ENFORCING PUBLIC EDUCATIONAL RIGHTS VIA A PRIVATE RIGHT OF ACTION

SONJA RALSTON ELDER†

INTRODUCTION

Social mobility is the engine of the American Dream, and education is the key to social mobility. Access to education is therefore, understandably, at the heart of many movements, historical and modern, to improve social equality,

† Duke University School of Law, J.D. 2009; Duke University Sanford Institute of Public Policy, M.P.P. 2009; Texas Tech University, B.A. 2003. I thank Professors Goodwin Liu, Neil Siegel, Jane Wettach, and Ernest Young for their thoughtful comments. Special thanks to the members of the Duke Law Student Papers Series for their insight, advice, and support, and to the editors of the *Forum* for their diligent work in bringing this piece to life.

and the standard of living for the poor.[1] Indeed, in the nineteenth century, free, public education was "one of the most characteristic of American institutions."[2] Throughout the twentieth century, the push for improved access to and quality of education was a major social force.[3] This drive, however, has become stalled because the current movement of education adequacy lawsuits has been unable to deliver on its promise to ensure a high-quality education for all children.

This article hypothesizes that the structure of current adequacy lawsuits is partly to blame for the as-of-yet failure of the movement. In every case, the plaintiffs have been either school districts or large classes of students, with the former having been represented about four times more frequently.[4] Not surprisingly, the remedies requested and then ordered have been on the state or district level, and no court has ordered a student-level remedy.[5] The structure of these suits is also ill-formed to provide actual improvements for plaintiff children because the suits take too long and include remedies that are frequently too vague, and because courts tolerate non-compliance from the state officials charged with implementing the remedy. Therefore, a new, student-centered structure is needed to give the adequacy movement a second wind for improving the fate of at-risk students.

Part I reviews the history of educational social movements. Part II elaborates on the problems in the structure of adequacy lawsuits. Part III explores the legal basis for a private right of action for the inadequate provision of educational opportunity under a state's constitution and explains why such a right has not previously been recognized: courts have concluded that there are no judicially manageable standards for determining when an individual child's right has been denied.[6]

Part IV counters this objection by examining the Individuals with Disabilities Education Act (IDEA) as a model for determining when a student's rights are denied. Under the IDEA, students with disabilities are entitled to a free, appropriate public education, which, as defined by the courts, is strikingly similar to a sound, basic education or a minimally adequate education guaranteed under many state constitutions.[7] The IDEA provides reasonable deference to educational authorities regarding the adequacy of the instructional program offered along with judicial review of all aspects of that program.[8]

---

1. *See, e.g.*, JANE ADDAMS, TWENTY YEARS AT HULL HOUSE 150 (Macmillan Co. 1912) (1910) (explaining that one of the substantial achievements of Hull House was to show Chicago "that education and recreation ought to be extended to immigrants"); Teach For America, Our Nation's Greatest Injustice, http://www.teachforamerica.org/mission/index.htm (last visited May 5, 2009) (noting the commitment of more than 20,000 corps members to eliminating subpar academic opportunities for children in low-income communities to achieve greater social justice).

2. WILLIAM J. REESE, AMERICA'S PUBLIC SCHOOLS: FROM THE COMMON SCHOOL TO "NO CHILD LEFT BEHIND" 45 (2005) (quoting R.W. DALE, IMPRESSIONS OF AMERICA (1878)).

3. *See infra* Part I.

4. *See infra* notes 56–59 and accompanying text.

5. *See infra* notes 56–66 and accompanying text.

6. *See infra* Part III.B. Courts have also cited separation of powers concerns and the potential flood of litigation coming from recognition of such a right, but the lack of manageable standards is the most frequently cited reason for denying recognition.

7. *See infra* Part IV.B.

8. *See infra* Part IV.A.

Importantly, the IDEA also includes a broad selection of remedies, ranging from a revised educational program to compensatory services such as tutoring or additional years of schooling, to tuition at private or out-of-district public schools.[9] Finally, Part V argues for recognition of a private right of action. After justifying the right of action as an appropriate student-level remedy, this part evaluates the benefits and disadvantages of allowing a private right of action.

I. HISTORY OF EDUCATION MOVEMENTS

Three broad social movements in education chart the centrality of education to social mobility through U.S. history to greater and lesser degrees of success: the common school movement, desegregation, and education adequacy. The common school movement began around 1837 when Horace Mann became the first state secretary of education in Massachusetts.[10] Mann was instrumental in pushing for free, locally funded schools offering grades one through eight, starting in Boston and reaching throughout Massachusetts.[11] In 1852, Massachusetts became the first state with a compulsory school attendance law,[12] thus transforming education from an option to an obligation for the state's children.[13] The movement spread nationwide and school attendance rates rose steadily over the next century. By the early 1900s, most children were receiving at least a few years of free education.[14] The common school movement was largely a success: throughout the twentieth century proportionally more American children attended high school than children in any other country,[15] and locally maintained, free, public schools became the norm by mid-century.[16]

The success of the common school movement, however, illuminated the problems of segregation in southern schools.[17] In the early twentieth century, schools for black children had only a fraction of the resources white children's schools did.[18] For example, in 1930, South Carolina spent eight times as much per pupil for white children's education as for black children's; in 1929, the ratio in Mississippi was nine to one.[19] While improving the education of black children

---

9. REESE, *supra* note 2, at 45.

10. *Id.* at 10–11.

11. *Id.*

12. Compulsory Attendance Act of 1852, 1852 Mass. Acts 240, §§ 1–2, 4.

13. REESE, *supra* note 2, at 10–11.

14. *See* Claudia Goldin, *The Human-Capital Century and American Leadership: Virtues of the Past*, 61 J. ECON. HIST. 263, 266 (2001).

15. JENNIFER L. HOCHSCHILD & NATHAN SCORVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 19 (2003).

16. *See* Goldin, *supra* note 14, at 265 (noting the virtues of American education as "public funding, openness, gender neutrality, local (and also state) control, separation of church and state, and an academic curriculum"); *id.* at 267 (explaining that by the end of World War II, the median 18-year-old American was a recent high school graduate).

17. *See* REESE, *supra* note 2, at 14 (explaining how, simultaneous to the rise in common schools in the North, laws against educating slaves became commonplace in the South). Segregation or exclusion of blacks from public schools was not, however, an exclusively southern phenomenon. *See id.* at 73 (explaining that blacks were often excluded from rural schools in the Midwest and that many urban schools in the North were segregated).

18. DIANE RAVITCH, THE TROUBLED CRUSADE: AMERICAN EDUCATION 1945–1980 121 (1983).

19. *Id.*

was certainly not the only, if even the primary, goal of desegregation proponents,[20] there can be little doubt that it had just that effect.[21] Between 1970 and 1988, the gap in reading scores between white and black students decreased by about half.[22] During that time period, the percentage of black students attending schools with nearly all minority enrollments reached its lowest level to date.[23] Similarly, intradistrict discrepancies in class size and funding between schools decreased dramatically.[24] Although some researchers attribute the closing test score gap to increased parity in parental education,[25] the rise in educational attainment by black parents is also related to desegregation efforts that opened high schools and colleges to blacks, as well as to affirmative action programs that helped them gain admission. Even critics of the view that desegregation policy has substantial impact on the test score gap admit that likely alternative causes are increased access of minority students to advanced classes, decreased discrimination by teachers, and higher expectations for black students.[26] Certainly, such changes were not mandated by courts the way busing was, but they are part of the social change created, at least in part, by the judicial pronouncements against racial separation.[27]

As the promise of the Equal Protection Clause to achieve substantially equal educational opportunity through desegregation waned,[28] a third movement began. Like the common school movement of the prior century, the push for educational adequacy was directed at the least advantaged children in society,[29]

---

20. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 365 (rev. ed. 2004) (recounting Thurgood Marshall's closing argument in the South Carolina desegregation case, *Briggs v. Elliott*, noting that segregation, as an injustice, caused "lasting, not temporary, injury" to the students); *see also id.* at 380 (noting that some advocates thought black students may be better educated in segregated schools where black teachers cared deeply about their success).

21. Note that whether students perform better in integrated classrooms or schools is an entirely different question from whether the end to separate school systems and the accompanying changes in schools improved the educational outcomes of minority students. As to the former question, there is indeed substantial doubt. *See* CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 187 (2004).

22. Michael D. Cook & William N. Evans, *Families or Schools? Explaining the Convergence in White and Black Academic Performance*, 18 J. LAB. ECON. 729, 729–30 (2000). From 1973–1990, the gap in math scores decreased by a similar proportion. *Id.*

23. CLOTFELTER, *supra* note 21, at 56 tbl 2.1.

24. Cook & Evans, *supra* note 22, at 730–31.

25. David Armor, *Why Is Black Educational Achievement Rising?*, PUB. INT., Sept. 1992, at 65, 66.

26. Cook & Evans, *supra* note 22, at 750.

27. *See, e.g.*, Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").

28. Milliken v. Bradley, 418 U.S. 717, 752–53 (1974) (holding unconstitutional a cross-district busing plan designed to remedy metropolitan segregation).

29. *Compare* REESE, *supra* note 2, at 11 (explaining the motives for the common school movement), *with* William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 219 (1990) (noting that school financing lawsuits are motivated by a desire to improve education for disadvantaged students).

yet focused rhetorically on universal standards.[30] The drive for educational adequacy began in California in the early 1970s when a group of school children filed a class action suit against the state superintendent of public instruction challenging the unequal funding of schools.[31] The movement for improving educational opportunity through constitutional litigation hit a significant speed bump in 1973 when the Supreme Court, in *San Antonio Independent School District v. Rodriguez*,[32] upheld large disparities in local education funding under rational basis review after finding that education is not a fundamental right and that poverty is not a suspect classification.[33]

State constitutions, however, are flush with education articles that require the establishment of common schools or mandate the provision of basic education in one form or another.[34] Between 1971 and 2007, lawsuits based on these articles were filed in forty-five states[35] and have focused on two lines of argument: equality and adequacy.[36] Equality claims, often based on a state's equal protection clause, focus on the substantial disparities in per pupil funding between wealthy and poor districts whereas adequacy claims, based on a state's education clause, focus on the quality of the education provided regardless of disparities.[37]

Adequacy claims have been more successful.[38] Challengers have emerged victorious in twenty-five states[39] and obtained favorable settlements in four more.[40] In Minnesota,[41] Nebraska,[42] South Dakota,[43] and Wisconsin[44] courts

---

30. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212–13 (Ky. 1989) (noting that the state's constitution guaranteed all children the right to an adequate education that prepared them for future employment and citizenship).

31. *See* Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1244 (Cal. 1971). Although the California Supreme Court's decision in *Serrano* rested on the federal Equal Protection Clause, the court later affirmed the outcome and the reasoning as applied to the California Equal Protection Clause after the United States Supreme Court interpreted the federal clause in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). *See* Serrano v. Priest (*Serrano II*), 557 P.2d 929, 951 (Cal. 1976).

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

33. *Id.* at 35.

34. *See* Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343–48 (1992) (cataloging state constitutional provisions).

35. William S. Koski, *Ensuring an "Adequate" Education for Our Nation's Youth: How Can We Overcome the Barriers?*, 27 B.C. THIRD WORLD L.J. 13, 14 (2007).

36. Thro, *supra* note 29, at 225, 233.

37. *Id.* at 229–33.

38. *See* Nat'l Access Network, State by State, http://www.schoolfunding.info/states/state_by_state.php3 (last visited Jan. 26, 2009) (explaining the outcomes in all school finance cases).

