56 (2004); Ryan, *supra* note 55, at 308; James E. Ryan, Sheff*, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 533–35 (1999); Christopher A. Suarez, Note, *Sliding Towards Educational Outcomes: A New Remedy for High-Stakes Education Lawsuits in a Post-NCLB World*, 15 MICH. J. RACE & L. 477 (2010); Zwibelman, *supra* note 50, at 529–30.

60. Jill Ambrose, Note, *A Fourth Wave of Education Funding Litigation: How Education Standards and Costing-Out Studies Can Aid Plaintiffs in Pennsylvania and Beyond*, 19 B.U. PUB. INT. L.J. 107 (2009).

61. MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 57 (2009).

62. Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 469 (2000) (proposing "public and private tutoring programs"); Note, *Education Policy Litigation as Devolution*, 128 HARV. L. REV. 929, 930 (2015).

63. Shavar D. Jeffries, *The Structural Inadequacy of Public Schools for Stigmatized Minorities: The Need for Institutional Remedies*, 34 HASTINGS CONST. L. Q. 1 (2006); Aaron Saiger, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 COLUM. L. REV. 1830 (1999).

universal preschool,[64] public boarding schools,[65] school discipline reform,[66] school choice,[67] private school vouchers,[68] public school vouchers,[69] teacher tenure and evaluation reform,[70] multicultural and bilingual curriculum,[71] and the equitable distribution of quality teachers[72]—with still other remedies as potential offshoots.[73] So, fourth-wave remedies have been fetching, just not in the navigational sense that could generate an intense wave of litigation.

Second, each time the winds have sustained favorably in the same direction, the fourth wave has been curtailed by obstructions, most often in the form of adverse decisions in which courts maintain reservations about enforcing the remedy. This has been the pattern since the possibility of a fourth wave first took shape in *Sheff v. O'Neill*.[74] There, the Connecticut Supreme Court held that racial segregation, *de facto* as well as *de jure*, violates the state constitution's guarantee of "substantially equal educational opportunity and requires the state to take further remedial measures."[75] In a pair of articles published shortly after the decision, James Ryan argued that *Sheff* should herald a fourth wave of litigation in which plaintiffs seek nonmonetary remedies for violations of state constitutional rights to an equal or adequate education.[76] Specifically, Ryan proposed racial and socioeconomic integration as well as school choice.[77]

But the fourth wave did not surge after *Sheff* partially because of *Sheff*. The decision obstructed itself by (1) limiting "relief to a declaratory judgment that

64. James E. Ryan, *A Constitutional Right to Preschool?*, 94 CALIF. L. REV. 49 (2006); *see also* Kevin Woodson, *Why Kindergarten Is Too Late: The Need for Early Childhood Remedies in School Finance Litigation*, 70 ARK. L. REV. 87 (2017).

65. Bret D. Asbury & Kevin Woodson, *On the Need for Public Boarding Schools*, 47 GA. L. REV. 113 (2012); Shelaswau Bushnell Crier, *Beyond Money: Public Urban Boarding Schools and the State's Obligation to Make an Adequate Education Attainable*, 44 J.L. & EDUC. 23 (2015).

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

67. Ryan, *supra* note 55, at 310–14; Ryan, *supra* note 59, at 560–62; Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909, 969 (2007).

68. Greg D. Andres, Comment, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795, 796 (1995).

69. Adams, *supra* note 51, at 1652.

70. *See* Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75, 107, 123–42 (2016) (identifying reform movement which argues "that tenure and retention policies violate students' right to an adequate and equitable education" and explaining, that although claim is facially valid based on existing school funding precedent, it raises serious evidentiary and causation problems as well as justiciability concerns).

71. Hinojosa, *supra* note 51.

72. Black, *supra* note 55; Buszin, *supra* note 50.

73. Kevin G. Welner, *Silver Linings Casebook: How* Vergara*'s Backers May Lose by Winning*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 121, 141 (2015) (suggesting legal challenges to "inequities in class size," "grade retention," "access to enriched and engaging curriculum, transportation, buildings and facilities," and "access to and use of technology," among others previously mentioned).

74. Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996).

75. *Id.* at 1281.

76. Ryan, *supra* note 55, at 307–309; Ryan, *supra* note 59, at 553–54; *see also* McMillian, *supra* note 51, at 1896–1902 (noting potential for fourth wave a year after *Sheff*).

77. Ryan, *supra* note 55, at 308–15; Ryan, *supra* note 59, at 555–62.

the school districting and boundary-drawing system was unconstitutional" despite the broad sweep of the court's finding that *de facto* segregation violated the state constitution and (2) failing to specify a remedy.[78] Instead, the court advised "the legislature and the executive branch to put the search for appropriate remedial measures at the top of their respective agendas."[79] The dissent predicted that this failure to articulate a "principle upon which to structure such a remedy" would be problematic.[80] And indeed the plaintiffs were forced to return to court repeatedly to induce more state action.[81] It took the parties seven years to negotiate "Phase 1" of a settlement agreement—a "voluntary integration plan requiring the construction of eight new magnet schools to attract suburban White children to the urban center"[82] and "a state-wide inter-district public school attendance program [permitting] students from Hartford to attend suburban schools on a space-available basis."[83] Following subsequent court appearances and settlement agreements, the parties are negotiating "Phase 4," some twenty-one years after the initial decision.[84] To be sure, *Sheff* "led to important reforms, [but] many of the conditions the case sought to remedy remain just as bad as before."[85]

The putative fourth wave thus began with a court emulating the reluctance of courts in the preceding three waves to specify or give much guidance about the remedy. Two follow-on suits asserted the alternative claim that *Sheff* declined to reach because it was not argued in the lower courts—that socioeconomic and racial segregation deprives students of an adequate education.[86] Neither court had to grapple with the remedy, however. The first case, *Minneapolis Branch of the NAACP v. State of Minnesota*, settled without the court deciding the claim.[87] And the second case, *Paynter v. State*, failed to state a cognizable claim.[88] *Paynter* was arguably based on "the precise nature and limits of the constitutional right to education in New York rather than a conceptual rejection of the plaintiffs' claim."[89] Regardless, by leaving the legal theory for the remedy untested or calling it into question, the Minnesota and

78. Jim Hilbert, *Restoring the Promise of* Brown*: Using State Constitutional Law to Challenge School Segregation*, 46 J.L. & EDUC. 1, 42 (2017).

79. *Sheff*, 678 A.2d at 1290–91.

80. *Id.* at 1295–96 (Borden, J., dissenting); *see also* James K. Gooch, *Fenced in: Why* Sheff v. O'Neill *Can't Save Connecticut's Inner City Students*, 22 QUINNIPIAC L. REV. 395, 415 (2004) (agreeing with dissent that "failure to offer a standard by which improvement could be judged" or "a limiting principle" to the court's mandate inhibited progress).

81. Justin R. Long, Comment, *Enforcing Affirmative State Constitutional Obligations and* Sheff v. O'Neill, 151 U. PA. L. REV. 277, 293–95 (2002).

82. Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 LAW & INEQ. 81, 104–05 (2006).

83. Suarez, *supra* note 59, at 484.

84. *See Measuring Progress*, SHEFF MOVEMENT, http://sheffmovement.org/measuring-progress/ [https://perma.cc/75W8-DUW5].

85. Hilbert, *supra* note 78, at 43 (citing Suarez, *supra* note 59, at 478).

86. Sheff v. O'Neill, 678 A.2d 1267, 1267, 1286 (Conn. 1996).

87. Black, *supra* note 59, at 382–83.

88. Paynter v. State, 797 N.E.2d 1225, 1231 (N.Y. 2003).

89. Black, *supra* note 59, at 384.

New York litigations were little more than ripples in *Sheff*'s wake.

Around the same time, an effort to recognize access to publicly funded preschool under the state constitutional right to education also stalled—after initially gaining momentum in New Jersey—when state supreme courts in North Carolina, Arkansas, and Massachusetts, "declined to recognize a right to preschool, all overturning trial court decisions that had done so."[90] Renewing his call for a fourth wave, Ryan defended access to preschool as a viable remedy against separation of powers arguments that it was a "public-policy issue for the [legislature] to explore and resolve."[91] Ryan argued that, because courts must "give content" to the right to education, it would be inconsistent for them to identify some educational inputs (e.g., per-pupil expenditures) "within the definition of the right to equal or adequate educational opportunities" while excluding others (e.g., preschool) as nonjusticiable.[92] Despite such prodding, "the judicial embrace of early childhood education that Ryan envisioned is no closer to coming to fruition" now more than a decade later.[93] Only two appellate court decisions in North Carolina and South Carolina have since recognized explicitly that access to preschool can help remedy educational inadequacies.[94] Both are of limited value, however; the North Carolina decision was vacated, rendered moot by modest legislative amendments,[95] and the South Carolina decision did not actually impose a specific remedy and, in any event, was later overturned.[96]

This fourth-wave pattern of fits and starts has persisted most recently in legal challenges to teacher tenure laws and practices. The first of these challenges, *Vergara v. State*, contended that easy-to-obtain "tenure and the retention of ineffective teachers" engendered unequal educational opportunities and violated California's constitutional right to education.[97] The trial court agreed, ruling that the five challenged statutes harmed disadvantaged students and thus violated the equal protection clause of the state constitution, under which education is a fundamental right and wealth is a suspect classification.[98]

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90. Ryan, *supra* note 64, at 52, 52 nn.17–18 (citing Abbott v. Burke (*Abbott VI*), 748 A.2d 82, 84–85 (N.J. 2000); Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View III*), 91 S.W.3d 472, 500–02 (Ark. 2002); Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1156–57 (Mass. 2005); Hoke Cty. Bd. of Educ. v. State (*Hoke I*), 599 S.E.2d 365, 393–94 (N.C. 2004)).

91. Ryan, *supra* note 64, at 85 (quoting *Lake View III*, 91 S.W.3d at 501–02).

92. *Id.*

93. Woodson, *supra* note 64, at 88.

94. *See* Abbeville Cty. Sch. Dist. v. State (*Abbeville II*), 767 S.E.2d 157, 180 (S.C. 2014); Hoke Cty. Bd. of Educ. v. State, 731 S.E.2d 691, 697 (N.C. Ct. App. 2012); *see also* Gannon v. State (*Gannon V*), 402 P.3d 513, 538 (Kan. 2017) (observing legislative bill providing "additional $2 million for preschool-aged at-risk students" would be "helpful" but not sufficient "to remedy overall violation" of funding inadequacy).

95. *See* Hoke Cty. Bd. of Educ. v. State (*Hoke II*), 749 S.E.2d 451, 455 (N.C. 2013).

96. *See* Order of Dismissal at 1, *Abbeville V*, No. 2007-065159 (Nov. 17, 2017) ("*Abbeville II* was wrongly decided as violative of separation of powers.").

97. Black, *supra* note 70, at 78–79.

98. Vergara v. State, No. BC484642, 2014 WL 6478415, *5–7 (Cal. Super. Ct. Aug. 27, 2014).

"With that, the *Vergara* case sent shockwaves throughout the nation and suggested the possibility of a tectonic shift in educational equity litigation, as copycat litigation was filed in New York, Minnesota, and New Jersey."[99]

But the would-be wave of teacher tenure litigation may have been overhyped—an appellate court later reversed the trial court in *Vergara*, concluding that the plaintiffs failed to "show that the statutes inevitably cause a certain group of students to receive an education inferior to the education received by other students."[100] The California Supreme Court subsequently denied review of the appellate court decision, terminating the matter in state with the highest K-12 student population.[101] As of the date of this writing, the copycat litigation has not fared much better.[102] The tempering of expectations in these cases is again explained in part by remedial concerns. "The potential solutions to ineffective teaching and teacher removal are multifaceted," and thus, some would argue more appropriately "within the domain of the legislature."[103]

Thus far, the battle hymn of the putative fourth wave of litigation repeats the refrain of the first three waves: "The remedy is the experience. This is the dangerous liaison"[104] between courts and legislatures. William Koski perceives that plaintiffs sensitive to this dynamic are focusing now "on specific, identifiable educational 'wrongs' that allegedly result in specific, identifiable educational 'harms' to specific, identifiable students" as a way to make the litigation more palatable to judges.[105] Koski observes "parallel tracks" along which litigants are pursuing fourth wave remedies in what he labels "next generation" cases.[106] "On one rail are those who continue to focus on the adequacy and equity of specific educational resources" (e.g., access to

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99. Koski, *supra* note 46, at 1920 (citations omitted).

100. Vergara v. State, 209 Cal. Rptr. 3d 532, 538 (Cal. Ct. App. 2016), *review denied*, 209 Cal. Rptr. 3d 532, 558 (2016).

101. *Id.* at 558.

102. The litigation appears most promising in the state with the fourth highest K-12 population, New York, where the challenge to tenure persists having overcome successive motions to dismiss and may now proceed to trial. *See* Davids v. State, No. 101105/14, 2018 WL 1514129 (N.Y. App. Div. Mar. 28, 2018) (affirming trial court's denial of motion to dismiss, concluding allegations state a claim for violation of state constitution). In neighboring New Jersey, the suit claiming that the "last in, first out" mandates governing teacher layoffs violate the state constitution education clause is on appeal from the trial court's dismissal. *See* H.G. v. Harrington, No. L-2170-16 (N.J. Super. Ct. May 4, 2017). And the Minnesota Supreme Court has agreed to review in part an appellate court's dismissal of a suit asserting that tenure statutes violate the education and equal protection clauses of the state constitution. *See* Forslund v. State, No. A17-0033, 2017 WL 3864082 (Minn. Ct. App. Sept. 5, 2017), *review granted in part* (Nov. 14, 2017).

103. *See* Black, *supra* note 70, at 82 ("[P]resuming that eliminating tenure through constitutional litigation is a solution, much less the best among competing possibilities, is dangerous."); Michele Aronson, Note, *The Deceptive Promise of* Vergara*: Why Teacher Tenure Lawsuits Will Not Improve Student Achievement*, 37 CARDOZO L. REV. 393, 425 (2015) ("[C]ourts in teacher tenure lawsuits are constrained in the remedies—and, by extension, the impact—they can have, because design of the remedies rests with the legislatures.").

104. *See* JASON MRAZ, *The Remedy (I Won't Worry)*, *on* WAITING FOR MY ROCKET TO COME (Elektra Records 2002).

105. Koski, *supra* note 46, at 1915–16.

106. *Id.* at 1916.

preschool, AP courses, instructional materials, clean and safe facilities).[107] Whereas "on the other rail are those who believe that the educational wrong stems from inefficient management of those resources due to constraints on administrative decision making and family liberty" (e.g., school choice, teacher tenure, evaluation, and compensation).[108] Although it can be helpful to distinguish and categorize the cases in this manner, there is also no conceptual barrier forcing them to proceed on separate tracks. A case could argue that a specific, identifiable educational harm derives from inefficient management of an otherwise deprived educational resource.[109]

In either case, Koski foresees legal and political challenges ahead. Despite the focus on specific educational wrongs and specific educational harms to specific students, he thinks plaintiffs might still be hard-pressed to establish a causal line between the two, "given the complexity that one may find beneath superficially clear cause-effect relationships."[110] This is because of the variety of factors that could be affecting academic performance.[111] Relatedly, he notes that the issues raised in these cases—e.g., school choice, teacher tenure and evaluation reform, and accountability—"are among the most empirically contested and politically debated topics in education policy today."[112] So, even though the cases seek specific remedies for discrete educational harms "it is not at all clear that courts will be willing to wade into the fray."[113] Indeed, the narrower the remedy sought, the less likely it may be sufficient (though perhaps necessary) to improve educational opportunity overall.[114] Koski therefore concludes with an appeal for "modesty among courts and advocates for what we can reasonably accomplish" and cautions that we "avoid unintended consequences of our remedial policy choices."[115]

One way to heed that sound advice is by drawing much-needed attention to the standards by which courts should measure the degree of fit (or expected gap) between the state constitutional right to education and the remedy. Before considering remedial standards, however, we must first understand the nature of the relation between that right and its remedy.

II. REMEDYING THE STATE CONSTITUTIONAL RIGHT TO EDUCATION

The remedial failures of past and contemporary waves of education rights litigation cannot be attributed solely to the remedies themselves but to their disconnect with the rights they are meant to vindicate. Alas, most courts seem

107. *Id.*

108. *Id.*

109. *See id.* at 1930 (calling for "litigation strategies that couple aspects of both rails of reform: more resources combined with better accountability for how those resources are spent and relaxation of regulations that create inefficiency in the deployment of those resources").

