THE JUDICIAL GIVE AND TAKE:

The Right to Equal Educational Opportunity in California

REBECCA M. ABEL*

* Law Clerk, U.S. District Court, Central District of California; J.D., UCLA School of Law, 2012; B.A., Brown University, 2007.

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INTRODUCTION

After the U.S. Supreme Court held that education is not a fundamental right under the Equal Protection Clause of the U.S. Constitution in *San Antonio Independent School District v. Rodriguez*,[1] litigants turned to state Equal Protection Clauses to serve as guarantors of educational equality. In subsequent years, some state courts have expanded the content of state-level equal protection doctrine to include students' fundamental right to equal educational opportunity.[2] Central to this doctrine is that the principle of equal opportunity can and should be applied to areas of life where the state government provides services that are integral to the functioning of a democratic society and the opportunities of its citizens.

The California Supreme Court declared education a fundamental right under the state constitution in its 1976 decision in *Serrano v. Priest*.[3] Since then, there has been a surge of state-level education litigation in California, which has shown no signs of slowing. Despite the mounting caselaw, the contours of California students' right to equal education remains unclear. Although the California Constitution creates an enforceable right to "basic educational equality,"[4] the state courts have not succinctly stated the programs, services, resources, or funding necessary to satisfy this right.

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[1] 411 U.S. 1, 33 (1973).

[2] In a frequently cited article on the use of state constitutions to protect individual rights, Justice Brennan encouraged state courts to provide more expansive protections for substantive individual rights than those provided by the federal constitution. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977) ("Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism."); *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986) [hereinafter Brennan, *The Bill of Rights and the States*] (recognizing that state courts have interpreted state constitutional provisions as providing greater protections than similar provisions, including the Equal Protection Clause, found in the federal constitution).

[3] 18 Cal.3d 728 (1976) (en banc).

[4] *See* Butt v. State of California, 4 Cal.4th 668, 681 (1992) ("[T]he state itself has broad responsibility to ensure basic educational equality under the California Constitution.").

California educates a highly diverse population of over 6.2 million students.[5] In recent years, California students have ranked near the bottom in fourth and eighth grade math and reading scores compared to students in other states.[6] Eighty-one percent of Californians believe educational quality is a problem in California's K–12 public schools.[7] Californians are also very concerned about inequities among students based on income, race, and English proficiency.[8] Given the concerns over the quality and equality of education in California, it is imperative to define the scope of the state's duty to provide an education to students. For almost forty years, students, parents, and advocacy groups have turned to California's courts for guidance on the states' educational obligation, yet the caselaw remains equivocal.[9]

This article reviews the thirty-five year history of California education equal protection litigation in an effort to identify what is contained within and excluded from students' fundamental right. This article seeks to answer the question: What constitutes "basic" educational equality in California's public schools? An in-depth review of the case history reveals that California courts oscillated between granting and taking away benefits which affect students' full enjoyment of their right to a basic education. The vacillation is ongoing. Litigants continue to bring challenges under California's Equal Protection Clause, attempting to push the courts to more concretely define the scope of students' fundamental right to education, with variable success.[10] Many of the recent cases are still at the

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[5] *See* National Center for Education Statistics, U.S. Department of Education, NAEP State Profiles: Summary of NAEP Results for California 1990–2013 (last visited Nov. 30, 2014), http://nces.ed.gov/nationsreportcard/states.

[6] *See id.*

[7] *See* Mark Baldassare, et al., *PPIC Statewide Survey: Californians & Education* 20 (2014), *available at* http://www.ppic.org/content/pubs/survey/S_414MBS.pdf.

[8] *See id.* at 17 (finding that a majority of Californians are concerned about teacher shortages in low-income areas, that low-income students are less likely to be ready for college, and that English language learners score lower than other students on standardized tests).

[9] *See* James E. Ryan, *A Constitutional Right to Preschool?,* 94 Cal. L. Rev. 49, 85 (2006) ("If courts are willing, as they should be, to determine whether state constitutions create a right to equal or adequate educational opportunities, they must be committed to defining the content of those opportunities.").

[10] *See* Vergara v. State of California, No. BC484642 (Cal. Super. Ct. filed May 14, 2012); Campaign for Quality Educ. v. State of California, No. RG10524770 (Cal. Super.

trial level or have settled out of court. In pursuing basic educational equal protection challenges, plaintiffs confront the difficulty of developing a cogent legal strategy which relies on the courts' existing jurisprudence while pushing for a robust interpretation of students' fundamental right.