39. Sonja Ralston Elder, Note, *School Financing Lawsuits: The Way out of the Fog or Just Blowing Smoke?*, EDUC. L. & POL'Y F., Nov. 2007, at 5 tbl.1, http://www.educationlawconsortium.org/forum/2007/papers/Ralston2007.pdf [hereinafter *School Financing Lawsuits*]. Because state constitutions, state laws, and state courts are all different, of course, it is important to remember that a victory in one state does not have exactly the same meaning as a victory in another state. Despite these differences though, there are substantial similarities in the holdings of the courts and the challenges faced by children which makes comparisons, while undoubtedly broad, helpful.

40. *See* Nat'l Access Network, *supra* note 38 (explaining settlements in Colorado, Indiana, Iowa, and North Dakota).

41. Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993).

found that the state constitution guaranteed some level of adequate education but that the state's current system already met the required level. In some cases, defeat in court was not the end of the story. In Oklahoma, the legislature raised taxes to fund smaller class sizes and higher teachers' salaries after education advocates sued in the late 1980s even though the state had prevailed in court.[45] In Florida, after the state supreme court declared that the state constitution did not require educational adequacy, in part because there were no judicially manageable standards,[46] the voters passed an amendment to the state constitution making it very clear just how fundamental a right they thought education was. [47]

Unlike the two prior movements for educational opportunity, the adequacy movement has been less successful thus far in translating legal and policy victories into educational ones.[48] For example, in several states where courts have recognized the unconstitutionality of the current funding system, the judges have yet to order specific remedies or enforce mandates for legislatively created ones.[49] Although it is also true that many courts tasked with implementing desegregation were hesitant at first to order or enforce drastic remedies,[50] they were eventually spurred by the Supreme Court to be more aggressive[51] in a way that cannot[52] and will not[53] happen in adequacy cases. Along with reticent legislatures, there is evidence that the adequacy movement has not created significant improvements for students that would parallel the gains of the 1970s

---

42. Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993) (upholding the trial court's grant of summary judgment because the plaintiffs failed to allege that differential funding led to inadequate education).

43. *See* Nat'l Access Network, *supra* note 38 (describing the trial court's decision in *Bezdicheck v. State* in 1994).

44. Vincent v. Voight, 614 N.W.2d 388, 396–97 (Wis. 2000).

45. Nat'l Access Network, *supra* note 38.

46. Coal. for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 408 (Fla. 1996).

47. The first sentence of the education article now reads, "The education of children is a fundamental value of the people of the State of Florida." FLA. CONST. art. IX, § 1(a).

48. *See* Elder, *supra* note 39, at 2 (explaining that students' test scores in states with victorious lawsuits have not improved significantly more than those in other states).

49. *See* Sonja Ralston Elder, Note, *Standing up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 785–90 (2007) [hereinafter *Standing up to Legislative Bullies*].

50. *See* Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 13–14 (1971) (noting that between 1954 and 1968 "very little progress had been made" in integrating schools, in part, because the lower federal courts encountered "problems" in designing and enforcing remedies).

51. *See id.* at 15 (noting that "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies").

52. Because state high courts have final authority to interpret state constitutions, the Supreme Court may not broaden the scope of state courts' powers to remedy state constitutional wrongs. Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.").

53. The Supreme Court has become increasingly less interested in enforcing educational rights. *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 250 (1990) (holding that once a school district has reached unitary status, the district court's authority to review the school district's student assignment policies must end); *cf.* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring) (finding that a student's race may be a factor in student assignment only as "a last resort to achieve a compelling interest").

and 80s.[54] Combining this lack of improvement with the lack of enthusiasm for judicial management of schools, it is likely that, without something more, the adequacy movement will wither and die before achieving substantial improvements in the educational opportunities of at-risk children.

II. ADEQUACY LAWSUITS ARE POORLY STRUCTURED

As a means of ensuring that each child's right to an adequate education is vindicated, educational adequacy and school financing lawsuits are poorly structured. The lawsuits have been focused on the macrolevel rather than the microlevel, resulting in judgments that take years to enforce and have few, if any, trickle-down benefits for individual students in need of better educational opportunities.

Educational adequacy or school financing lawsuits have been brought in forty-five states.[55] In more than 80 percent of these cases, a school district or nonprofit organization was a named plaintiff.[56] In the remaining eight cases in

---

54. *Compare School Financing Lawsuits*, *supra* note 39, at 2 (noting the lack of dramatic improvement in the black-white achievement gap due to financing lawsuits), *with* Cook & Evans, *supra* note 22, at 730 (explaining that the black-white achievement gap narrowed substantially from the early 1970s through the mid-1980s).

55. Nat'l Access Network, *supra* note 38.

56. *See* Opinion of the Justices No. 338, 624 So. 2d 107 (Ala. 1993) (an advisory opinion upholding the decision in *Alabama Coalition for Equity v. Hunt*); Moore v. State, No. 3AN-04-9756 Civ. (Alaska Super. Ct. filed Aug. 9, 2004) (plaintiffs include three school districts); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994); Lake View Sch. Dist., No. 25 v. Huckabee, 91 S.W.3d 472 (Ark. 2002); Coal. for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400 (Fla. 1996); Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1997); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); Lake Cent. v. State, No. 56 C01-8704-CP81 (Ind. 1987); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170 (Kan. 1994); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Charlet v. Legislature, 713 So. 2d 1199 (La. Ct. App. 1998) (plaintiffs included six New Orleans parishes and the Orleans Parish School Board); Sch. Admin. Dist. No. 1 v. Comm'r, 659 A.2d 854 (Me. 1995); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Durant v. State, 566 N.W.2d 272 (Mich. 1997) (plaintiffs included fifty-one school districts from *Schmidt v. State* (Docket No. 132677) because the cases were consolidated); Skeen v. State, 505 N.W.2d 299 (Minn. 1993) (plaintiffs included fifty-two school districts); Comm. for Educ. Equal. v. State, 878 S.W.2d 446 (Mo. 1994); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989); Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); Zuni Pub. Sch. Dist. v. State, CV-98014-II (N.M. Dist. Ct., McKinley County Oct. 14, 1999), https://repository.unm.edu/dspace/bitstream/1928/6859/1/ReportSpaecialMasterZuniPubSch.Jan.15%2c2002.pdf (last visited Apr. 11, 2009); Campaign for Fiscal Equity, Inc. v. New York, 861 N.E.2d 50 (N.Y. 2006); Hoke County v. State, 599 S.E.2d 365 (N.C. 2004); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994); DeRolph v. State 677 N.E.2d 733 (Ohio 1997) (plaintiffs included five school districts); Fair Sch. Fin. Council v. State, 746 P.2d 1135 (Okla. 1987); Coal. for Equitable Sch. Funding v. State, 811 P.2d 116 (Or. 1991); Danson v. Casey, 399 A.2d 360 (Pa. 1979) (plaintiff was the Philadelphia School District); City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Brigham v. State, 692 A.2d 384 (Vt. 1997) (plaintiffs included two school districts); Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994) (plaintiffs included seven school boards); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978); Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000) (plaintiffs included school districts); Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995); Coal. for a Common Cents Solution v. State (Iowa 2002), http://www.schoolfunding.info/resource_center/legal_docs/Iowa/Coalition__v_Iowa_StateDistrictCou.pdf (last visited Apr. 11, 2009) (case settled shortly after being filed); South Dakota Legislative

which all plaintiffs were individual students, the suits were filed as[57] or treated as[58] class actions rather than individual suits. This structure is unsurprising considering how expensive lawsuits can be, particularly when expert witnesses and multiple appeals will be required.[59] School districts, due to their institutional capacity, have more available resources, frequently including lawyers on staff.

The real problem arises during the remedy phase of the case where the individual child's interest in receiving an adequate education immediately, and the school district's interest in self-preservation and promotion or the nonprofit's interest in fixing the system as a whole, diverge. In every successful case, the original remedy has been to order the state legislature to reform the school financing statute to provide equalized or increased funds at the district level.[60] Yet there is seldom discussion of the wisdom or efficacy of giving more money to the entity that ultimately has been unable to provide the adequate education in the past. And indeed, the strategy has yet to prove effective: between 1992 and 2005 there was no statistically significant difference in the improvement in student achievement between states with adequacy victories and those without.[61]

The questionable efficacy of the monetary remedy implicates an ongoing debate in the educational community about whether money matters in education.[62] Researchers like Eric Hanushek argue that educational outcomes are largely independent of financial inputs.[63] His methods, however, have been sharply critiqued by other researchers in the field.[64] The truth likely lies

---

Research Council, Issue Memorandum 94-39, http://legis.state.sd.us/ IssueMemos/ IssueMemos/im94-39.pdf (last visited Apr. 11, 2009) (describing Bezdichek v. South Dakota, CIV 91-209 (S.D. 1994) (plaintiffs were school districts)).

57. Serrano v. Priest (*Serrano I*), 487 P.2d 1241, 1244 (Cal. 1971); Pauley v. Kelly, 255 S.E.2d 859, 859 (W. Va. 1979).

58. Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1011 (Colo. 1982) (analyzing whether plaintiffs or those "similarly situated" were denied equal protection); Sheff v. O'Neill, 678 A.2d 1267, 1272–73 (Conn. 1996) (examining facts at the level of the school district rather than the specific situations of any of the sixteen individual plaintiffs); McDaniel v. Thomas, 285 S.E.2d 156, 157–60 (Ga. 1981) (analyzing data on the district level); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 549 (Mass. 1993) (examining the structure of school districts in Massachusetts to determine if the constitution was followed); Gould v. Orr, 506 N.W.2d 349, 351 (Neb. 1993) (analyzing data on the district level even though the case had only two plaintiffs, who were siblings); Abbott v. Burke, 693 A.2d 417, 420–21 (N.J. 1997) (analyzing the statute as it applied to the districts not the students).

59. For example, in 1997, the Supreme Court of Alabama upheld the award of more than $3 million in legal expenses to plaintiffs in a school financing case. James v. Ala. Coal. for Equity, 713 So. 2d 937, 950 (Ala. 1997).

60. *E.g.*, DeRolph v. State, 677 N.E.2d 733, 747 (Ohio 1997) (ordering the legislature to devise an entirely new system of education financing with an eye towards how such a system impacts discrepancies among districts).

61. Elder, *supra* note 39, at 2. To isolate the effects of the lawsuits on student achievement growth, this study controlled for growth in per capita income, growth in per pupil spending, prior per pupil spending, and the proportion of education spending provided by the state. *Id.* at 6.

62. NAT'L RESEARCH COUNCIL, MAKING MONEY MATTER: FINANCING AMERICA'S SCHOOLS 38–39 (Helen F. Ladd & Janet S. Hansen eds., 1999).

63. *E.g.*, Eric A. Hanushek, *Assessing the Effects of School Resources on Student Performance: An Update*, 19 EDUC. EVAL. & POL'Y ANAL. 141, 141 (1997).

64. *E.g.*, Alan B. Krueger, *Understanding the Magnitude and Effect of Class Size on Student Achievement*, *in* THE CLASS SIZE DEBATE (Lawrence Mishel & Richard Rothstein eds., 2002) (critiquing

somewhere in the middle: adequate funds are a necessary but insufficient part of providing quality education.[65] Although researchers have yet to discover the elusive magic formula for educating all students,[66] some inputs recur frequently enough in studies on quality to conclude that they really do matter.