110. *Id.* at 1924–25.

111. Koski, *supra* note 46, at 1924-25.

112. *Id.* at 1927–28.

113. *Id.* at 1928.

114. *Id.* at 1930.

115. *Id.*

resigned to toil under a rather "conceptually thin account" of the state constitutional right to education.[116] At the root of that right's "current under-enforcement," however, is its "past under-theorization by courts."[117] Prior legal scholarship has not filled that "theoretical void," yielding "very general descriptions of education rights" but otherwise making few inroads "to sketch out the proper connections between rights and remedies."[118] To that end, we must first discern the state constitutional right to education "from the remedies it might warrant."[119] Once the right's purpose or function is properly understood, we can analyze, for the benefit of future remedies, the ways in which previous remedies have and have not served that function.

A. Remedying the 'Right' Function

Start with the basic proposition that a judicially created remedy should effectuate the constitutional right that has been violated.[120] Specifically, the remedy should effectuate the right's function, i.e., "what rights do for those who hold them."[121] When children are deemed the rightholders, the most obvious function of the state constitutional right to education is to obligate the state to provide a public education.[122] In this instance, no remedy is necessary because "all states have fulfilled that function by providing a free, public education system."[123] And all states continue to perform under that duty by enacting necessary legislation (e.g., education budgets) and by making and administering education policy.[124] But provision and performance cannot be the right's only functions or else any education, however meager or rudimentary, would do.[125]

Surely the reason to command the state to educate children is tied

116. *See* Weishart, *supra* note 11, at 924; Black, *supra* note 30, at 463 ("[T]he right to education is ill-defined in precedent and operates more on assumption and conjecture than analysis and implementation.").

117. Black, *supra* note 30, at 463.

118. Bauries, *supra* note 16, at 756, 759.

119. *See* Black, *supra* note 30, at 463 ("While rights without remedies are practically meaningless and the two cannot be entirely separated, rights and remedies are conceptually distinct. Rights involve matters of constitutional principle, whereas remedies can implicate public policy.").

120. Abbot v. Burke (*Abbott IV*), 693 A.2d 417, 445 (N.J. 1997) ("[T]here can be no responsible dissent from the position that the Court has the constitutional obligation to do what it can to effectuate and vindicate the constitutional rights of the school children."); *see* Bush v. Lucas, 462 U.S. 367, 374 (1983) (observing that constitutional grant of jurisdiction to decide cases includes "authority to choose among available judicial remedies in order to vindicate constitutional rights").

121. Leif Wenar, *Rights*, *in* STAN. ENCYCLOPEDIA PHIL., at § 2 (last updated July 2, 2011), http://plato.stanford.edu/archives/fall2011/entries/rights [https://perma.cc/D6F7-LXPF].

122. *See* Weishart, *supra* note 11, at 955.

123. *Id.*

124. *Id.* (citing Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 311 (2011)).

125. *Cf.* Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 778 (Tex. 2005) ("At one extreme, no one would dispute that a public education system limited to teaching first-grade reading would be inadequate, or that a system without resources to accomplish its purposes would be inefficient and unsuitable.").

inexorably to the instrumental and intrinsic value of an education. This explains why courts interpret state constitution education clauses that simply mandate the establishment of a free, public education system[126] to require that the education provided be of a certain quality.[127] More often, education clauses employ adjectives like "suitable," "efficient," "thorough," or some combination thereof,[128] which signify that a quality education should be provided.[129]

In a number of states, the education clauses also declare explicitly why a quality education matters: It is "essential to the preservation of rights and liberties of the people"[130] and to a "free,"[131] "good,"[132] or "republican form"[133] of government "by the people."[134] Several courts have also acknowledged that education for citizenship is democracy-reinforcing absent such explicit language

126. *See, e.g.*, 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."); 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."); S.C. CONST. art. XI, § 3 ("The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable.").

127. *See, e.g.*, Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 227 (Conn. 2010) ("[T]he state constitution embodies a substantive component requiring that the public schools provide their students with an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting, and to prepare them to progress to institutions of higher education, or to attain productive employment and otherwise to contribute to the state's economy."); Abbeville Cty. Sch. Dist. v. State (*Abbeville I*), 515 S.E.2d 535, 540 (S.C. 1999) ("We hold today that the South Carolina Constitution's education clause requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education."); Campaign for Fiscal Equity, Inc. v. State (*CFE I*), 655 N.E.2d 661, 666 (N.Y. 1995) ("[The education clause] requires the State to offer all children the opportunity of a sound basic education . . . consist[ing] of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.").

128. *See, e.g.*, KAN. CONST. art. VI, § 6(b) ("The legislature shall make suitable provision for finance of the educational interests of the state."); KY. CONST. § 183 ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State."); W. VA. CONST. art. XII, § 1 ("The legislature shall provide, by general law, for a thorough and efficient system of free schools.").

129. *See, e.g.*, Gannon v. State (*Gannon I*), 319 P.3d 1196, 1225 (Kan. 2014) (per curiam) ("Simply put, use of 'suitable' necessarily conveys the presence of standards of quality below which schools may not fall."); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) ("[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities."); Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979) ("We may now define a thorough and efficient system of schools: It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.").

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

131. *See* IND. CONST. art. VIII, § 1; N.H. CONST. pt. 2, art. LXXXIII.

132. *See* MICH. CONST. art. VIII, § 1; N.C. CONST. art. IX, § 1; ARK. CONST. art. XIV, § 1.

133. *See* IDAHO CONST. art. IX, § 1; MINN. CONST. art. XIII, § 1; S.D. CONST. art. VIII, § 1.

134. *See* N.D. CONST. art. VIII, § 1.

in the state constitution.[135] Courts have been unequivocal about the importance of education to the common good—as one put it, the state is "dependent *for its survival* on citizens who are able to participate intelligently in the political, economic, and social functions of our system."[136] Regarding those economic functions, a few state constitutions specifically identify "commerce, trades, manufactures" as well as "vocational," "mining," "agricultural," "scientific," and "industrial" improvements as dependent on an educated workforce.[137] Again, even where state constitutions are not that specific, courts interpreting them have said that education equips children with the capabilities "to attain productive employment and otherwise contribute to the state's economy,"[138] "to compete favorably"[139] on the job market, and "lead economically productive lives to the benefit us all."[140]

State constitutions therefore regard a quality education's "instrumental value as a public or collective good" that can sustain democracy and a state's economy.[141] "But courts adjudicating the right to education have also recognized education's intrinsic value as a private, individual good that should be enhanced by nurturing children's capabilities *to be* autonomous generally."[142] They have emphasized that education cultivates "the development of the mind, body, and social morality (ethics),"[143] "maturity and understanding,"[144] "self-knowledge,"[145] and capacity to "flourish in the twenty-first century."[146]

In addition to being a collective and individual good, education is a positional good, at least in the competitions that confer the benefits of higher socioeconomic status, prosperity, and influence (e.g., selective-college

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

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

137. *See* MASS. CONST. pt. 2, ch. V, § 2; N.H. CONST. pt. 2, art. LXXXIII; KAN. CONST. art. VI, § 1; NEV. CONST. art. XI, § 1; IND. CONST. art. VIII, sec. 1; N.D. CONST. art. VIII, § 4.

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

139. Pinto v. Ala. Coal. for Equity, 662 So. 2d 894, 896 (Ala. 1995); McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993); Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1359 (N.H. 1997).

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

141. *See* Weishart, *supra* note 11, at 963.

142. *Id.*

143. Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979).

144. Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978).

145. Pinto v. Ala. Coal. for Equity, 662 So. 2d 894, 896 (Ala. 1995); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).

146. Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1359 (N.H. 1997).

admissions and high quality jobs). In those competitions, "the instrumental value of a person's education depends on the quantity and quality of education she has compared to others. That is, she will be competitive only if her educational attainment is equivalent to or greater than that of her peers."[147] It is for this reason that courts since the first wave have been concerned about the distribution of educational opportunity as "a major determinant of an individual's chances for economic and social success in our competitive society."[148] "Unequal education," noted the very first high court decision, "leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society."[149]

Courts into the second and third waves have remained troubled that "disadvantaged children will not be able to compete in, and contribute to, the society entered by the relatively advantaged children" due to educational inequities.[150] And so, courts tend to "focus on disparities and seek to ensure rough comparability" of resources and opportunities,[151] that is, "some kind of egalitarian commitment [as] necessary to protect children from unfairness in the competition for postsecondary admission and jobs and from suffering potential dignitary harms."[152]

State constitutions and judicial interpretations therefore suggest a third, overriding function of the right to education—to protect children (and thereby society at large) from the harms of deprivations in educational quality and disparities in educational opportunity.[153] Admittedly, this inference is not unavoidable. One reason to provide an equitable and adequate education (and perform the duty to educate) is because it is morally the right thing to do.[154] But that has not been the prevailing justification asserted in state constitution

147. *See* Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 521–22 (2014).

148. Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1255–56 (Cal. 1971).

149. *Id.* at 1257.

150. *See, e.g.*, Abbott v. Burke (*Abbott I*), 495 A.2d 376, 390 (N.J. 1985); Hoke Cty. Bd. of Educ. v. State (*Hoke I*), 599 S.E.2d 365, 385 (N.C. 2004) (affirming trial court's conclusion that schools in rural district "failed to provide graduates with the skills necessary to compete on an equal basis with others in contemporary society's gainful employment ranks"); DeRolph v. State (*DeRolph I*), 677 N.E.2d 733, 744 (Ohio 1997) ("None of the appellant school districts is financially able to keep up with the technological training needs of the students in the districts, which makes it highly unlikely that the children of the appellant school districts will be able to meaningfully compete in the job market against those students from richer districts who receive a sufficient level of technological training.").

151. Ryan, *supra* note 48, at 1237; Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1866 (2012) ("Plaintiffs' success in these cases has been based on evidence that demonstrated a wide-spread pattern of inequities and blatant educational inadequacies, primarily affecting low-income and minority students, in states throughout the country.").

152. William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 611 (2006).

153. *See* Weishart, *supra* note 11, at 957–58.

154. *See id.* at 960–61.

education clauses or among courts construing those clauses.[155] Alternatively, one could say that provision and performance remain the essential functions of the right and entail substantive components (adequacy and equity) because education is an individual, collective, and positional good.[156] That alternative justification is more reflective of state constitutions and judicial interpretations, but it still begs the question.

What's more, the provision and performance functions do not fully account for the state's power to infringe children's liberty by compelling them to *receive* an adequate and equitable education.[157] For that, states "have relied on the *parens patriae* doctrine in enacting compulsory-education laws."[158] The "*parens patriae* authority to intercede in the lives of children in order to protect their safety, promote their education, or otherwise to further their best interests" is justified by the view that children are not fully autonomous.[159] *Parens patriae* power implies "the duty to protect"[160] and indeed it has been "defined by many states as more than just a [power], but also a duty to protect the interests of children."[161] This lesser common law duty has been enveloped by a greater constitutional duty: If the state has a duty to protect children by educating them, it has the duty to protect them from the state-sanctioned harms of its compulsory education.[162]

At bottom, it is a concern about the harms from educational deprivations and disparities that more completely explains what the right to education is supposed to do for children—protect their equality and liberty interests.[163] Before evaluating proposed fourth wave remedies in this light, we should understand the reasons that the remedies of the preceding three waves—equality,

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155. *Cf.* Skeen v. State, 505 N.W.2d 299, 313–14 (Minn. 1993) ("[O]ur conclusion that education is a fundamental right is amply supported by other state courts which have interpreted similar constitutional provisions.") (citing favorably Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 91 (Wash. 1978) ("[The education clause] is the Declaration of the State's social, economic and educational Duty as distinguished from a mere policy or moral Obligation.")).

156. *Cf.* Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 232–33 (2008) ("[C]ourts stand the best chance of harmonizing their recognition of constitutional welfare rights [e.g., right to education] with latent public morality not by attempting to articulate a comprehensive theory of our moral beliefs, but by reasoning in a more specific and contingent way about the distributive norms applicable to particular social goods.").

157. *See* Weishart, *supra* note 11, at 970 & nn. 340–41 ("[S]tate compulsory education laws [] restrict not only children's negative liberties but profoundly shape their positive liberties as well.").

158. Gregory Thomas, *Limitations on Parens Patriae: The State and the Parent/Child Relationship*, 16 J. CONTEMP. LEGAL ISSUES 51, 57 (2007).

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

160. *Cf.* O'Connor v. Donaldson, 422 U.S. 563, 583 (1975).

161. *See* Rebecca Williams, Note, *Faith Healing Exceptions Versus Parens Patriae: Something's Gotta Give*, 10 FIRST AMEND. L. REV. 692, 722 (2012) (citing cases).

162. *Cf.* Liu, *supra* note 156, at 252–53 ("[I]t would be neither legitimate nor persuasive to the citizenry for a court to treat education as a protected right absent a backdrop of laws, institutions, and social understandings against which failures of provision appear conspicuous and irregular.").

163. *See* Weishart, *supra* note 11, at 956–59, 962 (contending that the claim-right to an adequate education functions "to protect liberty in a positive sense—*freedom to be*.").

equity, and adequacy—have not fully effectuated this protection function.[164]

B. The Remedial Shortcomings of Equality, Equity, and Adequacy

Early first- and second-wave courts generally authorized remedies that required "either *horizontal equity* among school districts, such that per-pupil revenues were roughly equalized by the state, or at least *fiscal neutrality*, such that the revenues available to a school district would not depend solely on the property wealth of the school district."[165] These remedies were abandoned, however, in no small part because leveling up or leveling down educational spending to achieve absolute fiscal equalization, though possible, was not sustainable politically.[166] But the more fatal flaw was that equalization remedies did not actually protect children from the harms of both deprivations in educational quality and disparities in educational opportunity:

> First, equalizing per pupil funding does not in itself improve the quality of education; it does not protect against inadequate funding, provided that inadequacy is equally shared. Second, formal equality fails to address the needs of disadvantaged children, who enter the schoolhouse door already on unequal footing. Equalizing per-pupil funding without directly addressing those needs perpetuated inequalities. Disadvantaged children required not equal but more spending to even approximate the educational opportunities and attainment of their peers.[167]

Second- and third- wave courts then gradually came to realize that the

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164. It is worth noting here the criticism that "the wave metaphor arguably overstates the differences between [] adequacy- and equity-based constitutional challenges." Asbury & Woodson, *supra* note 65, at 107 n.104 ("[It] arguably downplays the extent to which adequacy-based cases actually are grounded in, and in some instances decided upon, measures of equity and equality. [It] also overstates the chronological ordering of these cases. The earliest adequacy cases predated many of the equity cases. Further, litigants in some states have continued to bring equity-based cases long after the rise of adequacy-based constitutional challenges."). "However, if one avoids the common flaw of assuming a clear line of demarcation between each wave and accepts that each case may draw from theories dominant in one or more waves alternatively, then the metaphor remains useful as an explanatory tool." Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 726 (2012).

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

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

167. Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 228 (2017) (internal quotations and citations omitted).

remedy should "direct more compensatory resources and services to the neediest students to mitigate their disadvantages and progress *vertical equity*."[168] This shift from horizontal to vertical equity began with courts granting that "absolute equality or precisely equal advantages are not required" and that "a state may recognize differences in educational costs based on relevant economic and educational factors."[169] Consequently, "differences in area costs as well as qualities of students may result in different levels of spending" and "disadvantaged students [likely will] require above-average access to education resources."[170] Instead of "treating all children identically," vertical equity demanded "treating differently situated children as equals *according to their needs*."[171] Several courts endorsed this shift from formal equality of educational opportunity to "*substantial* equality of educational opportunity."[172]

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168. *Id.* at 229 ("Such remedial measures are most often implemented through weighted student funding formulas, which assign weights to all students . . . but apportion additional weights to certain student demographic categories that have more expensive educational needs . . . which is supposed to result in schools with higher populations of these student categories receiving more state funding.").