This article suggests that plaintiffs seeking to raise the minimum standard of education necessary to satisfy students' fundamental right should pursue claims left open by the gaps in the courts' existing Equal Protection Clause jurisprudence. Part I explores the education clauses of California's constitution. First, this section provides an introduction to the caselaw under California's constitutional education clauses as well as the case history establishing the state as the entity ultimately responsible for California's education system. Second, this background is necessary to understand the rise of California's Equal Protection Clause, and not the constitutional education clauses, as the guarantor of students' basic equity of educational opportunity. Finally, the article explores the rationales behind the courts' embrace of equal protection doctrine, and the rejection of the substantive rights identified in the education clauses, examining the roles of state judicial power, equal protection policies, and the state's education system.

Whereas Part I examines the role of the California Constitution's education clauses, Part II explores the state's Equal Protection Clause. First, this Part identifies the three key cases that expanded students' right to equal educational opportunity in the last forty years. Because the courts lack an analytical structure to evaluate basic educational equality claims, this article proposes a two-part test to use as a tool for analyzing prior caselaw granting education rights under the Equal Protection Clause, and as a framework to more logically structure future claims, hopefully with a greater likelihood of success. Conversely, the next subpart details the history of state caselaw that contracted students' fundamental right to education, thereby excluding rights and services from the protection of strict scrutiny. Finally, in order to demonstrate the utility of the suggested two-part test, the final section uses three recent cases challenging the provision of basic educational equity in California to demonstrate that a coherent and identifiable structure can help ensure the success of an equal

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Ct. filed July 12, 2010); Robles–Wong v. State of California, No. RG10-515768 (Cal. Super. Ct. filed May 20, 2010); Reed v. State of California, No. BC 432420 (Cal. Super Ct. filed Feb. 24, 2010).

protection claim and perhaps expand it to encompass qualitative claims of educational inadequacy.

I. THE EDUCATION CLAUSES

California's constitution, like many other states', includes two provisions that provide the foundation for education litigation. First, every state, including California, has an education clause in its constitution, which obligates the state to create and maintain a public school system.[11] Second, as introduced in Part I.C and discussed in detail in Part II, the state constitution contains provisions that parallel the federal Equal Protection Clause, which can be used to challenge the inequality of education among students.[12]

A. THE EDUCATION CLAUSES OF THE CALIFORNIA CONSTITUTION

Since its ratification in 1849, the California Constitution has included several clauses relating to the state's role in the education system. Specifically, the education provisions of article IX outline two basic principles. First, the people of California recognize the value and importance of an educated citizenry, and have vowed to protect it. Second, the Constitution makes the

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[11] *See* CAL. CONST. art. IX, §§ 1, 5. Every state constitution includes an education clause, although they vary from state to state in form, scope, and responsibility. *See* William E. Thro & R. Craig Wood, Commentary, *The Constitutional Text Matters: Reflections on Recent School Finance Cases,* 251 ED. LAW REP. 510, 510 (2010). The education clauses from each state constitution are collected in an appendix to Allen Hubsch, Note, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343 (1992).

[12] *See* CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ."); *id.* § 7(b) ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens . . . ."); *id.* art. IV, § 16(a) ("All laws of a general nature have uniform operation."). For an overview of Equal Protection Clauses in all fifty states, *see* Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 251–60 (1999). For some examples of other states' Equal Protection Clauses that parallel the federal standard, *see* ILL. CONST. art. I, § 2 ("No person shall . . . be denied the equal protection of the laws"); N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof.").

state, and in particular the Legislature, responsible for the creation, financing, and maintenance of the state's education system.

The Constitution states that "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."[13] This section of article IX, section 1 demonstrates the state's textual commitment to a robust educational program, and the Legislature must use "all suitable means" to carry it out.[14] The California Supreme Court declared that this provision indicates that the citizens of California recognize "the advantages and necessities of a universally educated people as a guaranty and means for the preservation of the rights and liberties of the people."[15]

Since 1849, the California Constitution endowed the Legislature with the responsibility of "provid[ing] for a system of common schools" and ensuring that local school districts offer education free of charge.[16] These basic mandates found in article IX, section 5 create California's free public school system and place it under the control of the state legislature. Separate constitutional provisions set out more specific educational requirements, including the Legislature's appointment of the superintendent of public instruction[17] and State Board of Education,[18] who make the

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13 Cal. Const. art. IX, § 1.