For example, studies frequently cite effective or high-quality teachers as the most important input in student learning.[67] Teacher quality is indeed one of the most significant measurable differences between high-income and low-income schools and between white and nonwhite schools.[68] Experienced teachers consistently flee low-achieving, low-income, and, most notably, minority majority schools for greener pastures.[69] High turnover among teachers creates problems in addition to those associated with simply having less-experienced and less-qualified teachers: the school becomes unstable, teacher training and development suffers because there are no experienced teachers to be mentors or they are worn out from doing it year after year, and budgets must be spent on recruiting new teachers instead of improving the school or buying instructional materials.[70] Lower teacher salaries and poorer working conditions are also associated with low-achieving schools.[71] Yet no court has enforced a requirement that every child receive an effective teacher.[72]

In more circuitous fashion, many courts have commissioned studies or relied on studies commissioned by governors that analyze how much it would

---

Hanushek's "vote counting" methodology for over counting weaker studies and misrepresenting the consensus of research).

65. *See* Richard J. Murnane & Frank Levy, *Evidence from Fifteen Schools in Austin, Texas*, *in* DOES MONEY MATTER? THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS 93, 93–96 (Gary Burtless ed., 1996) (exploring the impact of increased funds in fifteen schools and finding that only two schools—those which used the money to improve teacher training and instruction—saw significant gains in achievement).

66. *See* NAT'L RESEARCH COUNCIL, *supra* note 62, at 18 ("Figuring out how to improve learning for all students is an evolving story."); *see also* RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP 61–83 (2004) (explaining that even successful interventions for disadvantaged students are not perfectly replicable).

67. *See* NAT'L RESEARCH COUNCIL, *supra* note 62, at 210–11 (cataloging studies that show the positive impact of high-quality teachers on student achievement).

68. *See* Susana Loeb, John Luczack, & Linda Darling-Hammond, *How Teaching Conditions Predict Teacher Turnover in California Schools*, 80 PEABODY J. EDUC. 44, 48–49 (2005) (explaining the perils for students who are taught by inexperienced and under-qualified teachers for several years in a row and that such conditions are more likely to occur at high-poverty, high-minority schools).

69. *Id.* at 45. Minority majority schools are those where a majority of the student body is comprised of students of color.

70. *Id.* at 48–49.

71. *Id.* at 49 (finding that students in schools with high teacher turnover "experience a number of negative consequences" and learn less than they should); *id.* at 49, 51 (finding that schools with high turnover rates have higher rates of new and inexperienced teachers, whose salaries are comparatively low); *id.* at 65 (finding that working conditions are a substantial predictor of teacher turnover).

72. North Carolina has come the closest. In 2004, the state supreme court upheld the trial court's determination that a sound basic education includes "'every classroom be[ing] staffed with a competent, certified, well-trained teacher.'" Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 389 (N.C. 2004) (quoting the trial court's order). Yet, even in this case, no sanctions have been applied to schools that continue to use uncertified teachers or long-term substitutes, a still-common occurrence in many rural classrooms.

cost to provide a quality education.[73] These costing-out studies seek to divine how much a good education costs by one of four methods: statistical analysis, effective schools, professional judgment, and whole-school design.[74] The first method utilizes econometrics to identify numerous variables and analyze the impact of each variable through statistical models.[75] Statistical analysis, however, is highly complex and difficult for policymakers (and judges) to understand; it is also limited by the difficulty of quantifying all the relevant variables.[76] Perhaps the most serious flaw of this method is that it relies, in theory, on the existence of an education production function—a magic formula—which likely does not exist.[77] The second method identifies successful or effective schools that have high achieving students and low costs and deems their per pupil expenditures "adequate."[78] The effective schools method was used in Ohio and Illinois, but it fails to control adequately for differences in student statuses such as disability, poverty, and speaking English as a second language, as well as cost of living and other geographic differences.[79] The third method, professional judgment, selects a panel of experts who construct an ideal instructional delivery system and then assigns a cost to each of the components of that system.[80] This method was used in Wyoming, and is likely no less precise than the others, although the process is less transparent and the results depend greatly on which experts are chosen.[81] The final method, whole-school design, takes off-the-shelf blueprints for model schools and determines the cost for implementing them.[82] This is likely the weakest method because none of the available designs are research tested or verified.[83]

Additionally, each method suffers from the need to make adjustments for the type of students in a given school and the local cost of resources.[84] In a study for the state of New York, Standard & Poor's used a common weighting system to adjust the results of its effective schools approach: students with disabilities were counted as 2.1 students, English-language learners as 1.2, and economically disadvantaged students as 1.35.[85] Geographic adjustments are more complicated but also possible—and necessary: no one disputes that everything is more expensive in Manhattan than it is in Albany.[86]

---

73. *E.g.*, Campaign for Fiscal Equity, Inc. v. New York, 861 N.E.2d 50, 53–56 (N.Y. 2006).

74. NAT'L RESEARCH COUNCIL, *supra* note 62, at 114.

75. *Id.* at 115–16.

76. *Id.* at 117 (examples of variables that are hard to measure or hard to include in models because they are not currently measured include students' social skills, work readiness, and appreciation for cultural diversity).

77. *Id.* at 117–18.

78. *Id.* at 118.

79. *Id.* at 120.

80. NAT'L RESEARCH COUNCIL, *supra* note 62, at 121.

81. *Id.* at 122–23.

82. *Id.* at 123.

83. *Id.* at 124.

84. *Id.* at 124–25.

85. Campaign for Fiscal Equity, Inc. v. New York, 861 N.E.2d 50, 54 (N.Y. 2006).

86. *See id.* at 54–55.

The most serious flaw with each of these methods is that they fail to account for the labor market effects of changes in demand for the most costly resource: effective teachers. Effective teachers are not a commodity whose price is unaffected by supply and demand: as more schools demand effective teachers, each school will no longer be able to purchase a sufficient quantity at the pre-high-demand price. That is, just because a school could hire one effective teacher for $40,000 today it does not follow that every school in the state could staff itself exclusively with effective teachers for $40,000 a piece. These models, therefore, will underpredict the amount of money needed, resulting in insufficient funds even if the plan is fully enacted, which it rarely is.[87]

Another reason these lawsuits are failing the children they aim to help is that they simply take too long. The North Carolina Supreme Court first recognized the right to education in 1997.[88] In 2007, the case was still active on remand.[89] In Ohio, the state supreme court held the school funding system inadequate in 1997,[90] but later abandoned the case without any significant changes having been made.[91] In New Jersey, the ordeal has dragged on for more than three decades without resolve.[92] Other states have similar stories.[93] By the time the remedy is implemented, if it ever is, the children who were the subjects of the suit, like Robb Leandro in North Carolina, have grown up without the adequate education to which they were entitled.[94]

This is reminiscent of the fight for desegregation in which it took nearly ten years for southern schools to make measurable progress on integration.[95] Just like Robb Leandro, the children of Clarendon County, South Carolina, plaintiffs in *Briggs v. South Carolina* never attended integrated schools, and Linda Brown attended an integrated high school for a mere two years even though she was only seven when *Brown v. Board of Education* began.[96] Much of the progress that did come in desegregation likely was prompted by the federal government

---

87. *See, e.g.*, *Standing up to Legislative Bullies*, *supra* note 49, at 791–92 (explaining that while the N.Y. Court of Appeals ordered the state to increase spending for N.Y.C. public schools by $1.9 billion annually, the actual increase approved by the legislature was only about $900 million).

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

89. *See* Rick Martinez, *Schools Change at a Snail's Pace*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 19, 2007, at A13.

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

91. *See Standing up to Legislative Bullies*, *supra* note 49, at 785–86 (explaining the *DeRolph* line of cases and the lack of change to the status quo ante).

92. *See id.* at 786–89.

93. *See* Nat'l Access Network, *supra* note 38 (cataloging the ongoing battles over education equity and adequacy in all fifty states).

94. Indeed, the lead plaintiff in the North Carolina lawsuit, Robb Leandro, was a high school student when the case was filed and is now an attorney at the firm that is handling the case on remand. Parker Poe, Attorney Profile, Robb A. Leandro, http://www.parkerpoe.com/attorneys/bios.cfm?id=485 (last visited Mar. 15, 2009).

95. CLOTFELTER, *supra* note 21, at 24, 26 (explaining that in 1959 only 0.2% of black students in the South attended school with whites but by 1972 only 25% attended schools that were more than 90% black).

96. Brown v. Board of Education of Topeka, MSN ENCARTA, http://encarta.msn.com/encyclopedia _761588641/Brown_v_Board_of_Education_of_Topeka.html (last visited Dec. 15, 2007).

through the Civil Rights Act of 1964[97] and the Elementary and Secondary Education Act of 1965,[98] which tied federal funding for schools to progress on integration.[99] In contrast, it is unlikely that Congress will step in to ensure adequacy.

The recent federal effort to improve educational quality, the No Child Left Behind Act of 2001 (NCLB),[100] is rhetorically bold, but falls far short of providing sufficient resources and guidance to substantially improve education for disadvantaged students.[101] Like school financing lawsuits, NCLB is focused at the school level: schools must make adequate yearly progress for each subgroup of students and face sanctions if they fall short.[102] Individual students, however, are left with few remedies under the law. They are allowed to transfer to other schools, but only if those schools are not in need of improvement and are in the same school district, conditions that are rarely met at all and certainly not in the numbers necessary to provide alternatives for all students in struggling schools.[103] NCLB, like most federal education efforts, is critically underfunded.[104] Additionally, the law creates incentives for states to lower their standards, shuffle low-performing minority students among schools to avoid having to count their scores, and encourage truly struggling children to drop out altogether.[105]

Adequacy lawsuits have been on the scene in serious numbers for more than two decades, yet in 2007, eighth graders eligible for the free and reduced-price lunch program scored three-quarters of a standard deviation below their more affluent peers in math and reading on the National Assessment of Educational Progress.[106] This means that seventy-seven percent of non-poor students score higher than the average poor student. These gaps are the same as in 1996.[107] Clearly, something is not working.

---

97. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered section of the 42 U.S.C.).

98. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

99. CLOTFELTER, *supra* note 21, at 26.

100. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6300 et seq. (2006).

101. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 932–34 (2004).

102. *Id.* at 940.

103. *Id.* at 966–67. In many parts of the country, school districts are geographically small and relatively homogeneous in achievement, so a failing school is overwhelmingly likely to be part of a failing district. *Id.*

104. *See, e.g.*, David J. Hoff, *Debate Grows on True Costs of School Law*, EDUC. WK., Feb. 4, 2004, at 1.

105. Ryan, *supra* note 101, at 934.

106. Inst. for Educ. Sci., U.S. Dep't of Educ., http://www.nces.ed.gov/nationsreportcard/nde (last visited Mar. 17, 2009) (click on "Quick Start," agree to the terms, select radio buttons for "Grade 8" and either "Mathematics" or "Reading," click on "National," and then select "National Public," select "Natl School Lunch Prog eligibility," click on "Go to Results," on the next page, select "average scale score with standard deviation").

107. *Id.* (follow the same instructions, except select "all years available" on the criteria selection page to get results from 1996).

III. THE LEGALITY OF THE RIGHT OF ACTION

The case for the private right of action for inadequate educational opportunity under a state's constitution is a simple one: the right belongs to the student who therefore deserves the opportunity to seek individualized enforcement of that right rather than rely on a third party to do so on his or her behalf. First, this part includes a discussion establishing the constitutional, common law, or statutory basis for the private right of action, which differs based on the state. Next follows a discussion examining why such a right has not already been recognized.