169. Horton v. Meskill (*Horton I*), 376 A.2d 359, 376 (Conn. 1977); *see also* Opinion of the Justices, 624 So. 2d 107, 115 (Ala. 1993) ("Equal educational opportunities need not necessarily be strictly equal or precisely uniform…schoolchildren who have different educational circumstances, needs and aptitudes may require different school resources and facilities which, in turn, may entail different costs. This may be most obvious in the case of children with disabilities and children otherwise disadvantaged."); Gannon v. State (*Gannon I*), 319 P.3d 1196, 1239 (Kan. 2014) ("Simply put, equity need not meet precise equality standards."); Brigham v. State, 692 A.2d 384, 397 (Vt. 1997) ("[W]e emphasize that *absolute* equality of funding is neither a necessary nor a practical requirement to satisfy the constitutional command of equal educational opportunity."); Washakie Cty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 336 (Wyo. 1980) ("[W]e wish to make clear that we are not suggesting that each school district receive exactly the same number of dollars per pupil as every other school district. . . . A state formula can be devised which will weigh the calculation to compensate for special needs educational cost differentials.").

170. Abbott v. Burke (*Abbott I*), 495 A.2d 376, 388 (N.J. 1985); *see also* Montoy v. State, 102 P.3d 1160, 1164 (Kan. 2005) (concluding that school "financing formula was not based upon actual costs to educate children" of different needs and "distorted the low enrollment, special education, vocational, bilingual education, and the at-risk student weighting factors"); Hoke Cty. Bd. of Educ. v. State (*Hoke I*), 599 S.E.2d 365, 393 (N.C. 2004) (affirming trial court's finding that at-risk students were not receiving the remedial aid necessary to "avail themselves of [an] educational opportunity"); State v. Campbell Cty. Sch. Dist. (*Campbell II*), 19 P.3d 518, 547 (Wyo. 2001) ("We hold the adjustments for funding EDY [economically disadvantaged youth] and LES [English speaking] students result in disparities in funding which are not justified by any compelling state interest and which do not reflect the cost of adequately educating these students. The state is directed to fund the actual and necessary costs of EDY and LES students").

171. Weishart, *supra* note 167, at 236–37.

172. *Brigham*, 692 A.2d at 397; *see also* Opinion of the Justices, 624 So. 2d at 115 ("Thus, the Court, in reviewing the evidence, has focused its inquiry broadly on the issue of substantial equity and fairness in the way the state's system of public schools allocates educational opportunity to its students."); Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View III*), 91 S.W.3d 472, 500 (Ark. 2002) ("Equality of educational opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education."); *Horton I*, 376 A.2d at 375 ("[State must] provide a substantially equal educational opportunity to its youth in its free public elementary and secondary schools"); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) ("efficient" system

Although remedial measures incorporating vertical equity principles could better mitigate the harms of *disparities* in educational opportunity, they did not necessarily protect children from *deprivations* in educational quality. Cue the third-wave adequacy lawsuit. It seized on the standards-based reform movement of the 1980s and the general reluctance of state governments to achieve more equitable school funding formulas.[173] "Rather than demand equalization of tax capacity or expenditures across school districts, adequacy only required that each school district have enough funding so that all of its students could achieve a minimum qualitative threshold."[174] Wealthy, politically powerful school districts would be permitted to spend above that threshold.[175] Adequacy was thus thought to be "the more achievable, but more modest" remedial alternative to equity.[176] And indeed courts have been more receptive: plaintiffs prevailed in approximately 75% of adequacy cases from 1989 to 2006.[177] It was also during this third wave, however, that courts in six states surrendered, deciding that they could not decide adequacy cases due to separation of powers concerns.[178] Those concerns eventually festered into other states, prompting courts once willing to advance into battle to retreat in quick succession. It turned out that adequacy was less achievable and modest to enforce as a remedy than it was initially billed.

To be sure, there were doubts about justiciability from the outset, but specific remedial concerns were not at the forefront in the first liability phase of adequacy litigation. Courts were then tasked preliminarily with deciding whether their state constitution education clauses entailed adequacy as a distributive principle demanding a minimum threshold of educational quality.

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guarantees "substantially equal access to similar revenues per pupil at similar levels of tax effort" so that students are "afforded a substantially equal opportunity to have access to educational funds"); Tenn. Small Sch. Sys. v. McWherter (*McWherter I*), 851 S.W.2d 139, 140–41 (Tenn. 1993) ("The constitution, ... imposes upon the General Assembly the obligation to maintain and support a system of free public schools that affords substantially equal educational opportunities to all students."); Pauley v. Kelly, 255 S.E.2d 859, 865 (W. Va. 1979) ("Equal protection, applied to education, must mean an equality in substantive educational offerings and results, no matter what the expenditure may be.").

173. Weishart, *supra* note 167, at 236.

174. *Id.* at 236–37. More than forty states have adopted "some version of foundation funding" whereby the state obligates "local school districts to levy taxes at a rate [] aimed at generating enough revenue to fund a minimum education, with the state supplementing the amount actually raised by poor districts when the required rate did not yield the minimum 'foundation level.'" *See* Rebell, *supra* note 152, at 1965–66. But most of these states "substantially compromise the foundation concept by creating a limited foundation category that does not cover all basic adequacy needs, adding to the formula a confusing array of categorical funding streams and additional formula programs, and then failing to fund the formula at an adequate level." *Id.* at 1966.

175. Weishart, *supra* note 167, at 237.

176. Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 182 (1995); *see also* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1168–76 (1995) (discussing the factors prompting the shift from equity to adequacy).

177. *See* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1483 n.73 (2007).

178. *See supra* note 9 and accompanying text.

Most had little trouble reaching that conclusion,[179] even though some were reluctant to define an adequate education, assigning that work, in the first instance, to the legislative and executive branches.[180] When those branches have dragged their feet, however, "courts have ultimately taken it upon themselves to define adequacy and set the constitutional standard."[181] But most courts left it to their legislatures to devise the remedial scheme and afforded them "substantial deference" in doing so.[182] As that duty went unfulfilled and plaintiffs came back to court to complain, judicial enforcement became a bit more challenging.

In this initial remedial phase of adequacy litigation, courts have employed "a variety of remedial schemes ranging from simply 'vetoing' the legislature's operative finance plan and sending it back to the drawing board, to ordering that an expert consultant be retained to 'cost out' what would be an adequate education."[183] When states still failed to comply, judicial enforcement of the adequacy remedy went from challenging to daunting. In the ensuing remedial and contempt phases, plaintiffs have returned to court demanding what they perceived to be the clear import of prior orders, i.e., more money for schools. Plaintiffs thus "focused more and more on levels of funding as the measure of adequacy in education, often to the exclusion of other elements that might be less tangible but more easily approached by courts."[184] In some cases, plaintiffs were armed with those costing-out studies that further quantified adequacy but also nudged courts "firmly into the legislative territory of appropriations," reinforcing the notion that adequacy is "about funding and nothing more."[185]

State defendants have responded by challenging the cost-out study

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179. In fact, many of the courts that surrendered also conceded as much before declining to entertain the merits of the claim. *See id.*

180. *See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View III*), 91 S.W.3d 472, 487 (Ark. 2002) ("[T]he General Assembly is well on the way to defining adequacy while the Department of Education, from all indications, has been recalcitrant."); Claremont Sch. Dist. v. Governor (*Claremont I*), 635 A.2d 1375, 1381 (N.H. 1993) ("We do not define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor."); Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 261 (Mont. 2005) ("Because the Constitution mandates that the Legislature provide a quality education, we determine that the Legislature can best construct a 'quality' system of education if it first defines what is a 'quality' system of education.").

181. Weishart, *supra* note 167, at 238 ("[S]ome states either adopted the seven capabilities from *Rose* or have specified others. Even in states where courts have declined to list a particular set of capabilities, courts have defined the standard broadly to emphasize that an adequate education must enable children *to be* responsible citizens, productive members of the economy, or autonomous individuals.") (citations omitted).

182. *Id.* at 263.

183. Koski & Reich, *supra* note 152, at 565 (observing that middle range remedies have included "specific directive[s] that the state provide a certain type of educational programming for certain children and schools (an inputs standard)," and alternatively "order[s] that the state shall ensure that students achieve a certain outcome without dictating the specific inputs (an outcomes standard)").

184. Simon-Kerr & Sturm, *supra* note 6, at 104.

185. *Id.* at 109.

methodology or with their own experts questioning whether increased funding can actually improve educational outcomes, that is, whether money even matters.[186] Defendants also point to any increase in funding as falling "near, or within, the spectrum of plausible [adequacy] standards" to support their argument that courts should not be "substituting their own judgment for that of the legislature on issues that push against the bounds of the separation of powers."[187]

Courts wading through all of this in successive remedial and contempt phases of adequacy litigation frequently choose the path of least resistance—retreat or at least cease to advance. A majority of courts confronted with increasingly-recalcitrant legislatures either (1) refuse "to evaluate appropriations, the heart of the legislature's domain," and thus deny plaintiffs relief,[188] (2) continue to declare the financing system unconstitutional without issuing further remedial guidance,[189] or (3) approve school funding schemes as "reasonably calculated" to achieve a constitutionally adequate education in deference to legislative prerogatives, despite persistent educational deprivations and disparities.[190]

As a result, "between 2008 and 2012, plaintiffs lost about two-thirds of the time in high courts [and], notwithstanding the end of the recession, the trend has not substantially improved since 2012."[191] Meanwhile, states *cut* education budgets "in excess of what was necessary and maintained most of [those cuts] after tax revenues returned to pre-recession levels," in some states "a full 20 percent or more below the pre-recession levels."[192] It is little wonder then that so much of the scholarly commentary on the third wave has been consumed with whether adequacy can overcome justiciability concerns that hinder enforcement.

There is nevertheless a more profound problem with adequacy as a remedy for violations of the state constitutional right to education. Adequacy alone cannot effectuate the right's function to protect children from the harms of both deprivations in educational quality and disparities in educational opportunity. This is the more fatal flaw just as it was for the early first- and second-wave equalization remedies.

Regarding deprivations in educational quality—the primary target of the adequacy remedy—the problem "has been delineating the quality standards."[193] Courts have defined adequacy qualitative goals, at least in broad terms, but they

186. *See id.* at 106–13.

187. *Id.* at 103.

188. *Id.* at 104.

189. *Id.* at 88–89, 100 (contending such "empty formalism" permits the legislature to "simply continue making its own best effort at improvement, even if that effort falls far short of a constitutional minimum").

190. Weishart, *supra* note 167, at 237.

191. *See* Black, *supra* note 30, at 451 ("Since the recession, plaintiffs have suffered complete or substantial losses before the highest courts in six states.").

192. Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309, 1345–46 (2017).

193. Weishart, *supra* note 167, at 237.

have not required further standard setting as to "the skills, competencies, and knowledge necessary to serve those goals of an adequate education, as the unraveling of the Common Core suggests."[194] Legislative resistance to funding even the generally low-to-moderate adequacy thresholds has also deterred courts from setting their sights higher, which might be necessary "to diminish any positional advantages" in the competition for postsecondary education and employment or to maintain equal citizenship.[195] Although several courts have recognized that the educational quality standards must evolve,[196] not enough have insisted through subsequent enforcements that the remedy actually "be relational and dynamic because what it takes to be an equal citizen—that is, where to set the adequacy threshold—invariably turns on what educational resources others have."[197] Without this relational or comparative component

194. *See* Koski, *supra* note 46, at 1908; *see also* Claremont Sch. Dist. v. Governor (*Claremont VII*), 794 A.2d 744, 751–52 (N.H. 2002) ("[Definition of an adequate education] must have standards, and the standards must be subject to meaningful application so that it is possible to determine whether, in delegating its obligations to provide a constitutionally adequate education, the State has fulfilled its duty.").

195. *See* Weishart, *supra* note 147, at 527, 535; *see also* David Hinojosa & Karolina Walters, *How Adequacy Litigation Fails to Fulfill the Promise of Brown (But How It Can Get Us Closer)*, 2014 MICH. ST. L. REV. 575, 581 (2014) ("If courts continue to apply the lowest level of academic achievement when defining an "adequate education," [they] will essentially gut the constitutional rights at stake and render them meaningless.").

196. *See, e.g.*, Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 255 (Conn. 2010) ("The broad constitutional standard also reflects our recognition of the fact that the specific educational inputs or instrumentalities suitable to achieve this minimum level of education may well change over time."); *Montoy*, 120 P.3d 306, 309 (Kan. 2005) ("The Kansas Constitution thus imposes a mandate that our educational system cannot be static or regressive but must be one which "advance[s] to a better quality or state."); McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993) ("The content of the duty to educate which the Constitution places on the Commonwealth necessarily will evolve together with our society."); Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1359 (N.H. 1997) ("A constitutionally adequate public education is not a static concept removed from the demands of an evolving world."); DeRolph v. State (*DeRolph II*), 728 N.E.2d 993, 1001 (Ohio 2000) ("The definition of 'thorough and efficient' is not static; it depends on one's frame of reference."); McCleary v. State (*McCleary I*), 269 P.3d 227, 251 (Wash. 2012) ("The legislature has an obligation to review the basic education program as the needs of students and the demands of society evolve"); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978) ("We must Interpret the constitution in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning."); State v. Campbell Cty. Sch. Dist. (*Campbell II*), 19 P.3d 518, 561 (Wyo. 2001) ("The state must assure that over time appropriate local enhancements are adopted as state required facilities as the standards for an adequate education evolve.").

197. *See* Weishart, *supra* note 147, at 527; *accord* Robinson v. Cahill (*Robinson II*), 355 A.2d 129, 133 (N.J. 1976) ("[W]hat seems sufficient today may be proved inadequate tomorrow, and even more importantly that only in the light of experience can one ever come to know whether a particular program is achieving the desired end."); *Montoy*, 120 P.3d at 309 ("The Kansas Constitution thus imposes a mandate that our educational system cannot be static or regressive but must be one which "advance[s] to a better quality or state."); *McDuffy*, 615 N.E.2d at 555 ("The content of the duty to educate which the Constitution places on the Commonwealth necessarily will evolve together with our society."); *Claremont II*, 703 A.2d at 1359 ("A constitutionally adequate public education is not a static concept removed from the demands of an evolving world."); *DeRolph II*, 728 N.E.2d 993, 1001 (Ohio 2000) ("The definition of 'thorough and

informing the standards, adequacy cannot fully remedy the harms of deprivations in educational quality.[198]

Similarly, adequacy as a remedy can only partially mitigate the harms of disparities in educational opportunity for those children below the adequacy threshold. "For if adequacy requires getting all students above a certain threshold, it will tend to focus disproportionate resources on disadvantaged students so that they can actually meet that threshold."[199] And indeed adequacy court decisions have at times authorized remedies "to compensate for differences in regional costs and student needs that translate into higher costs to supply the same quality of education throughout the state."[200] In theory then, if not in practice, "adequacy is vertical equity by a different name," at least concerning below-threshold educational disparities.[201] The most practical and immediate way to employ vertical equity-type "needs-based" assessments is "in the methods used in costing-out an adequate education."[202] The trouble has been that "courts have not uniformly embraced and ordered concepts of vertical equity to be included in adequacy cost studies and legislatures have done so only rarely."[203]

Although the potential exists to mitigate disparities below the threshold, adequacy in its extreme does not demand any remedial measures be taken to address above-threshold educational disparities. In theory, adequacy presumptively denies the moral significance of above-threshold disparities because its egalitarian aim is "to assure not that children have the *same* educational resources and opportunities, but that all children have *enough* to avoid oppression and function as equal citizens."[204] In practice, however, courts

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efficient' is not static; it depends on one's frame of reference."); *McCleary I*, 269 P.3d at 251 ("The legislature has an obligation to review the basic education program as the needs of students and the demands of society evolve"); *Seattle Sch. Dist. No. 1*, 585 P.2d at 94 ("We must Interpret the constitution in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning."); *Campbell II*, 19 P.3d at 561 ("The state must assure that over time appropriate local enhancements are adopted as state required facilities as the standards for an adequate education evolve.").

198. *See* Koski & Reich, *supra* note 152, at 562–63 ("[N]one of [the adequacy] standards necessarily specifically targets poor or minority children, nor distributes educational resources on a basis that compares under-resourced schools to their privileged peers, nor seeks as a matter of principle to reduce resource inequality gaps between the well off and the poor.").