14 In her discussion of state education constitutional provisions, Erica Black Grubb categorizes these clauses into four groups. *See* Erica Black Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 Harv. C.R.–C.L.L. Rev. 52, 66–70 (1974). Grubb places California's education provisions in the second to most protective category, in which the textual commitment to education is very strong. *Id.* at 68. She points to the inclusion of the language "all suitable means," as well as the emphasis on the relationship between education and the exercise of basic rights. *Id.* at 68–69.

15 Piper v. Big Pine Sch. Dist. of Inyo Cnty., 193 Cal. 664, 668 (1924). *See also* Ward v. Flood, 48 Cal. 36, 50 (1874) ("[The] advantage or benefit thereby vouchsafed to each child, of attending a public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is, therefore, a right — a legal right — . . . and as such it is protected, and entitled to be protected by all the guaranties by which other legal rights are protected and secured to the possessor").

16 Cal. Const. of 1849 art. IX, § 3; Cal. Const. art. IX, § 5. *See also* N.J. Const. art. VIII, § 4(1) ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools.").

17 Cal. Const. art. IX, § 2.

18 *Id.* § 7.

executive, administrative, and policy decisions for the school system.[19] In addition, the Constitution directs the Legislature to set up the education finance system,[20] the adoption and distribution of free textbooks,[21] the minimum teachers' salary,[22] and the incorporation and organization of local school districts.[23] These specific provisions provide substance and detail to the primary mandate found in section 5. Via the education clauses of the Constitution, California has inextricably intertwined itself with the educational system, making the state responsible for major aspects of public school structure and governance.

B. LITIGATING EDUCATION RIGHTS UNDER CALIFORNIA'S EDUCATION CLAUSES

Because the education clauses include two textual assurances — that education is an essential right of the people and that the state is responsible for the education system — these constitutional provisions have been the subjects of extensive litigation. Plaintiffs have relied on theses clauses to protect and expand their educational rights.[24] Setting aside a handful of limited successes, California courts have not been willing to set out a minimum level of education necessary to satisfy these constitutional provisions. As discussed *infra* in Part I.C, the courts instead have chosen to use the state's equal protection doctrine to define students' educational rights.

A review of a few key cases is useful to understand the courts' reluctance to rely on these clauses to grant a substantive individual right and their eventual turn to the California Equal Protection Clause to uphold

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[19] As agents of the Legislature, the State Board of Education acts as "the governing and policy determining body," CAL. EDUC. CODE § 33301(a)), and the superintendent of public instruction is vested with all executive and administrative functions, *id.* § 33301(b).

[20] CAL. CONST. art. IX, § 6.

[21] *Id.* § 7.5.

[22] *Id.* § 6.

[23] CAL. CONST. art. IX, § 14.

[24] *See* Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991). For a complete analysis of how the wording of a state education clause can affect a challenge to the school funding system, *see* William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation,* 79 EDUC. L. REP. 19 (1993).

students' right to education.[25] The remainder of this section discusses litigation advancing adequacy or equality arguments[26] under the two education clauses: (1) article IX, section 5 which requires the Legislature to provide a free system of public schools,[27] and (2) article IX, section 1 which is a description of the goals and purposes of public schools.[28]

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[25] For a review of caselaw under the education articles in states outside of California, *see* Hubsch, *supra* note 11, at 1336–42; *see also* Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 B.Y.U. Educ. & L.J. 1, 15–18 (1997) (reviewing case history from multiple states brought under the education clauses); Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. Rev. 2241, 2257–69 (2003) (summarizing judicial approaches to interpreting state education clauses).

[26] Historically, education litigation has relied on two distinct approaches. First, in equality suits, plaintiffs assert that all children are entitled to equal educational opportunities or resources. The theory is that equality in resources, money, and opportunities will lead to equal education outcomes, and the analysis involves a comparison between schools or districts in order to measure equality among them. Plaintiffs rely on state equality guarantees extrapolated from state education clauses or on equal protection theories in states where education is a fundamental right. *See* Jared S. Buszin, Comment, *Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy*, 62 Emory L.J. 1613, 1618 (2013); Alan E. Schoenfeld, Note, *Challenging the Bounds of Education Litigation: Castaneda v. Regents and Daniel v. California*, 10 Mich. J. Race & L. 195, 222–25 (2004); Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. Rev. 399, 405–11 (2000) (summarizing the history of caselaw relying on equity arguments).