A. The Basis for the Private Right of Action

The private right of action could be based in one of three areas: the state constitution itself, a state statute providing for the remedy of constitutional violations, or common law principles. Twenty-seven states have direct constitutional provisions guaranteeing access to the courts, unbiased justice, and remedy by due course of law.[108] At least one state court judge has found that such a provision gives plaintiffs the ability to assert their state constitutional rights in court.[109] These provisions essentially make the state constitution self-enforcing and thus plaintiffs may bring their educational rights claims by pleading directly for enforcement of the state's constitution.[110] Second, federal statutory law provides a model for many state laws, and 42 U.S.C. § 1983 allows citizens to initiate suits at law or in equity to recover when their federal civil and constitutional rights have been violated "under color of any statute, ordinance, regulation, custom, or usage" of a state.[111] Many states have similar provisions allowing suits when state constitutional rights have been violated.[112] Because educational rights are state constitutional rights, suits seeking to enforce those rights fit squarely within the parameters of these civil rights statutes.

Third, the common law provides an analogy for a private right of action for constitutional violations through the similar implied rights of action recognized for the enforcement of statutes. In 1975, through the case *Cort v. Ash*, the Supreme Court laid out a four-factor test for determining if a federal statute implied a private right of action.[113] The factors were: 1) whether the plaintiff is a member of the class for whose benefit the statute was enacted; 2) legislative intent; 3) consistency with the underlying purposes of the legislative scheme; and

---

108. *See, e.g.*, ME. CONST. art 1, § 19.

109. Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993) (White, J., dissenting in part) (calling plaintiff's right to be heard in court "readily apparent"). While courts in forty-five states have heard challenges to school financing statutes on constitutional grounds, few of those decisions explain under what statute or provision plaintiffs properly stated their claims. But, the same route that provides a school district with third-party standing and a cause of action in those suits should provide a cause of action to an individual plaintiff.

110. *Id.*

111. 42 U.S.C. § 1983 (2006).

112. *E.g.*, 16-123-105 ARK. CODE (Weil 2007) (mirroring the language of § 1983); *accord* NEB. REV. STAT. § 20-148 (2007).

113. Cort v. Ash, 422 U.S. 66, 78 (1975).

4) whether the cause of action is traditionally relegated to state law.[114] Many state courts apply a version of the *Cort* test.[115] In 2001, the Supreme Court abandoned that test, holding in *Alexander v. Sandoval* that private rights of action "must be created by Congress."[116] The Court's reasoning was based largely on the fact that while "[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts," it is inappropriate for federal courts that do not have common law powers.[117] Because state courts, unlike federal courts, are common law courts, the states that followed *Cort* have not yet followed *Sandoval* and their *Cort*-style tests remain good law.

For example, West Virginia uses a nearly identical four-factor test where the first three factors are the same as in *Cort* and the fourth inquires as to whether the private right of action would intrude on an area of exclusively federal law.[118] In another variation, Illinois courts consider whether:

> (1) the plaintiff is a member of the class for whose benefit the statute was enacted, 2) it is consistent with the underlying purpose of the statute, (3) plaintiff's injury is one the Act was designed to prevent, and (4) it is necessary to provide an adequate remedy for violations of the statute.[119]

Kansas courts apply a similar two-part test considering whether 1) the statute was designed "to protect a specific group of people rather than . . . the general public," and 2) the private right of action was intended by the legislature.[120] In contrast, Arizona courts assume a private right of action exists unless the legislature has shown explicit intent to prohibit it.[121]

Collectively, then, there are six possible factors: 1) whether the right inures to a specific class of which the plaintiff is a member; 2) whether the injury in question is the type the provision was designed to prevent; 3) whether the issue is preempted by federal law; 4) whether the cause of action is consistent with the purpose of the provision; 5) whether the cause of action is necessary to remedy the violations; and 6) the intent of the drafters or the purpose of the act.

In applying these tests to the right to adequate educational opportunity, some factors are easier than others. First, as free public education is only available to schoolchildren, education articles in state constitutions are aimed at a particular class: children. In fact, some articles specifically mention children as the benefactors of the right.[122] Individual students would be members of that

---

114. *Id.*

115. *See, e.g.*, Noyola v. Bd. of Educ., 688 N.E.2d 81, 85 (Ill. 1997).

116. Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

117. *Id.* at 287 (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)).

118. United Steelworkers v. Tri-State Greyhound Park, 364 S.E.2d 257,260 (W. Va. 1987).

119. *Noyola*, 688 N.E.2d at 85.

120. Nichols v. Kan. Pol. Action Comm., 11 P.3d 1134, 1143 (Kan. 2000).

121. Hayes v. Cont'l Ins. Co., 872 P.2d 668, 672 (Ariz. 1994).

122. *See* N.M. CONST. art. XII, § 1 ("A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained."); VT. CONST. § 68 (requiring that "a competent number of schools ought to be maintained in each town . . . for the convenient instruction of youth"); WASH. CONST. art IX, § 1 ("It is the paramount duty of the state to make ample provision for the education of the children . . . .").

class. Second, because education is a positive right, the inadequate provision of educational opportunity is precisely the harm that providing a right to education is designed to prevent.[123] Third, education is not an area of law delegated to the federal government.[124] Fourth, allowing a private right of action is consistent with the purpose of a state's education clause if the constitutional provision is designed to ensure the provision of an adequate education and if the cause of action is a means of ensuring such provision in practice.[125] Fifth, the question of whether such a cause of action is necessary to remedy violations of the right is a factual inquiry that could be supported by substantial evidence that other remedies have proven insufficient. Sixth, the intent of the drafters is the most difficult factor to apply as it is historically unclear whether private rights of action for enforcement of constitutional rights were even cognizable to the drafters of state constitutions. This difficulty, however, should not stop state courts from undertaking the analysis.

B. Why Courts Do Not Already Recognize the Right

In the past, students and their parents have attempted to sue school districts for personal remedies under two different theories: educational malpractice and constitutional claims for vouchers. In nearly every instance, the cases have been dismissed at the pleadings stage because the courts were unwilling to delve into the policy problems of adjudicating such cases.[126]

The first educational malpractice case surfaced in 1976 when an eighteen-year-old high school graduate sued his school district for failing to teach him to read above the fifth-grade level.[127] The court dismissed his negligence claim because he failed to establish that the school district owed him a duty.[128] It stated, "[u]nlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, cause, or injury."[129] The court also cited policy concerns about the potential flood of litigation that would

123. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999) (explaining that positive rights are those that entitle persons to receive some benefit from the government and that such rights are common in state constitutions).

124. *See* NAT'L RESEARCH COUNCIL, *supra* note 62, at 5 ("Education is not mentioned in the federal Constitution and therefore has been viewed as a power reserved to the states . . . .").

125. *E.g.*, Opinion of the Justices No. 338, 624 So.2d 107, 173 (Ala. 1993) (explaining that the legislative history of the state's education clause shows that the clause was designed to "accord[] schoolchildren of the state the right to a quality education that is generous in its provision and that meets minimum standards of adequacy").

126. *See* Greg D. Andres, Comment, *Private School Voucher Remedies in Education Cases*, 62 U. CHI. L. REV. 795, 803 (1995) (discussing both of the cases in which students sued for vouchers and the cases were dismissed); Kimberly Walters-Parker, Note, *When Students Pass, but Schools Fail: The Negligent Failure to Teach Students to Read*, EDUC. L. & POL'Y F., Nov. 2007, at 11–12, http://www.educationlawconsortium.org/forum/2007/papers/Walters-Patker2007.pdf (*sic*) (last visited Mar. 17, 2009) (cataloging educational malpractice suits and their high rate of dismissal).

127. *See* Walters-Parker, *supra* note 126, at 11–12 (relating the factual background of *Peter W. v. San Francisco Unified School District*, 131 Cal. Rptr. 854 (Ct. App. 1976)).

128. Peter W. v. San Francisco Unified School District, 131 Cal. Rptr. 854, 861 (Ct. App. 1976).

129. *Id.* at 860.

follow recognition of educational malpractice as a cause of action.[130] The *Peter W.* court's reasoning has been recurrent in subsequent educational malpractice cases,[131] none of which have been successful.[132]

In 1992, the Washington, D.C.-based Institute for Justice filed two lawsuits—one in Chicago and the other in Los Angeles—seeking vouchers for students attending poorly performing, low-income, inner-city schools, which were alleged to be violating each state's constitution.[133] Both state courts dismissed the cases, finding that the plaintiffs failed to state a cause of action or request relief within the court's power to grant.[134] The Illinois court opined that even if it were to recognize that the schools are constitutionally inadequate, vouchers were a "political question that should be decided in the public arena."[135] Similarly, the California court found that decisions about the allocation of school funds were for the legislature.[136]

In sum, courts' concerns come down to three areas, none of which should be persuasive: separation of powers, the flood of litigation, and the lack of judicially manageable standards. The first objection fundamentally misunderstands the separation of powers doctrine.[137] First of all, the separation of powers doctrine developed in the federal courts on the basis of Article III's structural delegation of power to the courts and the overall structure of the federal Constitution.[138] As such, it is not wholly, and perhaps not even partially, applicable to state courts interpreting state constitutions.[139] In contrast to federal constitutional rights, which are largely negative in structure,[140] many state constitutional rights, including the right to education, are positively structured.[141] The amount of judicial intervention required to enforce and uphold positive rights is greater than that required to enforce negative ones because injunctions alone usually will not suffice.[142] By including these positive rights, state constitutions "explicitly engage state courts in substantive areas that have historically been outside the Article III domain"[143] by requiring "state court[s] to share explicitly in public governance, engaging in the principled dialogue that commentators traditionally

---

130. *Id.* at 861 (noting that recognizing such a claim would "expose [schools] to the tort claims—real or imagined—of disaffected students and parents in countless numbers").

131. Walters-Parker, *supra* note 126, at 12.

132. *Id.* at 3. This article tracks cases through 2006. *Id.* The author was unable to locate any additional cases post-dating this analysis.

133. Press Release, Institute for Justice, "Voucher" Remedy Sought for Low-Income Parents in Major Lawsuits Filed against Chicago and Los Angeles Public Schools (June 9, 1992), http://www.ij.org/schoolchoice/chicago/6_9_92pr.html.

134. Andres, *supra* note 126, at 796 nn.2–3.

135. Jenkins v. Leininger, No. 92 CH 05578, slip op. at 14 (Ill. Cir. Ct., Cook County Mar. 30, 1993).

136. Andres, *supra* note 126, at 803.

137. *Standing up to Legislatice Bullies*, *supra* note 49 (discussing the misunderstandings of the separation of powers doctrine).

138. *Id.* at 759.

139. *Id.* at 759–60.

140. *Id.* at 760.

141. *Id.* at 760–61.

142. *Id.* at 761.

143. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1890 (2001).

associate with the common law resolution of social and economic issues."[144] Furthermore, nearly all state courts are common law courts whose business it is to craft as well as to apply the law.[145] Therefore, state courts enforcing state constitutional rights should not be preoccupied with the separation of powers.[146]

Second, although recognition of the private right of action would open the courthouse doors to more litigation, courts are unlikely to be flooded.[147] Furthermore, as Justice Harlan noted in a similar context, "[t]here is, however, something ultimately self-defeating about this argument."[148] It is true that judicial resources are stretched thin.[149] But lawyers will lack the incentive to bring numerous suits in which the possibility of recovery is speculative, so concerns about a flood of frivolous lawsuits are unfounded.[150] And if the suits brought are meritorious, it is counterintuitive to decrease access to the courts for those claimants who have been most wronged.[151] For example, a company should not be allowed to escape accountability through litigation because it manufactured a product that killed many people rather than merely a few. Indeed, the opposite is true: when a defendant has wronged a large number of people, the need for deterrence through civil judgment is at its highest.[152]

Moreover, a wholesale closing of the courthouse doors represents a value judgment on the part of the judiciary as to which types of claims and legally protected interests are important and which are not.[153] Certainly the rights of impoverished children are just as important as those of traffic accident victims and "stockholders defrauded by misleading proxies."[154] The "current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise

---

144. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1138 (1999).