199. Weishart, *supra* note 167, at 239.

200. Regina R. Umpstead, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 BYU EDUC. & L.J. 281, 298 (2007).

201. Weishart, *supra* note 167, at 239.

202. William S. Koski, *Achieving "Adequacy" in the Classroom*, 27 B.C. THIRD WORLD L.J. 13, 21–23 (2007). For instance, costing-out studies can price "additional resources for remedial reading programs and free breakfast and lunch for low-income children, English remediation for ELLs, and mandatory preschool and all-day kindergarten for children in low-income school district." *Id.* at 23.

203. Koski & Reich, *supra* note 152, at 568–69 ("Most importantly, even such targeted remedial schemes do not compare the resources of poor children to those of the affluent, and therefore they cannot achieve true vertical equity.").

204. Weishart, *supra* note 167, at 239–40.

have not always enforced this extreme form of adequacy with a few inclined to tolerate above-threshold disparities "until they undermine the ability of students to function as equal citizens and compete for admission for higher education and high-quality jobs on comparable terms."[205] Again, that calls for a vertical equity-type assessment but "the trouble has been that courts have not uniformly insisted that adequacy and vertical equity be mutually reinforcing [in this way] nor have they consistently demanded evidence (cost studies or other empirical findings) from which they could make that assessment."[206]

In sum, the adequacy remedy cannot effectuate the right to education's function to protect children's equality and liberty interests without incorporating the relational and comparative elements grounded in vertical equity remedial measures, which most courts and legislatures have not applied to a sufficient degree.

C. Protecting Equal Liberty

What does all of this portend for fourth-wave remedies? When the remedy has not effectuated the right to education's protection function, it has proved unsuccessful. That correlation, of course, does not imply causation; other factors better explain these shortcomings—when the remedy has been deemed practically infeasible, politically unsustainable, or potentially nonjusticiable. It is evident that past education rights litigation, "as a species of public law litigation, faces particular remedial problems that are not present in the typical private suit that seeks damages or negative injunctive relief."[207] Then again, the lack of complete success has not meant a remedy's complete failure. Horizontal equity, vertical equity, and adequacy have each left their mark. Both the virtues and vices of these remedies have affected the right to education's "content and scope."[208] The downfall of horizontal equity, for instance, expanded the right's scope beyond formal equality of educational opportunity (i.e., nondiscrimination). The early success of adequacy supplemented the right's content with the adoption of qualitative educational thresholds. But while these remedies have affected the right's content and scope, they have not fundamentally altered its protection function.

In fashioning remedies for the "next generation" of education rights cases, courts and advocates should be mindful of that protection function not because it will guarantee a remedy's complete success but because, when that function is effectuated, it animates the principles inhering in the right, and thereby, the

205. *Id.* at 240; *see* Ryan, *supra* note 48, at 1237; Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View III*), 91 S.W.3d 472, 496 (Ark. 2002) ("[Disparities] can sustain a finding of inadequacy but also, when compared to other schools in other districts, a finding of inequality."); Helena Elem. Sch. Dist. No. 1 v. State, 769 P.2d 684, 690 (Mont. 1989) ("[D]iscrepancies in spending as large as the ones present in Montana translate…into unequal educational opportunities").

206. Weishart, *supra* note 167, at 291.

207. *See* Molly Townes O'Brien, *At the Intersection of Public Policy and Private Process: Court Ordered Mediation and the Remedial Process in School Funding Litigation*, 18 OHIO ST. J. ON DISP. RESOL. 391, 401 (2003).

208. *See* Weishart, *supra* note 11, at 944 n.174.

will of the people.[209] That might assure just enough collective buy-in to guarantee a remedy's endurance.[210]

The other lesson for the would-be fourth wave is that it will take both vertical equity and adequacy to mitigate the harms of educational deprivations and disparities. "Whether or not that fourth wave ever surfaces, there has been a strong undercurrent drifting a few courts toward both adequacy and vertical equity."[211] That undercurrent has not developed into its own wave because "courts have tended to analyze vertical equity and adequacy separately, treating them as distinct claims or remedies [and thus] have not established standards for mutually enforcing these reciprocal demands."[212] Courts should instead own what their decisions have already begun to operationalize: Vertical equity and adequacy converge to constitute a claim for "a more robust, integral equal liberty that demands treating differently situated children as equals *according to their needs*, so as to cultivate, through state action, children's *positive* freedoms to become equal citizens."[213] The claim for equal liberty under the state constitutional right to education can be delineated as follows:

> The claim is for *adequately equal* educational opportunities aimed at ensuring approximately, not strictly, equal chances for educational success—achieved through vertical rather than horizontal equity. This form of equality is conducive to the positive and negative demands of liberty. The claim is also one for an *equally adequate education* in that all children should have access to a quality education—achieved through high adequacy thresholds sensitive to children's capabilities

209. *See* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); Gannon v. State (*Gannon II*), 368 P.3d 1024, 1057 (Kan. 2016) ("The Constitution is the work of the people—it declares their will—and those who would disobey its provisions, instead of disobeying the people, are in fact disregarding and defying their will."); *see also* Paul Gerwitz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983) ("The function of a remedy is to 'realize' a legal norm, to make it a 'living truth.'"); Walter E. Dellinger, *Of Rights and Remedies: The Constitution As A Sword*, 85 HARV. L. REV. 1532, 1551 (1972) ("[T]he court must first determine that the implicated constitutional provision provides substantive protection to one in the position of the plaintiff. The focus should then be upon whether there are other remedies available to those in the plaintiff's position that would as fully effectuate the purposes of the constitutional guarantee as the remedy sought.").

210. Levy, *supra* note 4, at 1091 ("[T]he effectiveness of judicial remedies in school finance cases may have more to do with the willingness of those involved to seek cooperative solutions than with the particular form of the remedy."); *see also* Evans v. Fenty, 701 F. Supp. 2d 126, 171 (D.D.C. 2010) ("[A]t a minimum, a 'durable' remedy means a remedy that gives the Court confidence that defendants will not resume their violations of plaintiffs' constitutional rights once judicial oversight ends."); Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 VAND. L. REV. 167, 219 (2017) ("Institutional reform litigation cannot succeed unless its remedies are both durable and adaptable. That is, the resulting injunctions must remain in place long enough to prompt meaningful systemic reform, and they must be flexible enough to account for changing facts and circumstances.").

211. Weishart, *supra* note 167, at 266–67 (citing cases).

212. *Id.* at 268.

213. *Id.* at 224.

> positive liberties to function as equal citizens and to compete for admission to higher education and for high-quality jobs. This positive form of liberty is equality enhancing, fostering a relational, democratic equality through equal citizenship.[214]

It may be asking state supreme courts too much to adhere to principles they were among the first to espouse, ahead of the U.S. Supreme Court's recent equal liberty jurisprudence. But it will make little difference for state courts to overtly endorse the convergence of vertical equity and adequacy if they remain disinclined to mutually enforce them at the remedial phase of the litigation. Remedial standards are therefore needed not just to effectuate the right's protection function but to instill confidence in judges that they can fulfill their constitutional role in authorizing remedies without treading on the powers of the other coordinate branches.

III. *REASONABLY* CONGRUENT AND *DIRECTLY* PROPORTIONAL

If "there is nothing new under the sun," then crafting remedial standards for the state constitutional right to education need not begin on a blank slate.[215] Indeed, an accessible, albeit imperfect, standard already regulates another affirmative, legislative duty to enforce substantive constitutional guarantees. It is a standard that bears particular relevance because it was designed to preclude remedies that breach separation of powers. Section 5 of the Fourteenth Amendment[216] confers "a positive grant of legislative power to Congress," the scope of which is "broad."[217] "It is for the Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment and its conclusions are entitled to much deference."[218] This broad grant of power, however, "is not unlimited."[219]

In keeping with separation of powers, Congress has the power "to enforce" the provisions of the Fourteenth Amendment but not "the power to determine what constitutes a constitutional violation."[220] Courts reserve the power to determine the "substance" and "meaning" of constitutional rights under the Fourteenth Amendment.[221] Because "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," courts apply the following remedial standard: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[222]

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214. *Id.* at 241 (quotations, alteration, and citation omitted).

215. *Ecclesiastes* 1:9 ("What has been will be again, what has been done will be done again.").

216. U.S. CONST. amend. XIV, § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment].").

217. City of Boerne v. Flores, 521 U.S. 507, 517 (1997).

218. *Id.* at 536.

219. *Id.* at 518.

220. *Id.* at 519.

221. *Id.*

222. *Id.* at 519–20.

Congress's Section 5 enforcement power initially seems an odd federal analog to the state constitutional right to education. Though enumerated, Congress's enforcement power is bounded by the congruence and proportionality standard, whereas most state constitutions grant the legislature plenary power over education.[223] This difference, in enumerated versus plenary power, affects judicial review in other contexts.[224] Federal courts generally are disinclined to afford great deference to Congress, fearing an "erosion of the concept of a national government of limited and enumerated powers."[225] State courts, by contrast, take a more "deferential attitude" on "the theory of plenary power" which they generally understand "as a mandate to defer to legislative judgments."[226]

The other significant structural difference is, of course, federalism which narrows the relief available in federal constitutional cases but "holds no purchase when a state court seeks to enforce a state constitutional right against a state official."[227] Beyond the structural differences, some might question the reliability of the ambiguous congruence and proportionality standard, which has been susceptible to misapplication[228] and has often been hijacked "to protect federalism values" more so than separation of powers.[229] Others might also question the wisdom of relying on a remedial standard employed in "a series of cases that invalidated or limited the application of civil rights statutes."[230]

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223. *See* Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1329 (1992) ("All but eight state constitutions appear to grant the legislature this plenary authority over education.").

224. *See* Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 716 (2000) ("Although the standard of judicial review likely reflects many influences, the pattern of deference in the federal and state courts corresponds to judicial understandings of the fundamental postulates of state and federal constitutions.").

225. *See id.* at 669; *accord Boerne*, 521 U.S. at 516 ("Under our Constitution, the Federal Government is one of enumerated powers. . . . The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the 'powers of the legislature are defined and limited.'").

226. *See* Schapiro, *supra* note 224, at 669; *accord* Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979) ("And we emphasize that great weight will be given to legislatively established standards, because the people have reposed in that department of government 'plenary, if not absolute' authority and responsibility for the school system."); *see* William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 441 (Pa. 2017) ("[T]his Court assumed a deferential posture toward the General Assembly's efforts, reflecting the judicial restraint ostensibly necessary to preserve free legislative development of education policy.").

227. *See* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 977 (2011).

228. *See* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1133 (2001); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 746 (1998); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 458 (2000).

229. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2050 (2003).

230. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 771 (2011).

The point of comparison is not to diminish these differences and concerns but to account for them in casting new remedial standards tailored to the state constitutional right to education.[231] A semblance of that right appears in Congress's Section 5 enforcement power which corresponds with an affirmative "duty of legislative rationality in construing the Fourteenth Amendment's substantive guarantees [of equal protection, due process, and citizenship] and in choosing the means to effectuate those guarantees."[232] Broadly, equality, liberty, and citizenship are the very same guarantees of the state constitutional right to education.[233] To be sure, state courts have construed the guarantees under that right more expansively than federal courts have construed equal protection and due process guarantees. But "many fundamental principles, consistent with their origins and evolution in state constitutions, are today properly and actually understood as transcendent American principles."[234] And when it comes to interpreting substantive guarantees, "general separation of powers principles [motivating the congruence and proportionality standard] are relatively uncontroversial."[235]

"In the case law that now constitutes our story of constitutionalism, we have embraced, first, the necessity of judicial review[, second,] the practice of judicial supremacy of constitutional interpretation[, and third,] that judicial interpretation should be exclusive."[236]

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231. *See* Hershkoff & Loffredo, *supra* note 227, at 969 ("We argue that [federal remedial] doctrines . . . are irrelevant to state court litigation—or, at the least, ought to be significantly adapted to account for the different institutional position of the state systems.").

232. *See* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 400 (2006) (situating a substantive right to "a meaningful floor of educational opportunity" in the Fourteenth Amendment's Citizenship Clause which Congress is duty bound to enforce).

233. *See* Weishart, *supra* note 167, at 241.

234. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1328 (2017) ("[S]tate constitutionalism must therefore rest on a justification for redundancy between state and federal courts in interpreting unitary constitutional principles."); *see id.* at 1312–13 ("This redundancy in interpretive authority—whereby state courts and federal courts independently construe the guarantees that their respective constitutions have in common—is one important way that our system of government channels disagreement in our diverse democracy. The legitimacy of state constitutionalism mainly turns on a proper understanding of the structure of our federal system, not on questions of interpretive methodology.").

235. *See* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1379, n.139 (2007).

236. Robin West, *Tom Paine's Constitution*, 89 VA. L. REV. 1413, 1433–34 (2003); *accord* Cooper v. Aaron, 358 U.S. 1 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution."). Notable dissenters argue that interpretative authority should be shared among the judiciary and legislative branches, *see* Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 171 (1997), or all three branches, *see, e.g.*, James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377, 1379 (2005). Others argue for legislative, not judicial, supremacy. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 230, 268–82 (2006). And still others emphasize that ultimate interpretative authority resides principally with the people. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181–82 (1999). But

Judicial supremacy does not always reign supreme in the states. The "features of state practice—the mutability of constitutional text, the prevalence of direct democracy, and the frequency of legislative and popular reversal of judicial interpretations—"undercut judicial supremacy in practice.[237] Yet these features have not undercut judicial *exclusivity*, at least not among the majority of state high courts that have interpreted and given effect to their state constitution education clauses.[238] These courts appear to understand that they "possess interpretive responsibility to articulate the scope and nature of the constitution's meaning, even if the other branches possess initial remedial responsibility to effectuate a constitutional duty."[239] The essential point here is that, although there are "a variety of significant differences between the work of the state courts and the work of the federal courts [regarding separation of powers],"[240] state courts respect the margins set by the congruence and proportionality standard.[241]

"In all fairness," that standard "is neutral in itself [and] can be good or evil, depending on the use that is made of it."[242] With one exception, "no Justice has criticized or rejected the *principle* of congruence and proportionality *per se*,"[243] even as several have disagreed with its application and have indicated they

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by and large those arguments have not carried the day.

237. David E. Pozen, *Judicial Elections As Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2090–91 (2010).

238. *See, e.g.*, Sheff v. O'Neill, 678 A.2d 1267, 1276 (Conn. 1996) ("[W]e are persuaded that the phrase 'appropriate legislation' . . . does not deprive the courts of the authority to determine what is 'appropriate.'"); Gannon v. State (*Gannon I*), 319 P.3d 1196, 1230 (Kan. 2014) ("As this court said after 9 years of statehood, [i]t is emphatically the province and duty of the judicial department to say what the law is.") (citation and quotation marks omitted); William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 436 (Pa. 2017) ("The foundation for the rule of law as we have come to know it is the axiom that, when disagreements arise, the Court has the final word regarding the Constitution's meaning."); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 83–84 (Wash. 1978) ("Both history and uncontradicted authority make clear that [i]t is emphatically the province and duty of the judicial department to say what the law is even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch.") (citations and quotation marks omitted).

239. Hershkoff & Loffredo, *supra* note 227, at 956; *see* Bauries, *supra* note 16, at 745 (pertaining as to whether or not the state constitution includes an explicit separation of powers provision, which "does not have any discernable impact on whether courts choose to abstain from the merits of constitutional litigation on the very grounds of separation of powers").

240. Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts,* 81 MINN. L. REV. 1543, 1548 (1997); *see also* Sonja Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 759 (2007).

241. *See* Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in Era of Positive Government*, 24 RUTGERS L.J. 1057, 1067 (1993) ("Consistent with *Marbury*, the states entrust constitutional interpretation to the branch most suited, the judiciary.").

242. Elisabeth Zoller, *Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?*, 78 IND. L.J. 567, 570 (2003) (emphasis added).