Second, in adequacy suits, plaintiffs argue that schools failed to provide a minimally adequate education as required by the state constitution. Central to these cases is inadequate educational quality, measured in terms of inputs such as teacher quality or curricular resources or outputs such as test scores or dropout rates. *See* Kagan, *supra* note 25, at 2248–55 (describing the types of inputs and outputs courts can use to measure adequacy). In adequacy suits, plaintiffs assert that the state set a particular quality standard and the schools failed to measure up. *See* Cochran, *supra*, at 411–17 (summarizing the history of caselaw relying on adequacy arguments). These two approaches — equality and adequacy arguments — are often combined in one lawsuit. *See* William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & Pol. 525, 534–37 (1998); *see generally* Richard J. Stark, *Education Reform: Judicial Interpretation of State Constitutions' Education Finance Provisions–Adequacy vs. Equality*, 1991 Ann. Surv. Am. L. 609 (1992) (describing the adequacy and equity approaches to education litigation and arguing that courts often intermingle the two approaches, making it difficult to identify the proper standard to apply).

[27] Cal. Const. art. IX, § 5.

[28] *Id.* § 1.

1. The Undefined Promise of a Free System of Common Schools

Several cases have been litigated under section 5 which requires the Legislature to "provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year . . . ."[29] This clause can be further broken down into two constituent parts: the free school clause and the common schools clause.

The key California case under the free schools clause is *Hartzell v. Connell*.[30] Due to budget shortfalls, a local school district began charging students fees to participate in extracurricular activities, including dramatic productions, musical performances, and athletic teams.[31] After reviewing extensive caselaw establishing the broad purposes of education,[32] the California Supreme Court determined that extracurricular activities are an integral component of public education and that schools cannot charge a fee

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[29] *Id*. § 5. The requirement that the school be kept up "at least six months" has been extended by statute to a minimum of 180 days per school year. *See* CAL. EDUC. CODE § 46200.

[30] 35 Cal.3d 899 (1984).

[31] *Id*. at 902. The school district's program also included a fee-waiver program for students with financial need. *Id*. at 904.

The factual scenario presented in *Hartzell* repeated itself in 2010 as a budget crisis ravaged the state, pushing schools to take unconstitutional measures to support its programs. In *Doe v. State of California*, students alleged that school districts across the state charged illegal fees for educational materials. For example, schools required that students pay for Advanced Placement exams, purchase required workbooks and lab manuals, and buy compulsory physical education uniforms. Complaint at 2, No. BC445151 (Cal. Super. Ct. Dec. 9, 2010), *available at* http://www.schoolfunding.info/news/litigation/CA-ACLUcomplaint.pdf. The complaint sought to enforce the free schools clause of the California Constitution and "ensure that public school districts do not require students to pay fees or purchase assigned materials for credit courses." *Id*. at 18. The students dismissed the lawsuit following the enactment of Assembly Bill 1575, 2012 Cal. Legis. Serv. Ch. 776 (West), which made clear that school fees are illegal and set up a statewide complaint system to identify offending schools. *See* Press Release, *ACLU Wins Fight to Protect Constitutional Right to Free Public Education in California*, ACLU OF SOUTHERN CALIFORNIA, Oct. 1, 2012, https://www.aclusocal.org/aclu-wins-fight-to-protect-constitutional-right-to-free-public-education-in-california.

[32] The *Hartzell* Court examined the role played by education in the state's constitutional scheme, determining that education "prepares students for active involvement in political affairs," "prepares individuals to participate in the institutional structures — such as labor unions and business enterprises," and "serves as a unifying social force." 35 Cal.3d at 907–08.

for student participation.[33] The Court interpreted the free schools clause, holding that "[e]ducational opportunities must be provided to all students without regard to their families' ability or willingness to pay fees or request special waivers."[34] Although the Court relied on the free school clause for its ultimate holding,[35] the language of the decision borrows heavily from equal protection doctrine, signaling the Court's embrace of equality principles as opposed to an interpretation of the education clauses.[36]

In early California case history, some Supreme Court decisions hinted at the possibility that the common schools clause could be a basis for litigating students' right to educational opportunity. In 1893 in *Kennedy v. Miller*, the Court interpreted the system of common schools to "import[] a unity of purpose as well as an entirety of operation, and the direction to

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[33] *Id.* at 911–12.