145. *Standing up to Legislative Bullies*, *supra* note 49, at 762–63.

146. *Id.* at 760.

147. *See* Walters-Parker, *supra* note 126, at 13–14 (explaining that while many courts have cited the "flood of litigation" rationale for denying educational malpractice claims, no court has presented evidence to support this claim); *see also infra* Part IV.C (explaining the obstacles to litigation that would prevent a flood of lawsuits).

148. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment) (explaining why fears of a flood of litigation were insufficient to persuade him that individuals should not have a right of action for damages against federal agents for violations of their constitutional rights).

149. *See, e.g.*, Tyeesha Dixon, *Courts Short of Timeliness Goals*, BALTIMORE SUN, Dec. 3, 2007, at 1B (noting that most of Maryland's courts fell short of 2001 goals to complete civil cases in eighteen months and criminal cases in six months due to overcrowding of the docket).

150. *See Bivens*, 403 U.S. at 410.

151. *Id.*

152. *See* WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS §12 (4th ed. 1971) ("It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds.").

153. *Bivens*, 403 U.S. at 411.

154. *Id.* at 410; *see also id.* (explaining that if damages are available for at least the "most flagrant abuses of official power," the issue of whether damages should be available in any given case is resolved by reference to how important the social value upheld by the law in question is).

sound constitutional principles."[155] Regardless of how frequently individuals actually seek relief in court, "it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances."[156] Part IV deals with the third argument regarding judicially manageable standards by presenting a model of manageable standards.

IV. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AS A MODEL

In 1975, Congress first passed the Education for All Handicapped Children Act[157] (EAHCA) that guaranteed every U.S. child access to the public schools or to be otherwise provided with educational opportunities.[158] Before the enactment of the EAHCA, eight million children with disabilities were not receiving accessible instruction, including one million children who were excluded from public schools all together.[159] In 1990, Congress substantially amended the law, retitling it the Individuals with Disabilities Education Act (IDEA).[160] The IDEA, in both its original and amended forms, provides students with disabilities with procedural and substantive rights to education and has been effectively enforced by state and federal courts for more than three decades. As such, it provides an apt model for a more generalized private right of action to enforce the existing state constitutional rights to an adequate education. Section A provides an overview of the law and its function; section B elaborates on the fit between the IDEA and state constitutional rights; section C examines the practical aspects of the proposed private right of action.

A. What the IDEA Is and How It Works

From the beginning, the EAHCA aimed to provide each eligible child with a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs."[161] To achieve this goal, the EAHCA required schools to create individualized education programs (IEPs) for each student that included the student's current level of performance and annual goals, the specific program to be provided, and criteria for evaluation.[162] To protect the child's right, it provided parents with the right to be involved in the process of developing the IEP,[163] to access the child's records,[164] to receive an independent evaluation of the child's needs,[165] and to submit complaints.[166]

---

155. *Id.* at 411.

156. *Id.*

157. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400 et. seq. (2006)).

158. *Id.* § 3(a), 89 Stat. at 775 (codified as amended at 20 U.S.C. § 1400(d)(1) (2006)).

159. *Id.* § 3(a), 89 Stat at 774.

160. *See* 20 U.S.C. § 1400(a) (2006) (stating that "this chapter may be cited as the 'Individuals with Disabilities Education Act'").

161. *Id.* § 1400(d)(1).

162. *Id.* § 1414(d).

163. *Id.*

164. *Id.* § 1415(b)(1).

165. *Id.*

Complaints must be adjudicated in an impartial due process hearing and parents may appeal the result of that hearing in a civil action in state or federal court.[167]

The 1990 amendments included requiring transition plans for students over sixteen,[168] implementing an evaluation program of the law,[169] and perhaps most importantly, requiring a waiver of state sovereign immunity for suits alleging failure to comply with the IDEA.[170] The IDEA makes clear that all remedies available "at law or in equity" are open to plaintiffs against states and local school boards[171] alike[172] and authorizes the recovery of attorneys' fees for the winning party.[173]

Although the IDEA is a statutory scheme, courts have been active in developing its scope and implementation and have explicated or created many of the details of its workings. Its definition of a free appropriate public education (FAPE) "tends toward the cryptic rather than the comprehensive"[174] and required judicial clarification.[175] In *Board of Education v. Rowley*, the Supreme Court constructed a constrained definition of a FAPE, holding that the IDEA does not require states to provide students with the "opportunity to achieve [their] full potential."[176] A school provides a FAPE when it "provid[es] personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."[177] To satisfy the standard, however, the educational benefit must be more than *de minimis*.[178]

The Supreme Court has also clarified procedural elements of the IDEA. For example, in 2006, the Court held that although the IDEA authorizes the prevailing party to recover reasonable attorneys' fees, it does not entitle parents to recover the costs of experts they used at trial.[179] Additionally, as in nearly all civil litigation, the plaintiffs, who are always the parents in IDEA cases, bear the burden of persuasion[180] even though the school, by virtue of being the designated record-keeper under the statute, bears the burden of production.[181]

---

166. *Id.* § 1415(b)(6).

167. *Id.* § 1415(f).

168. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 602(a), 104 Stat. 1103, 1103–04 (codified as amended at 20 U.S.C. § 1414(d)(1)(A)(i)(VIII) (2006)).

169. *Id.* § 203, 104 Stat. 1112 (codified as amended at 20 U.S.C. § 1418 (2006)).

170. *Id.* § 604, 104 Stat. 1106 (codified as amended at 20 U.S.C. § 1403 (2006)). Note that IDEA, as a grant program to the states, is enacted under Congress's spending power. *See* 20 U.S.C. § 1411.

171. The statutory text references local education agencies (LEAs), which are defined to include school boards. 20 U.S.C. §1401(19)(A).

172. *See id.* § 1415 (referring consistently to "local education agency" or "state agency" as the party responsible for complying with procedures and against whom redress may be sought).

173. *Id.* § 1415(i)(3)(B).

174. Bd. of Educ. v. Rowley, 458 U.S. 176, 188 (1982).

175. *See id.* at 190.

176. *Id.* at 186 (quoting Rowley v. Bd. of Educ., 483 F. Supp. 528, 533 (S.D.N.Y. 1980)).

177. *Id.* at 203.

178. Doe v. Bd. of Educ., 9 F.3d 455, 459 (6th Cir. 1993).

179. Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2457 (2006).

180. Schaffer v. Weast, 546 U.S. 49, 62 (2005).

181. *Id.* at 53 (listing the statute's requirement that schools provide parents with all records upon request); *see also id.* at 56 (noting that the parties agreed that who bears the burden of production was not in question).

Finally, parents may proceed *pro se* in actions to enforce the IDEA requirements because the statute provides rights to parents as well as to children.[182]

Courts have also been instrumental in defining the remedies available for violations of the IDEA. Broadly, the statute authorizes a court to "grant such relief as [it] determines is appropriate."[183] Courts may use their "broad discretion," taking into account "all relevant factors."[184] The Supreme Court has upheld remedies for specific performance[185] as well as monetary compensation.[186] Lower courts have also ordered a broad range of remedies from sign language interpreters[187] to enrollment at private, residential facilities.[188] For children with more minor disabilities like specific learning disabilities or mild Attention Deficit Hyperactivity Disorder, less drastic remedies like tutoring, summer school, and additional years of instruction are common.[189]

In evaluating IDEA claims, the trial court should undertake a two-step inquiry.[190] The first step is determining whether the state complied with the procedural requirements of the Act.[191] The second step is evaluating whether the child's IEP is "reasonably calculated to enable the child to receive educational benefits."[192] If the court finds the state lacking in the second area, it then considers the parents' proposed alternative placement to determine whether that placement is "proper under the Act."[193] The alternative placement need not meet all the same requirements as the placement proposed by the state,[194] but it must meet the basic "reasonably calculated" standard.[195]

The goal of the EAHCA/IDEA was to ensure disabled children the opportunity to benefit from public education.[196] With more than thirty years of experience, the statute can be judged a success. Before the enactment of the EAHCA, more than half of the nation's eight million children with disabilities were not receiving proper instruction, including one million who were excluded

---

182. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 534 (2007).

183. Individuals with Disabilities Education Act, 20 U.S.C. § 1415(e)(2) (2006).

184. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 16 (1993).

185. *See, e.g.*, Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891 (1984) (requiring a school to provide clean intermittent catheterization, a simple medical procedure, to a handicapped child in school to enable her to remain in school).

186. Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 369 (1985) (recognizing reimbursement of private school tuition as an appropriate remedy for failure to provide a FAPE).

187. *E.g.*, Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 114 (1st Cir. 2003).

188. *E.g.*, Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1122 (2d Cir. 1997).

189. *See, e.g.*, W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1482 (9th Cir. 1992).

190. Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

191. *Id.*

192. *Id.* at 206–07.

193. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993). If the state has violated the procedural requirements of the Act, the inquiry is more complex. Before evaluating the alternative placement, the court must determine that the procedural violation resulted in a denial of educational benefits. *See, e.g.*, Knable v. Bexley City Sch. Dist., 238 F.3d 755, 764 (6th Cir. 2001).

194. *Carter*, 510 U.S. at 13.

195. *Id.* at 11.

196. 20 U.S.C. § 1400(d)(1) (2006).

from schools all together.[197] In the 2004 reauthorization of the IDEA, Congress noted that the Act "has been successful in ensuring children with disabilities . . . access to a free appropriate public education and in improving educational results for children with disabilities."[198] Even though there have been thousands of lawsuits filed under the IDEA over the past several decades,[199] the fact that millions of children have been helped by the law indicates that it effectively leveraged the threat of litigation to ensure that every child's rights are upheld. This concept of effective leverage is not unique to the IDEA—indeed, the entire American tort system rests on the principle of liability as a deterrent.[200]

The Supreme Court has been frank that the main way for schools to avoid IDEA liability and being forced to reimburse parents for pricey private school tuition is to simply "give the child a free appropriate public education in a public setting."[201]

B. The IDEA as a Model for a Private Right of Action in Education

Because courts routinely evaluate the adequacy of the educational program offered in an IEP, IDEA litigation provides a model for establishing judicially manageable standards for adjudicating the state constitutional right to education in individual cases. This is true largely because the substantive standards are similar. It is also not uncommon for state tort causes of action to be based, at least in part, on the violation of a duty created by a federal statute or regulation, even when there is no independent federal cause of action.[202]

In 1989, the Supreme Court of Kentucky became the first court to thoroughly elaborate the substance of the right to education by laying out seven areas in which children should attain proficiency:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
>
> (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
>
> (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
>
> (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;

---

197. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142 § 3(a), 89 Stat 773, 774. This finding is no longer codified in the U.S.C., having been replaced by more current factual findings. 20 U.S.C. § 1400.

198. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, 2649 (codified at 20 U.S.C. § 1400(c)(3)).

199. *See* LEXIS, Federal and State Court Cases, Combined, search between January 1, 1990, and December 31, 2007, with the terms "Individuals with Disabilities Education Act" at least five times (returning 1,265 cases).

200. *See* RESTATEMENT (SECOND) OF TORTS § 901 cmt. c (1977).

201. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 (1993).

202. *See, e.g.*, Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 817 (1986).

> (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
>
> (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
>
> (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[203]

In subsequent years, the *Rose* decision has been cited by other states' high courts in determining the scope and content of their own state's constitutional right to education.[204] Other state courts have laid out similar, although slightly different, formulations of the right.[205] Two aspects common to nearly all formulations are 1) basic literacy and numeracy skills, and 2) skills necessary to prepare the student for independent living and the job market.[206]

In a similar vein, a FAPE often consists of basic academic skills, life skills, and job preparation.[207] Part of the statutory definition of a FAPE is that the education must "meet the standards of the State educational agency,"[208] which include basic academic skills. Additionally, the IDEA requires that the IEPs for all students aged sixteen and older include a section on transitioning to life after high school including a focus on "training, education, employment, and, where appropriate, independent living skills."[209]

One difference of note is that a FAPE is focused on the specific child's individual needs whereas the constitutional provisions are set forth in universal terms. But there is reason to believe that the specialized learning needs of children with certain developmental or cognitive disabilities are not that different from the needs of children growing up in poverty—those most likely to

---

203. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212–13 (Ky. 1989).

204. *E.g.*, Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997) (citing the *Rose* factors "as establishing general, aspirational guidelines for defining educational adequacy"); *accord* McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993).

205. *E.g.*, Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997) (holding that a sound basic education consists of "(1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society").

206. *See* Vincent v. Voight, 614 N.W.2d 388, 406 (Wis. 2000) ("An equal opportunity for a sound basic education is one that will equip students for their roles as citizens and enable them to succeed economically and personally.").

207. *See, e.g.*, Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 181–82 (3d Cir. 1988) (discussing how the legislative history of EAHCA demonstrates the Act's focus on fostering self-sufficiency and independence in handicapped children both to promote their dignity and because it is a good investment in the nation's future).

208. Individuals with Disabilities Education Act, 20 U.S.C. § 1401(9)(B) (2006).

209. *Id.* § 1414(d)(1)(A)(i)(VIII)(aa).

be denied a constitutionally adequate education.[210] New research indicates that children "from lower socioeconomic levels show brain physiology patterns similar to someone who actually had damage in the frontal lobe," with slower reaction time to informational stimuli and hampered problem-solving skills.[211]

Not only are the aspirational terms of the rights embodied in state constitutions similar to those in the IDEA, but the needs of the children to be served under each scheme are also strikingly similar. Because the reasoning employed by a court determining the statutory adequacy of an IEP could be applied essentially unchanged by one determining the constitutional adequacy of the child's instructional program, the IDEA provides a solid model of judicially manageable standards for the adjudication of a private right of action for educational rights.

C. The Private Right of Action in Action

This section explores some of the more practical elements of the private right of action. Although this section attempts to deal with some of the logistical issues that will arise when individual educational adequacy cases are brought, addressing these logistical issues is by no means the purpose of this piece. The overarching goal here remains to provide a sound doctrinal foundation for private suits and not to work out the details of individual cases. This is because the details of tort law vary significantly by state so it is difficult to make uniform statements about procedure, and also because the details are largely irrelevant to the larger point. Whether private suits should go forward, both as a matter of normative policy and of descriptive doctrine, has little to do with how long the pleading period is or what defenses will be recognized. Nonetheless, because practical objections can stand in the way of accepting the theoretical point, I attempt to address some of the most common practical issues below. I address these elements in three categories: pleadings, defenses, and potential alternatives to court.

1. Pleadings

In educational rights suits, as in any civil suit, the plaintiff must select the proper defendant, time the claim so that it is ripe, decide whether a class action is an efficient way to press a claim, and meet the burden of proof. First, there are two possible defendants in these suits: the state and the school district.[212] The state has the obligation to fulfill the constitutional right, whereas the district is the entity that has failed to provide the adequate education and that holds the

---

210. *See* Mark M. Kishiyama et al., *Socioeconomic Disparities Affect Prefrontal Function in Children*, 21 J. COGNITIVE NEUROSCIENCE (forthcoming 2009) (explaining how the low-income environment can be damaging to the neural development of children).

211. Press Release, Robert Sanders, Univ. Cal. Berkeley, EEGs Show Brain Differences Between Poor and Rich Kids (Dec. 2, 2008), http://www.berkeley.edu/news/media/releases/2008/12/02_cortex.shtml.

212. In some states, there is no choice to make. For example, in Hawaii, there are no local school districts, only a state education agency. Hawaii Dep't of Educ., About Us, http://doe.k12.hi.us/about/index.htm (last visited Dec. 7, 2008). Also, in some other states school districts are treated as an arm of the state. *See, e.g.*, Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 253 (9th Cir. 1992) ("Under California law, school districts are agents of the state . . . .").

records needed to prove the case. Also, from a systemic point of view, suing already cash-strapped school districts is somewhat counter-productive and will only siphon funds away from other children in need. For these suits to function as a lever for systemic change, the financial hurt must be felt at the state level because it is the state, not the locality, that has the ability to raise additional revenue.[213] Therefore, it makes sense to sue both the local school district and the state: the district is liable because they took on the state duty to educate by accepting state funds and the state is liable either because the fulfillment of constitutional rights cannot be delegated or because it failed to provide adequate resources for the district to fulfill its commitment.

Second, education is a continuous process, which makes it difficult to know when a claim accrues for the failure to educate. The remedies outlined above are all compensatory and educational in nature and thus will have the greatest impact for a child early on in his or her educational career. Defendants, however, may argue that a claim is not ripe until the school has had every opportunity to correct for the child's underperformance. In borderline cases, ripeness will be difficult to resolve. As a starting point, however, there are numerous cases that could be brought alleging per se violations of educational rights based on inadequate inputs. For example, a child who is not provided a certified, trained, or otherwise qualified teacher would have a claim for inadequate provision of education in the states where a high-quality teacher has been identified as a component of the constitutional right.[214] Furthermore, the IDEA can again serve as a guide here: it requires a child's progress be assessed annually and a new IEP provided each year—each IEP can be challenged for its adequacy.[215] Similarly, states could treat each school year as a separate claim under the state constitution. A shorter period might not provide the school long enough to provide education or monitor the child's progress. A longer period risks making it difficult to determine what happened due to lost records and faded memories as well as a compound effect of inadequate education.

Third, although I argue above that statewide class action suits are ill-suited to serve children's needs, genuine class actions or suits with multiple plaintiffs could be beneficial to plaintiffs, defendants, and courts alike. Consider the situation noted above where a child has an unqualified teacher. In a state where this violates the rights of child A, it also violates the rights of child A's classmates. Were these twenty or thirty children to join together in a single lawsuit, it would be easier for them to find counsel willing to take their case, cheaper for the defendants to defend one case instead of many, and less strain on the court system to hear the consolidated case. Unlike in the typical school financing suits, this situation would satisfy the rules of class actions because the facts, law, and defenses are all "common to the class."[216] When a class exists that

---

213. Low-wealth school districts often have no option to raise additional revenue because property tax rates are capped by state law and the districts with the lowest tax bases are often already taxing themselves at the highest tax rates. *See* NAT'L RESEARCH COUNCIL, *supra* note 62, at 234–38.

214. *E.g.*, Leandro v. State, 488 S.E.2d 249 (N.C. 1997).

215. *See* 20 U.S.C. § 1414(d) (2006).

216. *See* FED. R. CIV. P. 23(a).

meets the standards of the state's class action rules, plaintiffs should able to pursue their cases under those rules.

Finally, the burden of proof issue is relatively straightforward: as in a typical civil action, the plaintiff would bear the burden of persuasion; that is, they must prove by a preponderance of the evidence that the school, district, or state failed to fulfill its duty to provide a constitutionally adequate education. But one small caveat to the general civil scheme seems in order: as in IDEA cases, the school should bear the burden of production because it is the custodian of the educational records at issue.[217]

2. Defenses

There are three particularly relevant defenses that might be raised in educational adequacy suits. First, as in many lawsuits against a state government, the defendants are likely to raise sovereign immunity as a complete defense to monetary liability. There are two tactics plaintiffs can use to defeat this objection. First, because sovereign immunity does not protect the state from the judgment of liability but only from having to pay money damages, plaintiffs can avoid sovereign immunity problems by asking for non-monetary remedies such as specific performance.[218] Some remedies, including those most important in educational rights cases, like compensatory education, are considered non-monetary even though they involve the state expending financial resources.[219] Additionally, they can sue the state official responsible for protecting or ensuring their constitutional rights, such as the state superintendent of public instruction or the governor, rather than the state itself.[220] Second, many states waive their sovereign immunity protections for the purposes of enforcing state constitutional rights through state statute[221] or in the constitution itself.[222] If the plaintiffs are in a jurisdiction with such a statute, sovereign immunity will not be a valid defense.

The second category of defense likely to be raised in an educational rights suit is contributory or comparative negligence.[223] Because these suits are essentially constitutional torts, this traditional tort defense is entirely proper. Indeed, a state that can show it has offered a child a constitutionally adequate education but the child failed to learn because, for example, he did not attend school for much of the year, should not be liable. A trickier question arises regarding whether it is the child or the parent whose comparative negligence the

---

217. *See* 20 U.S.C. § 1415(b)(1) (2006) (stating that parents have a right to examine all records relating to their children); *see also* Schaffer v. Weast, 546 U.S. 49, 56 (2005) (noting that the parties and the Court agreed that who bears the burden of production is not up for debate).

218. Edelman v. Jordan, 415 U.S. 651, 664 (1974).

219. Milliken v. Bradley, 433 U.S. 267, 289–90 (1977).

220. *Ex parte* Young, 209 U.S. 123 (1908).

221. *See, e.g.*, Stephen v. Denver, 659 P.2d 666, 667 (Colo. 1983) (explaining the Colorado Governmental Immunity Act, which waives immunity for various types of torts).

222. *E.g.*, ALASKA CONST. art. II, § 21 ("The legislature shall establish procedures for suits against the State.").

223. Most states now follow the comparative negligence doctrine under which a defendant will be liable for damages in proportion to its share of the liability even if the plaintiff contributed to the injury. Only Alabama, the District of Columbia, Maryland, North Carolina, and Virginia retain the contributory negligence doctrine, which bars recovery when a plaintiff has contributed to his injury in any way. 57B AM. JUR. 2D *Negligence* § 956 (2008).

court should consider, an issue that may vary by state based on principles of parental rights and state statutory law regarding truancy and other policies.

The third likely defense comes from the public duty doctrine. This doctrine states that when the government owes a duty to the public in general, it is not liable to any one individual for a breach of that duty.[224] Originally developed to protect the police from claims of negligent failure to arrest, the doctrine expanded to cover all municipal functions such as fire protection, road construction, and health and safety inspections of workplaces and restaurants.[225] The doctrine is now one of state law and had largely fallen out of favor, but remains valid in some states.[226] Depending on how a state's right to education is framed, the public duty doctrine may seem to apply.[227]

Generally, the doctrine does not apply if the government owes a special duty to the individual or if there is a special relationship between the individual and the state.[228] Both of these exceptions could apply in the educational rights context. First, once a state court has determined that the right to education is an individual right,[229] it has established that the state owes a special duty to each individual child. Second, a special relationship exists where the governmental entity undertakes, for example, to protect the plaintiff.[230] The doctrine is designed to protect the government from liability towards those whose only relationship with the government is as citizens.[231] Students, however, are far from strangers to their schools. Indeed, the government has undertaken a very special relationship to the students: that of educator, caretaker, and de facto parent.[232] The failure to educate does create generalized harm to the community, for example, in terms of a less prepared workforce and higher crime rates, but it is not this generalized harm that individual education adequacy suits seek to remedy. Rather, as in standing doctrine, it is the concrete and specific harm to the individual student that, although generalized across a class of students, is unique

---

224. South v. Maryland, 59 U.S. (18 How.) 396, 402–03 (1855). *See generally* Shea Sullivan, Note, City of Rome v. Jordan*: Georgia is a Public Duty Doctrine Jurisdiction with No Waiver of Sovereign Immunity - A Good "Call" by the Supreme Court*, 45 MERCER L. REV. 533, 535–38 (1993).