243. *Id. But see* Tennessee v. Lane, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting) (criticizing congruence and proportionality as an "invitation to judicial arbitrariness and policy-driven decisionmaking").

would prefer a more deferential standard.[244] Critics nevertheless rightfully charge that the congruence and proportionality standard is "a wolf in sheep's clothing."[245] The Court has essentially overplayed its hand with this standard "in an effort to protect its position as the primary interpreter of the Constitution, as well as to protect the federalism-based claims of autonomy asserted by the states, [it] crafted a doctrine that undermines most of Congress's efforts to play a meaningful role in the enforcement of civil rights."[246]

Seemingly more concerned with policing federalism than separation of powers,[247] the Court superimposed on the congruence and proportionality standard a heavy evidentiary burden on Congress to make "specific factual findings of a relevant history and pattern of constitutional violations."[248] Compounding that problem, the Court has used the guise of congruence and proportionality to invalidate legislation when Congress, in fact, assembled a comprehensive record of constitutional violations.[249] And even when the Court has deemed the congressional record sufficient, it has rigorously applied the congruence and proportionality "tailoring" requirement in a way that "parses the legislation at issue and compares it, on a provision-by-provision basis, with the judicial standard for the underlying constitutional right that Congress sought to protect."[250]

Ironically, as a result of all of this second-guessing of Congress to protect federalism values, the Court has created a different set of separation of powers

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244. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 388 (2001) (Breyer, J., dissenting) ("The Court, through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative constitutional competencies, improperly invades a power that the Constitution assigns to Congress.").

245. *See* Caminker, *supra* note 228, at 1132–33.

246. *See* Tiffany C. Graham, *Rethinking Section Five: Deference, Direct Regulation, and Restoring Congressional Authority to Enforce the Fourteenth Amendment*, 65 RUTGERS L. REV. 667, 669 (2013).

247. *See* Post & Siegel, *supra* note 229, at 2050.

248. Carter, *supra* note 235, at 1379 n.139 (internal quotations omitted) (citing *Lane*, 541 U.S. at 558 (Scalia, J., dissenting) (suggesting this obligates the Court to "regularly check Congress's homework to make sure that [Congress] has identified sufficient constitutional violations to make its remedy congruent and proportional")). *But see* Simon Lazarus, *Stripping the Gears of National Government: Justice Stevens's Stand Against Judicial Subversion of Progressive Laws and Lawmaking*, 106 NW. U. L. REV. 769, 804 (2012) (contending that "Justice Stevens's opinion [in *Lane*] reduced the evidentiary hurdles that Congress must meet under that framework so that they do not obviously differ materially from traditional 'rational basis' deference in Necessary and Proper Clause precedents").

249. *See* Y. Frank Ren, Note, *Fixing Fourteenth Amendment Enforcement Power: An Argument for A Rebuttable Presumption in Favor of Congressional Abrogation of State Sovereign Immunity*, 94 B.U. L. REV. 1459, 1471 (2014); *see also* Pratik A. Shah, *Saving Section 5: Lessons from Consent Decrees and* Ex Parte Young, 62 WASH. & LEE L. REV. 1001, 1055 (2005). The Court has "discounted statements from members of Congress describing the extent of discrimination against the aged, disabled, and women" or "dismissed as irrelevant state reports of a pattern of unconstitutional discrimination against these groups." Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CAL. L. REV. 1565, 1627–28 (2013).

250. *See* Shah, *supra* note 249, at 1054–55.

concerns than those the congruence and proportionality standard was meant to address.[251]

Again, however, the trouble is not with congruence and proportionality *per se* but with the heightened evidentiary and tailoring standards that the Court has embedded in those terms.[252] This counsels a retooling of the remedial standard for the state constitutional right to education, though not necessarily a rejection of congruence and proportionality which "are hardly disagreeable qualities"[253] and have a fairly traceable lineage.[254] Stripped to their essence, congruence and proportionality entail separate measurements of the constitutional harm-remedy nexus.

The "congruence between the means used and the ends to be achieved"[255] calls for a determination of whether the remedy is designed to mitigate "a sufficient quantity of identifiable constitutional violations or is instead too underinclusive."[256] In other words, congruence requires fit between the means and ends: "the remedy presented should be reasonably precisely fixed to the violation it was meant to address."[257] Rather than focus on fit, proportionality is "focused on the overall impact of the remedy as compared to the scope of the harm."[258] That is, the remedy cannot be "so out of proportion to a supposed remedial or preventive object that it [is not] responsive to, or designed to prevent, unconstitutional behavior."[259]

Put simply, the unadulterated versions of congruence and proportionality are meant to ensure that the remedy appropriately targets the harm so as to effectuate the constitutional right consistent with separation of powers

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251. *See* Ren, *supra* note 249, at 1471; *see also* Graham, *supra* note 246, at 696 ("The congruence and proportionality test does not allow Congress to maintain its status as a co-equal partner in governance; rather, in this particular arena, it has been rendered subordinate by the Court.").

252. *Cf.* Zoller, *supra* note 242, at 570 ("The fact that the proportionality principle [has served] to protect federalism and states' rights need not prejudice in any way what can be done with it in the future.").

253. *See* Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481, 524 (2002); *see also* Yoshino, *supra* note 230, at 771 (observing that "layperson" and "dictionary definitions" of congruent and proportional "may not seem a significant restriction of congressional power" and indeed "might seem to provide Congress with more scope to act").

254. *See generally* Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 473 (1999) (tracing lineage of proportionality and defending it as consistent with precedent and principals governing the law of remedies) (citing, *inter alia*, McCulloch v. Maryland, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."). *But see* Zoller, *supra* note 242, at 580 (countering that Hamilton and Schoenbrod's "alleged similarity between [congruence and proportionality test] and [means-ends test derived from *McCulloch*] rests too much on their appearances and misses the actual purpose of each test").

255. City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

256. *See* Caminker, *supra* note 228, at 1154.

257. *See* Graham, *supra* note 246, at 693.

258. *Id.*

259. *Boerne*, 521 U.S. at 532.

principles. These standards therefore "serve two basic functions" of constitutional remedies.[260] And yet, Justice Scalia aptly described congruence and proportionality as "flabby," in the sense that these standards lack resilience and direction.[261] Rather than clarify their parameters, the Court has further obscured their meaning by viewing "congruence and proportionality as interchangeable terms without demarcating their respective spheres of operation."[262] Tailored to the state constitutional right to education's jurisprudence, these standards should be separated for optimal performance. Each should also be adapted, made more resilient, to correlate with the different separation of powers concerns of legislative versus judicial remedies.

Such revisions yield a reasonable congruence standard for judicial remedies and a direct proportionality standard for legislative remedies. Let's start with the latter.

A. Reviewing the Direct Proportionality of Legislative Remedies

Whereas the congruence and proportionality standard has been insufficiently deferential to Congress, the standards of review for the state constitutional right to education have been of late exceedingly deferential to state legislatures.[263] This has been especially true in the remedial and contempt phases of adequacy litigation.

Prior to the advent of adequacy, several courts that held their state's financing scheme unconstitutional "applied the means-ends test embodied in the tiers of scrutiny, though often in unconventional ways."[264] The tiers of scrutiny (strict, intermediate, rational basis) were more suitable at that time, when most courts were relying on equal protection guarantees and formulating the right to education as immunity against unequal or inequitable funding.[265] Construing the right as an immunity relieved courts of the burden to specify exactly what was required to remedy horizontal and vertical inequities. An "immunity thwarts the state action, in effect disabling the legislature's power to enact its chosen funding formula."[266] Courts therefore did not need to entangle themselves with the particulars of the remedy, they simply had to declare that the financing system was not rationally related or narrowly tailored to the state's legitimate or compelling interests and insist that the legislature sort out how to cure the violation.[267]

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260. *See supra* note 56 and accompanying text.

261. Tennessee v. Lane, 541 U.S. 509, 557 (2004) (Scalia, J., dissenting).

262. *See* K. G. Jan Pillai, *Incongruent Disproportionality*, 29 HASTINGS CONST. L.Q. 645, 651 (2002) (internal quotation marks omitted); *id.* at 654 ("[T]he Court seems to have consolidated congruence and proportionality into a single integrated requirement of proportionality without announcing that it was doing so.").

263. *See generally* Weishart, *supra* note 167 (examining the specified and unspecified constitutional standards of review used in the three waves).

264. *See id.* at 241, 242–50.

265. *See id.* at 254.

266. *Id.* at 255.

267. *Id.*

The shift to adequacy in the third wave demanded a new formulation of the right to education, one that secured it not merely as an immunity disabling state action but also as a claim-right compelling state action.[268] For that purpose, rational basis review is too deferential to legislative prerogatives" and would compel very little action.[269] "Utmost deference to the legislature is also antithetical with the propensity of state courts to exert judicial authority to conduct independent examinations of educational quality and craft their won substantive adequacy standards."[270] Conversely, strict scrutiny's narrow tailoring and compelling state interest requirements serve a "state-limiting purpose" that proved "incompatible with the aim of positive claim-right enforcement—which is not to restrain but to compel state action when it furthers the interests protected by those rights."[271] "This mismatch is reflected in third-wave adequacy decisions that did not apply strict scrutiny even when the right to education was deemed fundamental, and in decisions that supposedly applied strict scrutiny but nevertheless upheld alleged funding inadequacies."[272]

The fallback for courts that eventually abandoned the tiers of scrutiny was "a bare bones means-ends test" that "assessed with the legislature did enough (means) to provide a constitutionally adequate education (end)."[273] But most courts have not actually engaged in any meaningful means scrutiny recognizing that (1) the vast majority of state constitutions grant the legislature plenary power over education, (2) state constitution education clauses often obligate the legislature in the first instance to provide and maintain a free, public, adequate education, (3) the legislature and executive have prerogative over the state budget, and (4) "the details of education policymaking are innumerable, testing a delicate balancing of powers and responsibilities among coordinate branches of government."[274] Therefore, most courts have conferred substantial deference to the other branches in determining the means to fulfill a state's affirmative duty to provide a constitutionally adequate education."[275]

In the liability phase of adequacy litigation, most courts have instead engaged in a form of ends scrutiny—"acknowledging the many different ways that adequacy standards *can be* satisfied, courts nevertheless insist that the standards *must be* satisfied."[276] At least in this early phase before the legislature's remedy has been litigated, several courts were more confident "that the facts conclusively established that the ends have not been or cannot be achieved" under the existing financing scheme.[277] Once the litigation progressed into the remedial and contempt phases, however, courts that press on

268. *Id.*
269. *Id.*
270. *Id.* at 256 (quotation marks and alternation omitted).
271. *Id.*
272. *Id.* at 257 (citing cases).
273. *Id.* at 259.
274. *Id.* at 262–63 (citation and quotation marks omitted).
275. *Id.* at 263 (citing cases).
276. *Id.* at 263–64 (emphasis added) (quotation marks omitted).
277. *Id.* at 265.

(rather than dismiss the case) seem inclined to forsake ends scrutiny and review instead the "fit between the legislative means and the constitutional ends."[278] Notably, "when courts have upheld the financing scheme, often after successive rounds of litigation, they have taken assurances from the fact that, even though the ends have not yet been fully achieved, the means are reasonably calculated to achieve them."[279] This pattern of "ends-to-fit review, while more accommodating to the positive claim-right form of the right to education, has not fully advanced the right's function to protection children from the harms of educational disparities [and deprivations]."[280] And it is at once more and less deferential to the legislature than state separation of powers doctrine commands.

In theory, evaluating the fit or congruence between the legislative means and the constitutional ends is less deferential when a tight fit is required. As it turns out, most courts have required only a reasonable fit.[281] That brings the standard closer in orientation to intermediate scrutiny or rational basis review.[282] But, if we start with the premise accepted by the overwhelming majority of courts that judges should not scrutinize the legislative means, then any evaluation of fit would seem to be a step too far.

A fit inquiry forces the court to discuss if not analyze the legislative means. As previously explained, a few courts in the later remedial or contempt phases of adequacy have denied plaintiffs relief because they do not want to be forced to discuss, much less analyze or order, specific legislative means concerning budget appropriations.[283] Moreover, once a court that is willing to discuss legislative means reaches the conclusion that those means are not reasonably calculated to achieve the ends, it will be passing judgment on the legislative means when the constitutional right compels state action, implying that the legislature should do more or do differently.[284] That would cross the separation of powers boundary that courts have drawn for themselves.

In practice, courts have evaluated means-ends fit or congruence in a way that is more deferential than necessary or favorable. As previously mentioned, courts willing to discuss legislative means in the remedial and contempt phases tend to retreat either by (1) approving a declaratory judgment that the financing system remains unconstitutional while providing little remedial guidance, or (2) upholding the system as constitutional because it is reasonably calculated to achieve a constitutionally adequate education despite persistent educational

278. *Id.* at 264.

279. *Id.* at 265–66.

280. Weishart, *supra* note 167, at 242.

281. *See id.* at 264.

282. *See* Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 416 (2016).

283. *See supra* text accompanying note 188.

284. *Cf.* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 136 (1997) ("[T]he decently eligible range of means and measures is one thing when you are under no duty at all to act, and quite another when you are under a serious duty to act effectively.").

deprivations and disparities.[285] As the remedial and contempt phases drag on, however, courts that initially took option (1) almost inevitably take option (2)—throwing their hands up in the air after protracted battles with recalcitrant legislatures, as if to say that getting the legislature to make "a good faith effort" is "the best that we can do."[286] Either method of retreat results in the right's under-enforcement and ultimately devaluation.[287] Therefore, as applied to legislative remedies, congruence or fit as a standard falls short of both benchmarks, permitting remedies that might breach separation of powers and/or failing to effectuate the right's protection function.

That leaves a form of ends scrutiny which is more deferential, in that it requires virtually no evaluation of legislative means, and less deferential, in that it is quite demanding, requiring achievement of the constitutional ends. Such ends scrutiny might seem to strike the right balance, but some observers view it as tipping the scales. Those who think such ends scrutiny is too deferential accuse courts of engaging in "empty formalism," when it returns declaratory judgments without much remedial guidance.[288] Others think such ends scrutiny is insufficiently deferential and accuse courts of engaging in "judicial activism," because a declaratory judgment can "read like legislation" yet "lead to a kind of legislative learned helplessness," and because it requires "systemic" rather than "individual remediation" that "sets up an obvious inter-branch conflict."[289]

This Article is unlikely to persuade those who already hold the latter view, that a judgment declaring the state has failed to discharge its duty to provide a constitutionally adequate education amounts to judicial activism. Granted, a declaratory judgment "can be quite coercive despite the absence of an immediate

285. *See supra* text accompanying notes 189–90.

286. *See, e.g.*, Campbell Cty. Sch. Dist. v. State (*Campbell I*), 907 P.2d 1238, 1279 (Wyo. 1995); *accord Campbell IV*, 181 P.3d 43, 67 (Wyo. 2008) ("While perfection is not required or expected, a good faith effort to preserve and protect our constitution's commitment to a sound public education system is. We are convinced, as was the district court, that the state has met that standard and will continue to do so in the future."); *see also* Abbott *ex rel.* Abbott v. Burke, 971 A.2d 989, 1009 (N.J. 2009) ("The legislative and executive branches of government have enacted a funding formula that is designed to achieve a thorough and efficient education for every child, regardless of where he or she lives. . . . There is no absolute guarantee that [statute] will achieve the results desired by all. The political branches of government, however, are entitled to take reasoned steps, even if the outcome cannot be assured, to address the pressing social, economic, and educational challenges confronting our state. They should not be locked in a constitutional straitjacket."); Neeley v. West Orange-Cove Consol. Sch. Dist., 176 S.W.3d 746, 789–90 (Tex. 2005) ("Having carefully reviewed the evidence and the [factual] findings, we cannot conclude that the Legislature has acted arbitrarily in structuring and funding the public education system so that school districts are not reasonably able to afford all students the access to education and the educational opportunity to accomplish a general diffusion of knowledge.").

287. *See supra* text accompanying note 48.

288. *See* Simon-Kerr & Sturm, *supra* note 6, at 88.

289. *See* Bauries, *supra* note 14, at 985–87 ("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.").

sanction for noncompliance."[290] Some of the early, liability-phase adequacy decisions that did not order injunctive relief nevertheless led to sweeping reforms.[291] But those reforms were necessitated by giving effect to state constitution education clauses which establish a claim-right to an adequate education,[292] not merely a "fiduciary duty" of "loyalty" and "due care" owed by state legislators.[293] Moreover, relatively few "courts have issued or contemplated issuing policy-directive remedial orders," which perhaps could be labeled 'activist' if one disregarded that, "in most of those cases, [courts] did so only when forced by their recalcitrant legislatures after repeatedly trying" deferential approaches.[294] That declaratory judgments have led to significant reforms also rebuts the charge that courts are engaging in empty formalism. Even when very little remedial guidance is provided, declaratory judgments can also supply much-needed "content" to the right to education.[295]

Observers are nevertheless correct that the current form of ends scrutiny lacks balance. Remedial guidance clarifying "what the law proscribes" is eventually needed to hold the legislature accountable and deter constitutional violations.[296] Otherwise, the legislature wins the battle by attrition (through "legislative learned helplessness" or deliberate rebelliousness) and then the right goes under-enforced.[297] At the same time, the remedial standard cannot demand absolute achievement of the constitutional ends, not when those ends are educational adequacy and equity.[298] Those constitutional ends will probably never be fully and permanently achieved, and "any feasible and normatively

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290. *See* Weishart, *supra* note 11, at 946.