[34] *Id.* at 913. The Court explained that the waiver provision did not cure the constitutional problem because waiver applications resulted in "stigma" and are a "degrading experience" for needy students and families. *Id.* at 912.

See also Cal. Ass'n for Safety Educ. v. Brown, 30 Cal. App. 4th 1264 (1994) (finding that fees charged by a high school for driver training course violated free school guarantee of the California Constitution because driver training was "educational" in character). *But see* Helena F. v. W. Contra Costa Unified Sch. Dist., 49 Cal. App. 4th 1793, 1800 (1996) (holding state's constitutional obligation to provide free education does not encompass duty to provide schools that are geographically convenient to parent, where district's policy was to temporarily place late enrollees in schools outside of their attendance zone); Arcadia Unified Sch. Dist. v. State Dept. of Educ., 2 Cal.4th 251 (1992) (finding that a statute authorizing charges for school-provided transportation did not violate the free school guarantee because transportation is not an educational activity or an essential element of school activity). A further discussion of the *Arcadia* case and its implications for the California Equal Protection clause can be found at notes 179 to 185 and the accompanying text.

[35] However, a lengthy concurrence to *Hartzell* written by Chief Justice Bird advances an additional support for the holding under the equal protection guarantee of the California Constitution. *See* Hartzell v. Connell, 35 Cal.3d 899, 921–28 (1984) (Bird, C.J., concurring). *See infra* note 176 and accompanying text for a full discussion of the concurrence and its implications for students' basic right to an education in California.

[36] The practice of applying equality principles in education clause litigation is widespread. *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 Vand. L. Rev. 101, 139 (1995) ("In a number of other states, as several commentators have observed, emphasis on the analysis of state education clauses has increased during the past decade. But even with this shift in the primary textual basis of the suits, many litigants and courts have continued to look for the old equality-based arguments in the new education-based texts.").

the Legislature to provide 'a' system of common schools means one system which shall be applicable to all the common schools within the state."[37] The *Kennedy* Court's reading of this clause suggests that the text could be a vehicle for challenging legislative decisions that result in unequal schools, as any resulting inequality could undermine the school system's unity. Further elaboration on the utility and meaning of the clause came thirty years later in *Piper v. Big Pine School District of Inyo County*,[38] in which the Court ordered a school district to admit a Native American girl into its public schools. The Court reasoned that the California Constitution provides all citizens with the right to attend a system of common schools, consisting of a uniform course of study in which pupils advance from one grade to another and are admitted from one school to another pursuant to a system of educational progression.[39] The Court went so far as to declare that the right to attend a system of common schools is an "enforceable right[] vouchsafed to all who have a legal right to attend the public schools."[40] The Court's rationale in *Piper* suggests that the system of common schools clause could have provided a basis for litigants to contest the adequacy of their public schools.

However, the early hopes for the utility of the common schools clause were dashed by the 1970s. In addition to their equal protection arguments, plaintiffs in California's seminal school finance case, *Serrano v. Priest* (*Serrano I*),[41] alleged that the state's school finance system violated the common

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[37] Kennedy v. Miller, 97 Cal. 429, 432 (1893).

[38] 193 Cal. 664 (1924).

[39] *Id.* at 669.

[40] *Id.*

[41] Serrano I, 5 Cal.3d 584 (1971) (en banc). Part I.C discusses *Serrano I* more deeply. However, a cursory review of the facts will be helpful to better understand its use here. In *Serrano I,* plaintiffs claimed the state's public school financing system violated the Constitution because it was primarily based on wealth generated from local property taxes. *Id.* at 589. Students who attended schools in neighborhoods with lower property tax revenues received fewer educational opportunities than students who attended schools in prosperous areas. *Id.* at 599–600. After determining that education is a fundamental right and classification by wealth is suspect, the *Serrano I* Court applied strict scrutiny and struck down the finance system because it "classifies its recipients on the basis of their collective affluence and makes the quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents." *Id.* at 614.