225. *E.g.*, Ryan Rich, *Seeing Through the Smoke and Fog: Applying a Consistent Public Duty Doctrine in North Carolina After* Myers v. McGrady, 85 N.C.L. REV. 706, 711 (2007).

226. *See id.* at 708.

227. For example, a state whose constitution merely requires the legislature to provide a "thorough and efficient system of common schools" might be one in which the public duty doctrine would apply more readily than in a state whose constitution is more child-centered.

228. Rich, *supra* note 223, at 706.

229. *See, e.g.*, Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 379 (N.C. 2004).

230. Courtney E. Nuttall, Comment, Matthews v. Pickett County*: The Public Duty Doctrine and Its Special Duty Exception in the Face of the Governmental Tort Liabilities Act*, 30 U. MEM. L. REV. 457, 466–67 (2000).

231. *See id.* (cataloging cases applying the doctrine to protect officers from liability when no special relationship between the plaintiff and the government existed: when, for example, the police failed to arrest a drunk driver who later injured the plaintiff).

232. *E.g.*, Hoff v. Vacaville Unified Sch. Dist., 968 P.2d 522, 528 (Cal. 1998) ("The relationship between school personnel and students is analogous in many ways to the relationship between parents and their children. At common law, '[s]chool officials are said to stand *in loco parentis*, in the place of parents, to their students, with similar powers and responsibilities.'" (citation omitted)).

to them as students and not merely as citizens.[233] For these reasons, although it is likely to be raised by defendants, the public duty doctrine should not prohibit students from recovering for violations of their educational rights.

3. Alternative Dispute Resolution

Disputes regarding many of the positive rights granted by state statutes, such as entitlements, are initially resolved in administrative proceedings, with a right of appeal to a traditional state court. The administrative system serves to resolve disputes—especially those that are of a largely technical nature—more quickly and less expensively than a traditional trial and is also generally more accessible to the public and to self-representation. In fact, the IDEA allows states to establish administrative procedures to resolve IEP disputes, [234] and all states have done so. Administrative procedures also lessen the burdens on courts, thus dampening the impact on the judiciary of any potential flood of litigation. Currently, no administrative procedures exist for adjudicating individual claims of inadequate provision of education because the cause of action itself has yet to be recognized. There is, however, no apparent reason why educational rights suits could not also be handled though an administrative process if states wished to establish one for that purpose. Indeed, an administrative process that puts expert analysts to work evaluating these claims quickly may well be the best way to implement a system of adjudicating individual educational rights suits.

V. WHY A PRIVATE RIGHT OF ACTION?

In light of the failures of the systemic approach described above, innovation is required if children are to realize their rights. While parts III and IV discussed the legal and practical aspects of a private right of action, this part explores the theoretical justification for the right as well as the policy rationales that support it. As an initial matter, I concede that it would be preferable for legislatures to provide solutions to the problems of inadequate education. Legislatures have, however, had several decades to get around to providing an adequate education for all children. They have not done it. There is little reason to believe that this will be drastically different in the future.[235] If legislatures are unresponsive, and children have a right[236] that courts can effectuate,[237] it makes little sense to deny either the children or the courts the opportunity. After all, a right without a remedy is no right at all.[238]

---

233. *See* Fed. Election Comm'n. v. Akins, 524 U.S. 11, 22–24 (1998) (holding that a generalized grievance may still confer standing on individuals who have suffered a concrete and specific injury in fact).

234. *See* 20 U.S.C. § 1415(f)(1) (2006) (explaining the administrative hearing process).

235. *See Standing up to Legislative Bullies*, *supra* note 49, at 772–78 (discussing the political market failures that explain why legislatures are unwilling or unable to provide adequate education for all children).

236. *See infra* Part V.A.

237. *See supra* Parts III.B, IV.

238. *See, e.g.*, Peck v. Jenness, 48 U.S. 612, 623 (1849) ("A legal right without a remedy would be an anomaly in the law.").

A. The Right to an Adequate Education Is a Personal One

On their face, only four of the fifty state constitution education articles mention the quality of education to be provided.[239] Indeed, more than twenty-five percent of the state constitutions (fourteen) require only the basic establishment and support of a free system of public schools.[240] Of the remaining thirty-two, about half modify the basic requirement of providing a public school system with adjectives such as "thorough,"[241] "efficient,"[242] and "uniform,"[243] whereas the others require legislatures to use "all means necessary,"[244] or "suitable means"[245] to secure for their citizens the "advantages and opportunities of education,"[246] or to provide for the intellectual development of the people.[247]

On their texts, these constitutional provisions apply mainly to the legislatures of the states, usually as a mandate that "the legislature shall" maintain a school system.[248] Understanding, however, that the logical implication of mandating the provision of education is that those for whose benefit it is mandated, i.e. the children of the state, have a right to receive it, many courts have interpreted these provisions to grant fundamental rights to the children of the state.[249] Despite the substantial differences in the texts of the constitutions and the differences in the scope of court-articulated rights, there is little correlation between the explicit wording and the substantive right recognized by a court. For example, the Illinois constitution explicitly references quality,[250] but the Illinois Supreme Court has held that evaluating whether a quality education has been provided is beyond the province of the courts and solely for the legislature.[251] Conversely, although the Wyoming Constitution only requires the legislature to "provide for the establishment and maintenance of a

---

239. FLA. CONST. art. IX, § 1(a) ("Adequate provision shall be made by law for a . . . high quality system of free public schools . . . ."); ILL. CONST. art. X, § 1 (requiring the state to provide "an efficient system of high quality public educational institutions and services"); MONT. CONST. art. X, § 1(3) (mandating provision of "a basic system of free quality public . . . schools"); VA. CONST. art. VIII, § 1 (requiring the legislature to "ensure that an educational program of high quality is . . . maintained"); *see also* Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343–48 (1992) (cataloging state constitutional provisions).

240. *See* CONN. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; LA. CONST. art. VIII, § 1; MASS. CONST. ch. V, § 2; MICH. CONST. art VIII, § 2; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); NEB. CONST. art. VII, § 1; N.Y. CONST. art. XI, § 1; N.D. CONST. art. VIII, § 1; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3; TENN. CONST. art. XI, § 12; VT. CONST. § 68.

241. *E.g.*, COLO. CONST. art. IX, § 2.

242. *E.g.*, OHIO CONST. art. VI, § 2.

243. *E.g.*, IDAHO CONST. art. IX, § 1.

244. *E.g.*, R.I. CONST. art. XII, § 1.

245. *E.g.*, ME. CONST. art. VIII, § 1.

246. *E.g.*, S.D. CONST. art. VIII, § 1.

247. *E.g.*, CAL. CONST. art. IX, § 1.

248. *See* Hubsch, *supra* note 239, at 1329.

249. *E.g.*, Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 76 (Wash. 1978) (holding that the state constitution "imposes a paramount duty upon the State which in turn creates a correlative right on behalf of all children residing" in the state).

250. ILL. CONST. art. X, § 1.

251. Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1189 (Ill. 1996).

complete and uniform system of public instruction,"[252] the Wyoming Supreme Court interpreted this article as establishing a fundamental right to education[253] and applies strict scrutiny to laws impacting the right.[254] Similarly, state supreme courts in California,[255] Connecticut,[256] Kentucky,[257] Minnesota,[258] North Dakota,[259] West Virginia,[260] and Wisconsin[261] have each held that education is a fundamental right under their state's constitution. In state constitutional law, as in federal constitutional law, infringements upon and failures to fulfill fundamental rights receive strict scrutiny from the courts rather than rational basis review.[262] By extension, therefore, if the right to education is fundamental, the bar for proving a violation is lower.[263]

The North Carolina Supreme Court has gone the furthest of the state courts in interpreting the right to education. The education article of the North Carolina constitution is of the basic variety: "The General Assembly shall provide . . . for a general and uniform system of free public schools."[264] Yet in 2004, the North Carolina Supreme Court explained:

> We read *Leandro* and our state Constitution, as argued by plaintiffs, as according the right at issue to all children of North Carolina, regardless of their respective ages or needs. Whether it be the infant Zoe, the toddler Riley, the preschooler Nathaniel, the "at-risk" middle-schooler Jerome, or the not "at-risk" seventh-grader Louise, the constitutional right articulated in *Leandro* is vested in them all.[265]

Washington has taken a similarly strong approach, labeling the right to education "a true 'right' (an absolute)" that, unlike a fundamental right, may not be infringed by the state—even for compelling reasons.[266]

Other states have recognized a personal right to education without holding it to be fundamental. For example, the New York Constitution requires the bare minimum: "the maintenance and support of a system of free common schools."[267] Although the New York Court of Appeals has refused to label education a fundamental right,[268] that court has repeatedly recognized that the

---

252. WYO. CONST. art. VII, § 1.
253. Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1258 (Wyo. 1995).
254. *Id.* at 1266.
255. Serrano v. Priest (*Serrano II*), 557 P.2d 929, 951 (Cal. 1976).
256. Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977).
257. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 206 (Ky. 1989).
258. Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993).
259. Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 256 (N.D. 1994).
260. Pauley v. Kelly, 255 S.E.2d 859, 878 (W.Va. 1979).
261. Vincent v. Voight, 614 N.W.2d 388, 396 (Wis. 2000).
262. *See, e.g.*, Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1266 (Wyo. 1995).
263. *See id.*; *cf.* Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1187–88 (Kan. 1994) (noting that under rational basis scrutiny "the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective").
264. N.C. CONST. art. IX, § 2.
265. Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 379 (N.C. 2004).
266. Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 92 n.13 (Wash. 1978).
267. N.Y. CONST. art. XI, § 1.
268. Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 668–69 (N.Y. 1995).

state constitution establishes the right to an adequate education.[269] Likewise, in Arkansas, the supreme court has repeatedly determined that while education is not a fundamental right, it is a constitutional right enforceable by the courts.[270] Similar situations have occurred in Alabama,[271] Kansas,[272] Maryland,[273] Massachusetts,[274] Montana,[275] Nebraska,[276] New Hampshire,[277] New Jersey,[278] Ohio,[279] Oregon,[280] South Carolina,[281] Texas,[282] and Vermont.[283]

B. The Benefits Outweigh the Costs

Even if a private right of action is theoretically justified, the question of whether it is sound policy must be answered. Although there are some drawbacks to recognizing a private right of action for inadequate provision of educational opportunity at the state level, the benefits are substantial.

First, perhaps the strongest benefit to an individual right of action would be the speed with which students could receive remedies. If a child could receive a transfer to another school or tutoring services within a year of filing a complaint,

---

269. *Id.* at 681 (Simons, J., dissenting) ("The majority apparently view the constitutional provision as establishing an entitlement to receive an adequate education.").

270. Lake View Sch. Dist., No. 25 v. Huckabee, 91 S.W.3d 472, 492 (Ark. 2002) (reaffirming the interpretation of the education clause in a prior case).