291. *See id.*; *see also* Buszin, *supra* note 50, at 1653 (noting reasons "that declaratory relief alone may spur swift police change); Emily Chiang, *Reviving the Declaratory Judgment: A New Path to Structural Reform*, 63 BUFF. L. REV. 549, 551–52 (2015) ("The declaratory judgment . . . can provide the same leverage to drive negotiation as a request for a structural injunction and it can make the reform process more efficient and cost-effective, and thereby more available.").

292. *See* Weishart, *supra* note 11, at 948–49.

293. *See* Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 736, 748–59 (2012).

294. *See* Weishart, *supra* note 167, at 276.

295. *See* Weishart, *supra* note 11, at 946.

296. *See* REBELL, *supra* note 61, at 87 ("Lack of judicial resolve and absence of a clear strategy for judicial oversight are often what provoke [legislative] resistance.").

297. *See* Black, *supra* note 30, at 470; *see also* Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by* Sheff v. O'Neill*—and A Proposed Solution*, 29 CONN. L. REV. 1115, 1146–47 (1997) ("[T]he proper role of the courts is to explicate and apply to remedial issues the constitutional values at issue and to establish stable implementation and monitoring processes that will ensure that these values are put into effect . . . but the judges should not fully formulate the substance of the remedy or micro-manage its implementation.").

298. *Cf.* Ryan, *supra* note 48, at 1256 ("Courts should set for themselves a more modest goal: ensuring the opportunity for an adequate education by focusing on resources that are relevant to that goal. They need not and should not be any more precise or ambitious than that. Courts should be explicit about their own institutional limitations and the end goal of school funding litigation, which should be to create the conditions for adequacy, not adequacy itself."); Fallon & Meltzer, *supra* note 56, at 1778 ("*Marbury*'s apparent promise of effective redress for all constitutional violations reflects a principle, not an ironclad rule, and its ideal is not always attained.").

acceptable policies for making progress toward either goal are liable to largely coincide for the foreseeable future."[299] So, it does not make sense to "analyze educational opportunity at particular moments in time and order remedies in response to that moment" as school finance decisions are so prone to do.[300] Rather, the type of ends scrutiny needed is one that can provide some realistic remedial guidance for long-term compliance.[301] Such ends scrutiny calls for proportionality, not balance.

Importing Section 5 proportionality ("focused on the overall impact of the remedy as compared to the scope of the harm") will not do, however, because it provides no real direction and thus permits the legislature to scale the remedy for the harm to modest dimensions in the interest of politics and the "back-door deals that typically influence remedies."[302] If the remedy is to be calibrated in relation to the harms the right to education is meant to protect against, it must be designed to improve both vertical equity and adequacy.[303] To facilitate their mutually-reinforcing potential, vertical equity and adequacy must have "a directly proportional, upward direction of fit" such that the relationship between them should remain constant—as one improves so must the other by the same factor.[304] This direct proportionality standard does not demand the actual and permanent achievement of vertical equity and adequacy. It focuses instead on whether a legislative remedy is designed to advance both vertical equity and adequacy in tandem to mitigate educational deprivations and disparities below the adequacy threshold.

Above that threshold, judicial review of a legislative remedy should assess whether "the margin between vertical equity and adequacy is proportional."[305] "That space would become disproportionate if, for example, children just meeting the adequacy threshold could not compete on comparable terms for admission to higher education and high-quality jobs with children soaring above the adequacy threshold."[306] Only if the legislative remedy causes such disproportionality, must courts then require "the adequacy threshold to be recalibrated to diminish the positional advantages held by children well above the threshold, and require adjustments to the distribution of educational

299. *See* Elizabeth Anderson, *Race, Culture, and Educational Opportunity*, 10 THEORY & RES. EDUC. 105, 106 (2012).

300. *See* Black, *supra* note 30, at 469 ("[E]ducation is an ongoing project that requires constant vigilance—the failure of which can span over years and decades.").

301. *See id.* at 469–70.

302. *See* Hinojosa & Walters, *supra* note 195, at 614 (arguing court should review legislative remedies to ensure that they are "aimed at the harms shown in court" and "correct the violations found"); Liu, *supra* note 232, at 401 ("[C]ourts have faulted state legislatures for fashioning educational policy based on political or budgetary compromises rather than educationally relevant factors.").

303. *See supra* text accompanying notes 211–14.

304. *See* Weishart, *supra* note 167, at 287–88.

305. *See id.* at 292.

306. *Id.* ("So, in addition to educational outcomes, courts assessing the proportionality of the margin between adequacy and vertical equity could also consider evidence of socio-economic mobility, college admissions, and patterns of racial and class segregation.").

opportunities to ensure vertical equity necessary to meet the higher thresholds."[307] In short, direct proportionality plots a course for legislative remedies to avoid unconstitutional excesses and holds the legislature accountable when they do not.

Because state constitutions often obligate the legislature in the first instance to discharge the duty to provide an adequate and equitable public education system, the standard for determining whether there is a constitutional violation should be the same as standard for determining whether the legislative remedy will cure that violation. Significantly, this remedial standard does not restrict the legislature or the executive in making and administering education policy that regulates myriad issues beyond the public education system's adequacy and equity. There are, of course, other important values and principles that should guide education policymaking in that regard. Direct proportionality is meant only to serve as a standard for legislative remedies after a court has determined there has been a constitutional violation. Unencumbered from such a ruling, the legislature and executive could enact measures, say, to improve racial and socioeconomic integration, or provide more school choice, provided, of course, that those measures do not otherwise conflict with federal or state law.[308] But the legislature and executive retain most discretion over the means to remedy a violation even when operating under the direct proportionality standard.

> While educational rights can be identified in principle, imbuing the rights with meaning in the real world requires an almost endless number of small decisions relating to public policy, educational philosophy, and economic management. Formulation of a remedy requires choices among a wide variety of possibilities [considering] constantly changing demographics of schools and the inconsistent ebb and flow of tax dollars available in a volatile economy . . . . The remedial fact-finding required to make reasoned choices in this situation is essentially forward-looking, requiring expertise and insight into the merits of various proposals for an on-going plan for the remediation of violations of norms defined in the state constitution.[309]

The legislature, executive agencies, and school boards are better equipped to make specific remedial decisions and more politically accountable when they do.[310] Direct proportionality simply points them all in the same direction and

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307. *Id.* ("Such recalibration would also ensure that adequacy remains relational, responsive to changing societal conditions and the needs of children.").

308. *Cf.* Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, CORNELL L. REV. (forthcoming) (manuscript at 5–6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058266 (contending that "states may not favor choice programs over traditional public education systems" in ways that violate state constitutions regarding "funding, oversight, student and teacher rights, and enrollment practices" or enact choice policies that deprive students of "adequate and equitable public schools").

309. O'Brien, *supra* note 207, at 401.

310. *See* Rebell & Hughes, *supra* note 297, at 1146 ("The legislature's role is to develop specific implementation approaches which will effectuate the constitutional values in a manner that is consistent with other social needs and priorities, and the executive's function is to administer the

preserves a limited but meaningful role for courts to ensure the upward trajectory of vertical equity and adequacy.[311] This remedial standard therefore respects state separation of powers principles yet demands that the legislative remedy actually effectuate the right to education's protection function.

B. Reviewing the Reasonable Congruence of Judicial Remedies

Judicial remedies under the state constitutional right to education must likewise comport with the two basic functions of constitutional remedies—to redress the harm in effectuating the constitutional right and reinforce structural norms like separation of powers and the rule of law.[312] These considerations carry more force in the case of judicial remedies given the judiciary's "dual role" in our constitutional system to adjudicate claims and enforce separation of powers principles on itself as well as the other coordinate branches.[313] The nexus to the constitutional right must therefore be even closer for judicial remedies than legislative remedies—"any significant divergence between the contours of the [right] and the relief granted represents an improper exercise of judicial power [resembling] legislation."[314] Provided, however, that the court selects a remedy within those contours "to effectuate the constitutional rights at stake, it is not legislating but performing its adjudicative function."[315] This recalls the line-drawing problem that provoked the congruence and proportionality standard to distinguish impermissible legislative interpretation from permissible legislative enforcement.[316]

In the case of judicial remedies, the remedial standard should assist courts

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implementation plan in a manner consistent with the constitutional values and legislative criteria.").

311. *Cf.* Gannon v. State (*Gannon IV*), 390 P.3d 461, 484 (Kan. 2017) ("[I]t is not our province to consider the wisdom of legislative policy choices. The function of the court is merely to ascertain and declare whether legislation was enacted in accordance with or in contravention of the constitution—and not to approve or condemn the underlying policy.") (quotation marks and alternation omitted); Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1360 (N.H. 1997) ("[W]e were not appointed to establish educational policy, nor to determine the proper way to finance its implementation. That is why we leave such matters . . . to the two co-equal branches of government [but i]t is our duty to uphold and implement the New Hampshire Constitution."); Christopher A. Suarez, *Courthouse, Statehouse, or Both? Redefining Institutional Roles in School Finance Reform*, 28 YALE L. & POL'Y REV. 539, 549 (2010) (book review) ("[T]he extent to which courts exercise ongoing oversight should depend solely on educational outcomes.").

312. *See supra* text accompanying note 56; *accord* Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 224 n.21 (Conn. 2010) ("[W]e recognize that separation of powers concerns necessarily will inform the creation of any remedy in this case, should one ultimately be required.").

313. *See* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 303 (1995).

314. *See* Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 733–34 (2001) (citing, *inter alia*, HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 668 (William Eskridge, Jr. & Philip Frickey eds., 1994)).

315. *See* Bandes, *supra* note 313, at 336.

316. *See supra* notes 220–22 and accompanying text.

in drawing the line between impermissible judicial legislation and permissible judicial adjudication. Drawing that line can be difficult if and when a court is disposed to ordering injunctive relief. It is not so difficult when a court acts wholly within its province to issue declaratory relief that interprets the constitution or declares the state has or has not fulfilled the constitutional ends.[317] Indeed, a standalone remedial standard would be unnecessary when the judicial remedy amounts to no more than a declaratory judgment.[318]

Injunctive relief, on the other hand, confers "broad discretionary powers" on courts—powers typically exercised by the other branches in making and administering policy.[319] The potential for broad discretion accompanying injunctive relief is even more pronounced regarding the state constitutional right to education which takes the form of an affirmative claim-right to an adequate education.[320] "To enforce a positive right, courts must mandate a positive remedy by requiring the state government to act and thereby fulfill the constitutional right."[321] Hence, a court cannot enforce such a right simply with a "preventive injunction" that orders the state "to stop the illegal conduct."[322] The injunctive relief must either be "reparative" in "correcting the existing

317. *See* Rell, 990 A.2d at 225 ("[I]t is well within the province of the judiciary to determine whether a coordinate branch of government has conducted itself in accordance with the authority conferred upon it by the constitution.") (quotation marks omitted); Campaign for Fiscal Equity, Inc. v. State (*CFE II*), 801 N.E.2d 326, 345 (N.Y. 2003) ("[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them."); Neeley v. West Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 777 (Tex. 2005) ("The final authority to determine adherence to the Constitution resides with the judiciary [; if] the legislature has not discharged its constitutional duty . . . it is *our* duty to say so.") (quotation marks omitted); Washakie Cty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 319 (Wyo. 1980) ("Though the supreme court has the duty to give great deference to legislative pronouncements and to uphold constitutionality when possible, it is the court's equally imperative duty to declare a legislative enactment invalid if it transgresses the state constitution."). *But see supra* note 295 and accompanying text.

318. *See* Chiang, *supra* note 291, at 584; *cf.* Gannon v. State (*Gannon II*), 368 P.3d 1024, 1059 (Kan. 2016) ("[W]hile it is for the General Assembly to legislate a remedy, courts do possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If it did not, then the power to find a particular Act unconstitutional would be a nullity. As a result there would be no enforceable remedy. A remedy that is never enforced is truly not a remedy.") (quoting DeRolph v. State (*DeRolph II*), 728 N.E.2d 993, 1002 (Ohio 2000)).

319. *See* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 635 (1982); *see also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292–93 (1976).

320. *See supra* notes 268, 271 and accompanying text.

321. State *ex rel.* Morrison v. Sebelius, 179 P.3d 366, 381 (Kan. 2008) (citing Helen Hershkoff, *Positive Rights and States Constitutions: The Limits of Federal Rationality Review,* 112 HARV. L. REV. 1131, 1135 (1999)); Montoy v. State, 120 P.3d 306, 308 (Kan. 2005); *accord* McCleary v. State (*McCleary I*), 269 P.3d 227, 248 (Wash. 2012) ("[T]he court is concerned not with whether the State has done too much, but with whether the State has done enough. Positive constitutional rights do not restrain government action; they require it.").

322. *See* Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 315–16 (2004) (citing, *inter alia*, DAN B. DOBBS, LAW OF REMEDIES 164 (2d ed. 1993)).

effects and consequences of that harm" or "structural" in compelling organizational change, "rather than behavioral aspects, of an illegal institution."[323] Structural injunctions, and to a lesser extent reparative injunctions, raise separation of powers concerns.[324]

Yet few state courts have ordered or authorized reparative or structural injunctions under the state constitutional right to education.[325] Indeed, describing the operative order as reparative or structural in some of these cases would be a bit of an overstatement.[326] In truth, the vast majority of courts have exercised restraint, with a minority contemplating or authorizing injunctive relief only after wayward legislatures forced their hand.[327] These courts have concluded that they are empowered to provide a judicial remedy when the other branches fail to take appropriate action.[328] But most often that judicial remedy is little more than another fairly assertive declaratory judgment. The specter that broad structural or reparative relief may yet be necessary, however, still gives courts pause in later phases of adequacy litigation. Proposed fourth-wave remedies (e.g., integration, universal preschool, school choice) do not assuage such concerns; previously-sought adequacy remedies seem almost quaint by comparison. So, there is an ever-pressing need for a remedial standard that can

323. *See id.* at 316–17; *see also id.* at 319 (proposing an alternative classification of the three injunctions in which "[p]reventive relief addresses the core harm by ordering the cessation of illegal activity. Reparative relief addresses the subsequent consequences of that harm by redressing the resulting effects of the illegal act. Prophylactic relief focuses on the pre-harm time period in order to direct conduct that has a tendency to contribute to or facilitate the primary harm.").

324. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1090 (2004) ("Structural injunctions are accused of subverting [separation of powers] principles by excessively concentrating power in the court at the expense of the electoral branches."); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 661–63 (1978).

325. *See supra* text accompanying note 29.

326. *See* Weishart, *supra* note 167, at 276 n.333 ("[O]nly two of the seven courts ordered specific legislation or budget appropriations. Two more merely contemplated issuing such orders, or empowered the trial court to do so if necessary. Two courts ordered costing-out studies, while another reserved the right to continue monitoring the capital funds budget. These are hardly exemplars of judicial overreach.") (citations omitted).

327. *See id.*

328. Londonderry Sch. Dist. SAU No. 12 v. State, 907 A.2d 988, 996 (N.H. 2006) ("[T]he judiciary has a responsibility to ensure that constitutional rights not be hollowed out and, in the absence of action by other branches, a judicial remedy is not only appropriate but essential."); Hoke Cty. Bd. of Educ. v. State (*Hoke I*), 599 S.E.2d 365, 393 (N.C. 2004) ("Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it."); State v. Campbell Cty. Sch. Dist. (*Campbell II*), 32 P.3d 325, 332–33 (Wyo. 2001) ("The legislature's failure to create a timely remedy consistent with constitutional standards justifies the use of provisional remedies or other equitable powers intended to spur action. When insufficient action in the legislative process occurs, judicial monitoring in the remediation phase can help check political process defects and ensure that meaningful relief effectuates the court's decision. When these defects lead to continued constitutional violations, judicial action is entirely consistent with separation of powers principles and the judicial role.") (citations omitted).

assist courts in fashioning structural or reparative injunctions that adhere to state separation of powers principles.

Section 5 congruence and proportionality was originally devised as a "nexus test in the prophylactic legislation context" and thus presumably could apply as a "the test for properly tailored judicial prophylactic remedies."[329] But Section 5 proportionality[330] would afford courts too much latitude in determining the scope of the injunctive relief in relation to the scope of the harm. Remedial proportionality in and of itself provides no criteria for that determination.[331] To be sure, subjectivity cannot be eliminated completely from the act of judging, but a standard that permits courts to determine the scope of the harm vis-à-vis the remedy licenses too much discretion.[332] As the history of federal desegregation litigation suggests, the scope can be interpreted broadly to remedy harms having some causal link to educational opportunity or narrowly to enjoin only specific state-created harms.[333] Given the recent history of school finance litigation, it seems more likely that courts would use such discretion to narrow rather than broaden the scope of relief. In either case, the two functions of constitutional remedies would be frustrated: a narrow scope would keep the right under-enforced, a broad scope could institute a structural breach in the separation of powers.

The proper focus, then, is not on the proportional scope of the harm and remedy but on the nexus between the right and the remedy.[334] To be more precise, courts should determine whether the judicial remedy is calculated to effectuate the constitutional right's function.[335] For that purpose, congruence

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329. *See* Thomas, *supra* note 322, at 349.

330. *See* Caminker, *supra* note 228, at 1154 (noting that the focus of Section 5 proportionality is "on the calibration or balance between the magnitude of the prophylactic remedy and the magnitude of the wrong or problem being addressed").

331. *See* Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73, 126–29 (2007) ("The ability to alter the comparison point demonstrates the manipulability of the proportionality rule. It is this manipulability in the framing of the proportionality question that renders the standard subjective. . . . Add to this framing discretion a secondary level of subjectivity, which enters judicial decisions by the selection of the analytical inputs for the proportionality calculus. Subjectivity enters into the decisionmaking as the judges select the appropriate inputs for consideration--for example evaluating the magnitude of the harm.").

332. *See* Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 513 (1999) ("Stating that the scope of the injunction will be defined by the scope of the violation and will be confined to restoring the victims to their rightful place reveals very little about what the remedy should be. This loose standard does not logically compel a particular result, thus permitting a great deal of unrestricted discretion.").

333. *See* Thomas, *supra* note 331, at 128; *see, e.g.*, Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 280 (1977) ("[T]he nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to the condition alleged to offend the Constitution.") (citation and quotation marks omitted); *accord* Horton v. Meskill (*Horton II*), 486 A.2d 1099, 1111 (Conn. 1985).

334. *See* Dellinger, *supra* note 209, at 1551; Thomas, *supra* note 314, at 744 ("The constitutional mandate is simply that some remedy, not any particular remedy, must be applied by the courts in the exercise of their judicial power to effectuate constitutional rights.").

335. *Cf.* Abbott v. Burke (*Abbott II*), 575 A.2d 359, 367 (N.J. 1990) ("In order to pass on

requiring means-ends fit is more suitable than proportionality. The fit can neither be too strict nor too lose, however. A strict fit would preclude injunctive relief in almost every case in which the court had any doubt about the likelihood that the remedy would actually effectuate the right's function. Insisting on a strict fit would also be inconsistent with the broad authority of state courts to fashion equitable remedies to effectuate constitutional rights.[336] Conversely, a loose fit at a sufficient level of generality would bring the means-ends review close to the point of being a tautology, permitting considerable variance and judicial remedies that diverge significantly from the right's function.[337]

Courts reviewing legislative action in the remedial phases of adequacy litigation seemed to have settled in the middle on a reasonable degree of fit, demanding that the legislative means be "reasonably calculated" to achieve the constitutional ends.[338] Courts reviewing the casual nexus between injunctive relief and the right to education's function should demand no more and less of judges who are already somewhat constrained by their reliance on adversarial litigants to adduce the necessary evidence.[339] Reasonableness, not certainty, should also guide courts in weighing that evidence. Trial court factual findings in school finance cases are often entitled to a "substantial evidence" standard of review.[340] "Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion."[341] No

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plaintiffs' contention, we must once again, in the context of this case, define the scope and content of the constitutional provision. That definition is critical to our determination of a remedy. While precision in such definition is desirable, certain considerations suggest caution against constitutional absolutism in this area.").

336. *See* Hershkoff & Loffredo, *supra* note 227, at 979 ("[S]tate courts remain common-law generalists with equitable and inherent authority to create law, shape policy, and devise remedies."); *accord* State v. Campbell Cty. Sch. Dist. (*Campbell II*), 32 P.3d 325, 332 (Wyo. 2001) ("The legislature's failure to create a timely remedy consistent with constitutional standards justifies the use of provisional remedies or other equitable powers intended to spur action.").

337. *See* Parker, *supra* note 332, at 519 ("[I]f the connection between right and remedy is loose, then the right cannot determine the remedy. As a result, factors other than the definition of the right must be considered in determining the remedy. The right-remedy connection, although it appears to permit little 'choice' in crafting the remedy, actually allows a great deal of choice because of its indeterminacy.").

338. *See* Weishart, *supra* note 167, at 265–66.

339. *See* Hershkoff, *supra* note 321, at 1175–78 (acknowledging some of the comparative disadvantages of judicial fact-finding but contending that state courts can mitigate if not overcome these disadvantages."). *See generally* William S. Koski, *Courthouses vs. Statehouses*, 109 MICH. L. REV. 923 (2011) (book review).

340. *See, e.g.*, Gannon v. State (*Gannon I*), 319 P.3d 1196, 1246 (Kan. 2014); Leandro v. State, 488 S.E.2d 249, 259 (N.C. 1997); Neeley v. West Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, at 790 (Tex. 2005); McCleary v. State (*McCleary I*), 269 P.3d 227, 253 (Wash. 2012). "Most of the states use the term clearly erroneous and similar terms (e.g. clear error and clear and convincing) in connection with findings of fact by the trial court." Richard H. W. Maloy, *"Standards of Review"- Just A Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 623 (2000). But the clearly erroneous standard often means that a trial court's factual finding will be upheld if "supported by substantial evidence." *Id.* at 622 ("It has been said that the test of whether the findings of the trial court were clearly erroneous is whether there was substantial evidence to support the conclusion of the trier of fact.") (quotation marks omitted).

341. *See Gannon I*, 319 P.3d at 1240 (quoting Owen Lumber Co. v. Chartrand, 157 P.3d 1109

lesser or greater standard should apply in reviewing the factual nexus between the injunctive relief and the right to education's function.

In total, the remedial standard entails an inquiry into whether the judicial remedy is reasonably congruent with the constitutional right's function. A court applying that standard under the state constitutional right to education must determine whether substantial evidence shows that the requested injunctive relief is reasonably calculated to set both vertical equity and adequacy on an upward trajectory.[342]

Such a standard provokes an immediate question: Can a court award relief on other grounds, besides vertical equity and adequacy? The answer is: Of course, a court would not be bound by the reasonable congruence standard in awarding relief that is calculated to effectuate an education statute or regulation, or even some other constitutional provision, e.g., due process, that implicates education rights. But if a court is awarding relief to effectuate the state constitutional right to education, then it should be bound by that right's function to protect children from the harms of educational deprivations and disparities. And it should be bound to effectuate that function with injunctive relief that respects state separation of powers principles.

C. Previewing the Reasonable Congruence of Integration and Choice Remedies

Nearly twenty years after James Ryan first proposed them as fourth-wave remedies, integration and choice are still being pursued in litigation.[343] *Cruz-Guzman* resumes a prior legal challenge to segregated schools, *Minneapolis NAACP*, that previously settled in *Sheff*'s wake.[344] The complaint alleges that *de facto* racial and socioeconomic segregation in St. Paul and Minneapolis public schools deprives children of an adequate education guaranteed by the state constitution.[345] The plaintiffs seek declaratory and injunctive relief compelling "an adequate and desegregated education."[346] *Martinez v. Malloy* challenges Connecticut statutes and policies "that place limitations on the number of charter schools, on interdistrict choice, and on magnet schools aimed at increasing integration."[347] The complaint avers that such "anti-opportunity laws" violate students' fundamental liberty and equality interests to substantial

(Kan. 2007)).

342. The presumption that the injunctive relief is justified under this standard can be rebutted if, for instance, the requested relief contravenes some other state or federal law.

343. *See, e.g.*, Class Action Complaint, Cruz-Guzman v. State, NO. 27-CV-15-19117 (Minn. 4th Jud. Dist. Nov. 5, 2015); Complaint at 4–6, Martinez v. Malloy, No. 3:16-cv-01439 (D. Conn. Aug. 23, 2016) [hereinafter Martinez Complaint].

344. *See* Black, *supra* note 59, at 382–83.

345. *See* Cruz-Guzman v. State, 892 N.W.2d 533, 534–36 (Minn. Ct. App. 2017) (reversing trial court's denial of motion to dismiss the complaint as nonjusticiable), *review granted* (Apr. 26, 2017). In the interest of full disclosure, this Article's author joined an amicus brief of education law scholars filed with the Minnesota Supreme Court in support of Cruz-Guzman plaintiffs.

346. *Id.* at 535.

347. Koski, *supra* note 46, at 1923.

equal and minimally adequate educational opportunities under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[348] Although the Connecticut complaint seeks declaratory and injunctive relief under the U.S. Constitution, similar claims have been alleged in neighboring Massachusetts under the education clause, equal protection, and due process provisions of the state constitution. [349]

As none of these challenges have proceeded to a full trial on the merits, there is insufficient evidence from which to assess the reasonable congruence of these proposed judicial remedies. Part of the reason to preview that remedial standard, nevertheless, is to suggest just that—insufficient evidence may yet prove a temporary impediment for both remedies.

It is with some irony that there might be insufficient evidence that the integration remedy would advance children's equality interests in vertically equitable educational opportunities or that the choice remedy would advance children's liberty interests in an adequate education. After all, integration and choice are touted for advancing equality and liberty, respectively. But note the equality and liberty purportedly advanced is arguably of a different kind or degree than that construed in the jurisprudence of the state constitutional right to education.

Integration is perceived to advance a type of social equality essential for equal citizenship,[350] stipulating that children of different races or classes be treated the same (horizontal equity), not differently based on their needs (vertical equity). Choice is perceived to advance the negative liberties of parents to direct the education of their children,[351] not necessarily the positive liberties of children as cultivated through an adequate education. In contrasting these remedies, it should be noted that forced integration is criticized for subverting the negative liberty aims of school choice by restraining parental and local control,[352]

348. Martinez Complaint, *supra* note 344, at 55–68.

349. *See* Doe v. Sec'y of Educ., 95 N.E.3d 241 (Mass. 2018) (affirming trial court's dismissal of complaint alleging statutory cap on charter schools violated state constitution education clause and equal protection guarantees, as well as due process and liberty provisions).

350. *See* Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 271–72 (2006) ("[T]he integration vision most closely associated with the Civil Rights Movement had three primary characteristics: (i) the belief that assimilation would eventually cure racial bigotry, (ii) the expectation that race mixing under conditions of social equality would break down racial stereotypes and allow members of each group to appreciate a common, shared humanity, and (iii) the belief that integration would eradicate the advantages whites had accrued through segregation.") (citations and quotation marks omitted); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 338 (1986) ("The social vision nourished by the constitutional principle of equal citizenship not only tolerates but encourages a broad range of efforts to promote the integration of American society."). *See generally* ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION (2nd ed. 2010).

351. *See* JOHN E. COONS & STEPHEN D. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL (1978). *See generally* Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 819–21 (2011).

352. *See, e.g.*, Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455, 462 (2005) ("In the desegregation area, the argument is that courts should end forced integration and thus restore

whereas limitless school choice is criticized for subverting the social equality objectives of integration by enabling or tolerating *de facto* segregation.[353] Setting aside whether such criticisms are fair or unavoidable, there is a longstanding tension between integration and choice,[354] one that pits liberty interests versus equality interests rather than encourage their mutually-reinforcing tendencies in a way envisioned by this Article's proposed remedial standards.

The reasonable congruence standard indeed requires the injunctive remedy to advance both equality and liberty interests. Specifically, the question is whether there is substantial evidence that integration or choice is reasonably calculated to set both vertical equity and adequacy on an upward trajectory or otherwise maintain their direct proportionality. Answering that question depends, of course, on exactly how those remedies could be structured by a court and implemented by school authorities. Evaluating all the options would require another article or two.[355] What can be accomplished here is to observe some evidentiary deficits that either remedy would have to overcome as a general matter, if courts had to satisfy the reasonable congruence standard before issuing injunctive relief.

There is substantial social science research indicating that racial and socioeconomic integration could advance adequacy by improving educational quality, outcomes, and life chances overall and reducing achievement gaps.[356]

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parental selection of schools in their chosen residential neighborhoods."); *accord* Milliken v. Bradley (*Milliken I*), 418 U.S. 717, 741–42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

353. *See, e.g.*, Osamudia R. James, *Opt-Out Education: School Choice As Racial Subordination*, 99 IOWA L. REV. 1083, 1117 (2014) ("School-choice plans only compound the de facto school segregation that makes American public schools more segregated now than they were at the time of *Brown v. Board of Education*.").

354. Michael Heise, *From No Child Left Behind to Every Student Succeeds: Back to A Future for Education Federalism*, 117 COLUM. L. REV. 1859, 1882 (2017) (noting "the plethora of school choice options—options that exist within the public school sphere as well as options between the public and non-public school markets").

355. *See* Steven L. Nelson, *Still Serving Two Masters? Evaluating the Conflict Between School Choice and Desegregation Under the Lens of Critical Race Theory*, 26 B.U. PUB. INT. L.J. 43, 45–51 (2017).

356. *See, e.g.*, Ryan, *supra* note 59, at 555–60 (citing research); Black, *supra* note 59, at 404–15 (citing research); Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 327–36 (2009) (citing research); Roslyn Arlin Mickelson, Mokubung Nkomo & George L. Wimberly, *Integrated Schooling, Life Course Outcomes, and Social Cohesion in Multiethnic Democratic Studies*, 36 REV. RES. EDUC. 197–238 (2012); Roslyn Arlin Mickelson & Martha Bottia, *Integrated Education and Mathematics Outcomes: A Synthesis of Social Science Research*, 88 N.C. L. REV. 993, 995 (2010); Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1546–47 (2007); Argun Saatcioglu, *Disentangling School- and Student-Level Effects of Desegregation and Resegregation on the Dropout Problem in Urban High Schools: Evidence From the Cleveland Municipal School District, 1977-1998*, 112 TEACHERS COLL. REC. 1391, 1419, 1427 (2010); GARY ORFIELD & ERICA FRANKENBERG, THE CIVIL RIGHTS

That social science is not indisputable, but it need only be sufficient to support the conclusion of a reasonable person under the substantial evidence standard.[357] There is little reason to believe that advancing adequacy in this way would cause vertical *in*equities. Quite the opposite, integration would mitigate vertical inequities below the adequacy threshold to the extent that it reduces the number of students trapped in racially-isolated, high-poverty schools.[358]

It is less certain, however, whether integrating schools in itself would mitigate enough vertical inequities below the adequacy threshold.[359] Even more unclear is whether it would mitigate vertical inequities above that threshold or address the needs of particular students to meet higher thresholds. "So what?" might be the obvious reply. Educational justice will be progressed anyway, particularly if one is more concerned with fostering social equality through integration rather than vertical equity.[360] And yet, if the law is to advance social equality in order to guarantee equal citizenship, that cause ultimately will be imperiled by the failure to advance vertical equity in direct proportion with adequacy.[361]

PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 40 (2014), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf [https://perma.cc/K4AG-H2TU]; NAT'L ACAD. OF EDUC., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND SUPREME COURT CASES 32 (Robert L. Linn & Kevin G. Welner, eds., 2007), http://nepc.colorado.edu/files/Brief-NAE.pdf [https://perma.cc/4LBS-BSA5]; Rucker C. Johnson, *Long-Run Impacts of School Desegregation & School Quality on Adult Attainments* 2, 18–21 (Nat'l Bureau of Econ. Research, Working Paper 16664) (revised Sept. 2015), http://www.nber.org/papers/w16664.pdf [https://perma.cc/56AB-6Q2F].