271. Opinion of the Justices No. 338, 624 So.2d 107, 139 (Ala. 1993) (holding that education not being a fundamental right "is no defense to a claim of constitutional infringement because individual rights do not obtain *only* when the state believes that it can afford them").

272. Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1189–90 (Kan. 1994) (explaining that the court refused to classify education as a fundamental right because of problems inhering in the strict scrutiny test).

273. Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 786 (Md. 1983).

274. McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993) (holding that the state constitution creates a mandatory duty on the state to provide adequate education, which may be enforced by citizens through the courts, but declining to find a fundamental right).

275. Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 691 (Mont. 1989) (declining to decide whether education is a fundamental right because the equal protection issue was not dispositive on appeal).

276. Gould v. Orr, 506 N.W.2d 349, 354 (Neb. 1993) (White, J., dissenting in part) (indicating that the court had not decided whether education is a fundamental right because the plaintiff's claim was not properly pleaded).

277. Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1381 (N.H. 1993) (labeling education "an important, substantive right").

278. Robinson v. Cahill, 303 A.2d 273, 286 (N.J. 1973).

279. DeRolph v. State, 677 N.E.2d 733, 740 n.5 (Ohio 1997) (declining to decide whether education is a fundamental right but still declaring the state's financing system unconstitutional).

280. Coal. for Equitable Sch. Funding v. State, 811 P.2d 116, 124 (Or. 1991) (discussing the positive nature of the right to education in Oregon).

281. Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999) (holding that the state constitution creates a duty on the state to provide adequate education, which may be enforced by citizens through the courts, but declining to find a fundamental right).

282. Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397 (Tex. 1989) (holding the school financing statute unconstitutional because it was not "efficient" and declining to decide whether education is a fundamental right).

283. Brigham v. State, 692 A.2d 384, 396 (Vt. 1997) (finding the state's school funding statute to violate rational basis scrutiny, making a determination of whether education is a fundamental right unnecessary).

he would be substantially better off than under the status quo where he must wait a decade or more for some other entity to assert his rights and use new funds to improve his education. Also, because much of the legal legwork has already been accomplished in adequacy suits, individual suits should be able to move forward at a fairly rapid pace—the individual plaintiff will not have to spend years relitigating the existence of the basic right to education.

A second and related benefit would be that such suits would place the focus of the law where it belongs: on children rather than on bureaucrats or nonprofit organizations. Although it is true that nearly all children in public school receive their education from school districts, the right to an adequate education does not belong to the district. Justice is ill-served by pretending otherwise, because even though this is a rhetorical nuance, rhetoric is powerful and can drive results.

A third range of benefits are those that would accrue to students other than the plaintiff. Just as relatively few IDEA suits have incentivized school districts to provide free appropriate public education to millions of students,[284] the constitutional suits envisioned here would serve as leverage for districts and states to improve educational opportunities because failure to do so would carry real (and very expensive) consequences. Additionally, judicial decisions ordering elected officials to expend public resources on politically less-powerful groups can be a particularly effective means of resolving the political market failures that give rise to the dire conditions that precipitate the litigation. The judicial decision provides political cover for the elected officials who can then act to benefit the less-powerful group without fear of electoral reprisals.[285] That is, the court takes the heat, freeing the legislative and executive branches to solve the problem on the wholesale level.[286] When a district replaces an unqualified teacher with an effective one, not only the child who initiated the suit benefits, all of her classmates do as well.

The final category of benefits relates to the judicial process. First, by borrowing from the IDEA standards as laid out above,[287] judges would have a ready-made set of rules on how to interpret educational claims made by students and districts. This would reduce the burden on the justice system for handling constitutional rights cases. Second and similarly, using the remedy framework of the IDEA promotes flexibility in resolving cases. Just as some IDEA violations are more severe than others, some constitutional violations are more egregious than others and the full range of remedies familiar to the courts under the IDEA offer an appropriate panoply of remedies. Finally, because these are state rights enforced in state courts, there are "laboratories of democracy" benefits where each state can learn from the experiences of its sister states to continually improve the implementation of this right of action.

This plan, of course, is not without its drawbacks—most notably the cost of lawsuits and the limit of appropriate placements available in the market. First, lawsuits are a transaction cost and, as such, are economically undesirable.

---

284. *See supra* note 199 and accompanying text.

285. Clayton P. Gillette, *Reconstructing Local Control of School Finance: A Cautionary Note*, 25 CAP. U. L. REV. 37, 49 (1996).

286. *See id.*

287. *See supra* Part IV.

Although individual cases may not cost the millions of dollars education adequacy suits have, they are still likely to be expensive. Because of the upfront expense involved, the neediest children and their families may be unable to afford to take advantage of this remedy. There is also the possibility that districts and states will end up spending limited resources on legal rather than on educational services.[288] The threat of expensive litigation, however, is a key component of the leverage that could make private suits for educational adequacy just as effective as IDEA suits have been.

A critical limitation of the effectiveness of the private right of action is the quantity of available remedies. Spaces in high-performing public, private, and charter schools are limited as are available tutoring and summer school services. This shortage could create short-term disruptions in the ability of courts to order and enforce effective remedies. Comparing figures for children with disabilities (those served by the IDEA) and children in poverty (those most likely to be served by private rights of action), however, indicate that there is not much difference: nationally, about eleven percent of students have a diagnosed disability[289] and about eighteen percent of children live in poverty.[290] Just as not all children with disabilities are ill-served by their current public placements, not all children in poverty are ill-served either.[291]

The broader benefit to the private right of action is that, in contrast to an across-the-board legislative solution, it provides for incremental change. It will take time for high-performing public and private schools to expand their capacity to take students who are victorious in courts, and it will take time for the teaching labor market to respond to higher salaries by producing higher quality teachers. But, by starting slowly, with a few suits a year—as will inevitably be the case as parents, advocates, and courts adapt to a new cause of action—these suits can send the appropriate signals to the labor and educational markets, which can then respond accordingly. Essentially, a response to the lag-time for implementation is built into the process and the availability of remedies should not be a long-term issue.

---

288. *Cf.* Nanette Asimov, *Extra-special Education at Public Expense*, S.F. CHRON., Feb. 19, 2006, at A1 (cataloging numerous IDEA suits including a district's $239,044 in legal expenses to successfully defend its position that the student did not require horseback riding and swimming therapies). One key difference between IDEA and the right to an adequate education is likely the affluence of the prospective plaintiffs: under IDEA many of the most expensive cases are pursued by relatively wealthy families seeking relatively posh private placements for their children. *See id.* Because children in high-wealth school districts where relatively wealthier families are most likely to live likely, although not assuredly, already receive constitutionally adequate educations, they are unlikely to become a large proportion of the plaintiffs the suits envisioned here.

289. U.S. CENSUS, AMERICANS WITH DISABILITIES ACT: JULY 26 (July 19, 2006), *available at* http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006841.html. This figure does not include children whose disabilities are not yet diagnosed.

290. U.S. CENSUS, AM. CMTY. SURVEY, SELECTED ECONOMIC CHARACTERISTICS: 2007, http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=ACS&_submenuId=&_lang=en&_ts= (last visited Mar. 17, 2009) (click on "Data Profiles").

291. *See* DOUGLAS REEVES, ACCOUNTABILITY IN ACTION: A BLUEPRINT FOR LEARNING ORGANIZATIONS 185–96 (2000) (documenting "90/90/90" schools: those with 90% minority students, 90% poor students, and 90% pass rates on state tests).

Some may also argue that schools are not entirely to blame for some children's failure to learn; this is certainly true as numerous nonschool factors impact a child's success.[292] Nonschool factors like low parental involvement, however, will not be present in private right of action cases because only involved parents will bring suits, and such concerns are not significant enough to undercut the benefits such causes of action can bring to involved families.

A final criticism is that the justifications outlined above are ultimately beside the point because courts that rely on a lack of judicially manageable standards[293] merely do so rhetorically and have entirely distinct substantive reasons for their holdings. This criticism comes in two forms: first, judicial complaints about the lack of standards are merely cover for the true, and non-judicial, reasons for the courts' decisions; second, a lack of manageable standards is a court's way of articulating more generalized concerns with the difficulty of implementing positive rights. If the former, one can only guess as to what a court's true motivations might be, but the political heat of the issue and potential electoral repercussions are possibilities. As already noted, the fact that majoritarian legislatures have not already enacted policies that effectuate the goal of adequate education shows that such a goal is not a political priority.[294] Additionally, because nearly all state court judges face some form of electoral or legislative review,[295] is it also logical for them to be concerned about how their decisions will impact their job security. There is only one response to this criticism: it is a judge's job to answer to the constitution—not to the electorate—and if a state's constitution requires the enforcement of unpopular (and expensive) rights, it is the judge's obligation to require that enforcement. If judges are unwilling to see themselves as different from legislatures, then our system of government has larger problems than inadequate education for needy children.

If discussions of manageable standards stand for the latter concern regarding the difficulty of implementing positive rights, a court may correctly be wary of entering the foray of positive rights: such rights can be difficult to define, violations challenging to detect, and enforcement lengthy and arduous. But it should reassure courts that they enforce positive rights all the time, they are just usually in statutory rather than constitutional form. Indeed, the modern welfare state is brimming with positive rights such as income support for the disabled and the elderly,[296] medical support for the poor[297] and veterans,[298] and rights to

---

292. *See, e.g.*, RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP 19–45 (2004) (documenting non-school factors like parental involvement and access to quality health care that affect students' success).

293. *See supra* Part III.B.

294. *See Standing up to Legislative Bullies*, *supra* note 49, at 772–78.

295. *Id.* at 766.

296. *See* Social Security Act, 42 U.S.C. §§ 401 et seq. (2006).

297. *See* Social Security Act, 42 U.S.C. §§ 1396 et seq. (2006) (setting forth the eligibility and funding requirements of Medicaid).

298. *See* 38 U.S.C. §§ 1101 et seq. (2006) (detailing the various health and medical benefits to which veterans are entitled).

social services such as those provided in the IDEA.[299] Furthermore, courts are successful in implementing positive constitutional rights, such as the right to counsel in criminal proceedings.[300] Critics may complain that each of these examples is manageable because the right is provided only for a subset of the population (i.e., the disabled, the elderly, the poor, veterans, criminal defendants, etc.), and for logistical and financial reasons, such limitations might be necessary to make the rights functional. The right to an adequate education, however, is also demographically limited: it only applies to children, bringing it in line with the scope of other, well-recognized positive rights.

In any case, by providing a response to the courts' proffered reasoning, this piece seeks to move the dialogue forward. If courts can no longer rely on the lack of manageable standards as rhetorical cover for their decisions because that reasoning has been undercut, they may be more candid in the future regarding their true motivations, thus fostering greater dialogue among the branches of government and between government and the people regarding policy priorities and fundamental values.

CONCLUSION

Over two centuries, the experiment of United States public education has grown by leaps and bounds, served millions of students, spurred economic prosperity, and helped heal our cultural divisions. In the twenty-first century, the future of public education remains an open book as the nation is confronted with the hard realities of inadequacy that plague too many schools disproportionately populated by students of color. As in the past, the courts have the opportunity to push society forward and fulfill the promises of state constitutions by recognizing a private right of action that enforces the right to an adequate education. Social mobility is the engine of the American Dream, and education is the key to social mobility. The question is now: will every child be given a key?

299. *See* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. (2006).

300. *See* Gideon v. Wainwright, 372 U.S. 335, 339 (1962) (holding that the Sixth Amendment to the Constitution requires defendants be provided with counsel in felony proceedings).