357. *See supra* text accompanying notes 340–41.

358. *Cf.* Robinson, *supra* note 356, at 330 ("Research from the Civil Rights Project documents how racially isolated schools experience high concentrations of poverty, which brings to schools a variety of inequalities that result in inferior educational opportunities for their students. For instance, concentrated poverty brings to the schoolhouse door less qualified, less experienced teachers, lower levels of peer group competition, more limited curricula taught at less challenging levels, more serious health problems, much more turnover of enrollment, and many other factors that seriously affect academic achievement.") (citations and quotation marks omitted).

359. *Cf.* Liu, *supra* note 83, at 100 ("Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures. [For example], speech habits acquired in a segregated system do not vanish simply by moving the child to a desegregated school. The root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task."); Stuart Biegel, *Court-Mandated Education Reform: The San Francisco Experience and the Shaping of Educational Policy After* Seattle-Louisville *and* Ho v. SFUSD, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 159, 163 (2008) ("Too often, desegregation plans focusing on desegregation alone were seen as viable and complete remedies, and too often they did not succeed in implementing the mandate of *Brown*. Yet, … when race-conscious strategies are part and parcel of a much larger and multi-faceted menu of reform efforts…everyone benefits and lasting change is the ultimate result.").

360. *Cf.* Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 154, 160 (2009) (observing differences between equity and diversity desegregation plans).

361. *See supra* text accompanying notes 197–98, 203, 205; *cf.* Liu, *supra* note 82, at 105

Integration plans conceivably could be structured and implemented so that "the fate of disadvantaged students [are] tied to the fate of their more advantaged peers."[362] There was a time when the U.S. Supreme Court approved desegregation plans that included a wide range of compensatory services that "channeled additional resources to minority schools where racial balance could not be achieved through intradistrict busing."[363] The Court later curtailed federal courts' discretion in this regard.[364] In any case, the remedial strategy generally has been an either-or proposition: either integration or compensatory services, not both.[365] Although *Sheff* has raised the prospect for a "doctrine synthesis,"[366] the coupling of integration and vertical equity measures has not been pursued to a sufficient degree, which potentially limits existing social science research that could satisfy the reasonable congruence standard.

Conversely, there may be substantial evidence that choice plans are reasonably calculated to advance vertical equity but not adequacy. Some see a clear link between choice and equity: "The core principle of school choice is an equitable one," they contend, because "school choice grants poorer students an opportunity—the chance to choose their own schools—that is now reserved for wealthier students."[367] Others remain highly skeptical of that link given the origins of school choice. Early voucher proponents very much wanted "to replace the current system of public education with a virtually unregulated, market-driven alternative."[368] Choice plans were also proposed to derail desegregation efforts.[369] Contemporary proponents who "occupy the political center," nevertheless, purport to view school choice as a necessary "social intervention to aid the most disadvantaged," although some undoubtedly harbor "a broader agenda."[370]

("Although the relative importance of redistributing students versus redistributing resources will be a question for the ages, it would be surprising if genuine equality of educational opportunity did not ultimately require both.").

362. *See* Ryan, *supra* note 55, at 259.

363. *See* Liu, *supra* note 82, at 99–100 (citing Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 275–77, 279–88 (1977)). *See generally* Tracy Ellen Sivitz, Note, *Eliminating the Continuing Effects of the Violation: Compensatory Education As A Remedy for Unlawful School Segregation*, 97 YALE L.J. 1173 (1988).

364. *See generally* Bradley W. Joondeph, Missouri v. Jenkins *and the De Facto Abandonment of Court-Enforced Desegregation*, 71 WASH. L. REV. 597 (1996).

365. *See* Liu, *supra* note 82, at 102.

366. *See id.* at 105.

367. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2051 (2002); *see also* Janelle Scott, *School Choice as a Civil Right: The Political Construction of a Claim and Its Implications for School Desegregation, in* INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION 33–38 (Erica Frankenberg & Elizabeth Debray eds., 2011).

368. Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 812 (2005).

369. James E. Ryan, Brown*, School Choice and the Suburban Veto*, 90 VA. L. REV. 1635, 1636 (2004).

370. *See* Liu & Taylor, *supra* note 368, at 813–14; *see also* TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA'S PUBLIC SCHOOLS 329 (2011) ("The modern

Whether choice proponents truly have equity in mind or not, choice plans tend to serve disadvantaged children. Most but not all public voucher programs take "a targeted approach, conditioning eligibility on the basis of income, prior attendance at a low-performing school, or some other measure of educational disadvantaged."[371] "Charter schools educate a disproportionate number of poor, low-performing, and African-American students."[372] And, "school-district-wide choice programs are also often conceptualized as a means of improving educational options for poor and minority students."[373]

Given the student populations they tend to serve, there is social science research suggesting that choice plans could advance vertical equity.[374] As with

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arguments for vouchers have less to do with free markets than with social equity. They also have less to do with theory than with the commonsense notion that disadvantaged kids should never be forced to attend failing schools and that they should be given as many attractive educational opportunities as possible.").

371. *See* Liu & Taylor, *supra* note 368, at 813; Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL'Y 189, 211 n.109 (2016) ("Many of the voucher programs are limited to students who are poor and/or attending a school that is deemed failing or performing poorly."). *But see id.* at 219 ("[V]oucher programs are limited in the amount that they will pay which limits the ability of students using vouchers to attend more expensive and higher quality private schools."); Heise, *supra* note 354, at 1886 ("Contributing much to the recent growth in publicly funded voucher programs is a shift in voucher programs' initial focus on students from low-income households and those assigned to struggling public schools to a broader slice of middle-class students. … Now, ironically, successful political support for voucher programs typically requires that the programs include middle-class families as well.").

372. James E. Ryan, *Charter Schools and Public Education*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 393, 399 (2008); *see also* Wilson, *supra* note 371, at 212–13 ("In school systems serving large numbers of poor and minority students, charter schools have grown so much that in many instances they either approximate or exceed the number of traditional public schools in the school district."). *But see id.* at 219 ("[T]he number of high quality charter schools, particularly in school districts serving predominantly poor and minority students, is limited."); Julian Vasquez Heilig et al., *Separate and Unequal? The Problematic Segregation of Special Populations in Charter Schools Relative to Traditional Public Schools*, 27 STAN. L. & POL'Y REV. 251, 278 (2016) ("Our analysis, which looked at high-need student enrollment in charter schools relative to non-charter public schools at three unit of analysis (state, district, and local), illustrates that the claims by many charter school providers that they are serving disadvantaged students at comparable rates equal to or greater than public schools is misleading when examined spatially."); U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-543, CHARTER SCHOOLS: ADDITIONAL FEDERAL ATTENTION NEEDED TO HELP PROTECT ACCESS FOR STUDENTS WITH DISABILITIES 7 fig.2 (2012) (finding students with disabilities composed 11.1% of the national school-aged population but 8.2% of the charter school population).

373. Wilson, *supra* note 371, at 214; *but see id.* at 219 ("District-wide school choice programs also have limited number of slots for the high quality and most sought after schools.").

374. *See, e.g.*, Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 VAND. L. REV. 1, 18–19 nn. 61–62 (2017) ("The emerging consensus among education scholars is that even if charter schools do not perform better *overall* than traditional public schools, they do, on average, a better job—in some cases, a *much better* job—at educating disadvantaged urban students, especially minority students and English language learners.") (citing research); Anna J. Egalite & Patrick J. Wolf, *A Review of the Empirical Research on Private School Choice*, 91 PEABODY J. EDUC. 441 (2016); Alejandra Mizala & Florencia Torche, *Means-Tested School Vouchers and Educational Achievement: Evidence from Chile's Universal Voucher System*, 674 ANNALS AM. ACAD. POL. & SOC. SCI. 163 (2017).

the integration research, this choice research is far from indisputable and indeed has been intensely contested.[375] But it may be sufficient to meet the substantial evidence standard.

The same cannot be said with any confidence about the potential of choice plans to advance adequacy. "First of all, researchers find charter schools difficult to study due to 'the constant flux of schools and students'. . . [and particularly] challenging to study in the aggregate."[376] Although there are significant differences in charter school laws and policies, some studies "draw broad policy conclusions from analyses of a relatively small population of charter school students [whereas other] studies that are more national in scope tend to indiscriminately combine results from different states."[377] More rigorous studies nevertheless are mixed, finding "charter schools on average produce better results in math and reading than traditional public schools" in some states but not others.[378] Hence, "even though charter schools have captured the imagination of many school reformers and the ire of others, little credible evidence about their impact on student achievement is available."[379] Although there is more research on voucher programs, that research is likewise mixed concerning their "impact on student achievement."[380] To the extent that open-

375. *See, e.g.*, Minow, *supra* 351, at 843–48 (contending that school choice harms disadvantaged student populations and further racial and socioeconomic segregation); Nelson, *supra* note 356, at 49 ("School choice policies that are confined to poor, urban boundaries are unable to achieve equity due to their geographic limitations.").

376. Abigail Hoglund-Shen, Note, *Fixer Upper: Reforming Vergara's Teacher Tenure Statutes*, 25 WM. & MARY BILL RTS. J. 1151, 1168 (2017) (citation and quotation marks omitted).

377. Elaine Liu, Note, *Solving the Puzzle of Charter Schools: A New Framework for Understanding and Improving Charter School Legislation and Performance*, 2015 COLUM. BUS. L. REV. 273, 286–87 (2015).

378. *See id.* at 288 (citing EDWARD CREMATA ET AL., CTR. FOR RESEARCH ON EDUC. OUTCOMES, NATIONAL CHARTER SCHOOL STUDY 2013 (2013), http://credo.stanford.edu/documents/NCSS%202013%20Final%20Draft.pdf [http://perma.cc/J9Z6-4KTZ]); *see also* JULIAN BETTS & EMILY TANG, CTR. ON REINVENTING PUB. EDUC., THE EFFECT OF CHARTER SCHOOLS ON STUDENT ACHIEVEMENT: A META-ANALYSIS OF THE LITERATURE 1 (2011), http://files.eric.ed.gov/fulltext/ED526353.pdf [http://perma.cc/WMM5-72XZ] ("[T]he authors find compelling evidence that charters under-perform traditional public schools in some locations, grades, and subjects, and out-perform traditional public schools in other locations, grades, and subjects.").

379. Eric A. Hanushek et al., *Charter School Quality and Parental Decision Making with School Choice,* 91 J. PUB. ECON. 823, 824 (2007) ("This comes about primarily because of the difficulty separating differences in the quality of charter and regular public schools from differences in the students who attend schools in the respective sectors."); *see also* Steven L. Nelson & Heather N. Bennet, *Are Black Parents Locked Out of Challenging Disproportionately Low Charter School Board Representation? Assessing the Role of the Federal Courts in Building A House of Cards*, 12 DUKE J. CONST. L. & PUB. POL'Y 153, 155 (2016) ("The majority of research on charter schools is unsettled and limited to well-confined areas.").

380. *See* Nancy E. Hill, Julia R. Jeffries & Kathleen P. Murray, *New Tools for Old Problems: Inequality and Educational Opportunity for Ethnic Minority Youth and Parents*, 674 ANNALS AM. ACAD. POL. & SOC. SCI. 113, 119 (2017); Christopher Lubienski & Peter Weitzel, *The Effects of Vouchers and Private Schools in Improving Academic Achievement: A Critique of Advocacy Research*, 2008 BYU L. REV. 447, 448 (2008); PATRICK WOLF ET AL., U.S. DEP'T OF EDUC., EVALUATION OF THE DC OPPORTUNITY SCHOLARSHIP PROGRAM 51 (2010),

enrollment, interdistrict, or magnet schools count as choice not integration plans, they have a better track record,[381] although funding remains relatively minimal as does the research.[382]

Again, we can undertake only so much analysis at this juncture, without the benefit of a trial on the merits. This preview of proposed remedies suggests, however, that reasonable congruence is a fairly demanding but not unyielding standard for injunctive relief—a standard that inevitably interjects itself into the debate about the reliability of social science evidence concerning education policy. Some scholars urge "caution against the fetishization of evidence in social science policymaking."[383] There are "limits in the state of the research, difficulties in conducting this kind of social science research in the first place, and challenges in implementing what research findings exist." [384] Other scholars, sensitive to these complexities, suggest it may be time to throw a little caution to the wind—"in certain hard cases, where litigants have a strong argument for a proposed intervention but have been unable to produce credible estimates of its likely effect because of the state's control over treatment assignment, it may be appropriate for courts to issue a temporary experiment remedy, rather than entering a permanent, state-wide injunction or letting the state off the hook entirely."[385]

The reasonable congruence standard attempts to forge some middle ground, insisting on a reasonably close nexus between the right's function and the proposed injunctive relief to cabin judicial discretion while preserving the somewhat more accommodating substantial evidence standard state courts already employ. The standard thus serves as "the limiting principle" that James Ryan called for nearly twenty years ago for courts considering potential fourth-wave remedies.[386] By contrast, the direct proportionality standard for legislative

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https://ies.ed.gov/ncee/pubs/20104018/pdf/20104018.pdf [https://perma.cc/6X3L-DB5V] (concluding "no clear evidence of long term effect on achievement for students overall" from voucher program). *See generally* BRIAN GIL, ET AL., RAND CORP., RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS (2007), https://www.rand.org/pubs/monograph_reports/MR1118-1.html [https://perma.cc/DGD3-C7A9].

381. *See, e.g.*, GENEVIEVE SIEGEL-HAWLEY & ERICA FRANKENBERG, NAT'L COAL. ON SCH. DIVERSITY, MAGNET SCHOOL STUDENT OUTCOMES: WHAT THE RESEARCH SAYS (2011) 1–8, https://files.eric.ed.gov/fulltext/ED571619.pdf [https://perma.cc/WG7K-RRCC] (summarizing six major studies of magnet school student outcomes); U.S. DEP'T OF EDUC., INNOVATIONS IN EDUCATION: CREATING SUCCESSFUL MAGNET SCHOOLS PROGRAMS v, 1–3 (2004), https://www2.ed.gov/admins/comm/choice/magnet/report.pdf [https://perma.cc/64XC-WKGF].

382. *See, e.g.*, Rebecca I. Yergin, Note, *Rethinking Public Education Litigation Strategy: A Duty-Based Approach to Reform*, 115 Colum. L. Rev. 1563, 1601 (2015).

383. *See, e.g.*, Eloise Pasachoff, *Two Cheers for Evidence: Law, Research, and Values in Education Policymaking and Beyond,* 117 COLUM. L. REV. 1933, 1937, 1952, 1961 (2017).

384. *Id.*

385. *See* Christopher S. Elmendorf & Darien Shanske, *Solving "Problems No One Has Solved": Courts, Causal Inference, and the Right to Education*, 2018 U. ILL. L. REV. 693, 735 (2018); *see also id.* at 742 ("[T]he court will be able to learn whether its remedy made a difference, and terminate those remedies that prove ineffectual.").

386. *See* Ryan, *supra* note 59, at 553 ("[I]t seems clear that advocates seeking to expand or

remedies should be viewed as a maximizing principle, one that continually nudges lawmakers to keep adequacy and vertical equity on an upward, mutually-reinforcing trajectory.

CONCLUSION

There is hope that before it is all written the story of education rights litigation will bear the hallmarks not of a Russian novel in which "everyone dies in the end" but of a distinctly American novel, in the mode of Fitzgerald, that chronicles "who we *want to be*."[387] If it is the litigation that expresses what we *want* educational opportunity *to be*, it is the remedy that expresses what educational opportunity *will be*.

With so much depending on the remedies, it is bewildering that so little attention has been paid to the standards courts use to evaluate them. Courts should make up for lost time and adopt remedial standards that restore confidence that judges can approve legislative and judicial remedies that effectuate the right to education without transgressing separation of powers. Perhaps in so doing, courts will succeed in toning down the battle rhetoric which makes for good drama but not good law. They might also succeed in restoring balance to the judiciary's tactical options: Interpret. Engage. Enforce.

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alter the definition of an adequate or equal education will have to articulate a limiting principle—i.e., a principle that courts (if so inclined or inhibited) could use to distinguish valid from invalid claims.").

387. MAUREEN CORRIGAN, SO WE READ ON: HOW THE GREAT GATSBY CAME TO BE AND WHY IT ENDURES 4 (2014).