schools clause because the financing method produced separate systems where each district offered a distinct educational program depending on the district's wealth.[42] Although it cited the *Kennedy* and *Piper* decisions, the *Serrano I* Court went on to hold that the common schools provision does not require equal school spending.[43] The Court found that article IX, section 6, which provides for the levying of school district taxes, controlled the school financing system, and to avoid conflicting interpretations, section 5 should not be construed to apply.[44] The *Serrano I* Court's brief discussion of the clause closed it off to future education litigation, limiting the application of the common schools clause to maintaining basic uniformity and progression of grades throughout the state.[45]

Subsequent cases solidify the demise of the common schools clause as a means to pursue students' basic right to education in California. In *Wilson v. State Board of Education*,[46] plaintiffs challenged the Charter Schools Act (the "Act")[47] under several state constitutional provisions. Plaintiffs maintained that the Act violated article IX, section five because it granted charter schools complete control over essential functions of the education system, thereby abdicating the state's responsibility to maintain a system of common schools.[48] The court rejected the argument, reasoning that although the Act delegated educational functions to charter schools, it did not relinquish any power over the system.[49] The court found that the "curriculum and courses of study are not constitutionally prescribed. Rather, they are details left to the Legislature's discretion. Indeed, they do not

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[42] *Id.* at 595.

[43] *Id.* at 595–96.

[44] *Id.* at 596.

[45] *See* Robles–Wong v. State of California, No. RG10-515768 (Cal. Super. Ct. Jan. 14, 2011) (rejecting funding disparity arguments under the education clauses and citing to *Serrano I* for the proposition that these clauses were considered and dismissed as irrelevant by the Supreme Court). It is notable that in *Serrano I* plaintiff used the education clauses to make equity arguments, contending the school finance system produced disparate district outcomes. Whereas in *Robles–Wong,* the litigants relied on the clauses to make adequacy arguments, asserting that all California students are denied an adequate education in violation of these clauses.

[46] 75 Cal. App. 4th 1125 (1999).

[47] Cal. Educ. Code § 47600, et seq.

[48] 75 Cal. App. 4th at 1135.

[49] *Id.*

constitute part of the system but are merely a function of it."[50] The court interpreted the common schools clause as a broad delegation of power to the Legislature to determine the content of education, not an enforcement mechanism for plaintiffs seeking a declaration of minimum educational rights.[51]

2. The Legislature's Broad Discretion to Promote Educational Goals

Similarly, courts refuse to rely on article IX, section 1 as a basis for defining students' substantive educational rights. Arguably, the language of the section, namely that "the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement,"[52] creates a strong textual basis for declaring that California students have the right to receive a basic education.[53] However, California courts have been unwilling to interpret the provision as an affirmative right to a minimum level of education.[54] Instead, courts have interpreted

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[50] *Id.*

[51] A 2006 case in the California Court of Appeal, *Levi v. O'Connell*, 144 Cal. App. 4th 700 (2006), similarly narrowed the applicability and scope of the common schools clause. There, the mother of an extremely gifted 13-year-old college student sought to require the state to pay for her son's state college education. The court dismissed her claim under article IX, section 5, defining the "system of common schools" as encompassing only "a single standard and uniform system of free public K–12 education," not including college or university grades even for exceptionally advanced students. *Id.* at 708.

[52] Cal. Const. art. IX, § 1.

[53] *See* Thro, *supra* note 24, at 53–40; *see generally* Jensen, *supra* note 25 (arguing that state education clauses should be used as a basis for declaring minimum education rights in conformity with the clauses' textual commitment to education and their degree of specificity).

[54] *See, e.g.,* Serrano v. Priest (*Serrano II*), 18 Cal.3d 728, 775 (1976) (en banc) (refusing to rely on article IX, section 1 to uphold the state's school finance system); Long Beach City Sch. Dist. v. Payne, 219 Cal. 598, 606 (1933) (refusing to rely on article IX, section 1 to invalidate a tax statute that imposed a penalty on school districts that had unpaid taxes); Robles–Wong v. State of California, No. RG10-515768 (Cal. Super. Ct. Jan. 14, 2011) (granting a demurrer without leave to amend on claims under article IX, sections 1 and 5, declaring that the provisions do not create a mandatory duty which can be judicially enforced); Williams v. State of California, No. 312236, slip op. at 3 (Cal. Super. Ct. July 10, 2003), *available at* http://www.decentschools.org/court_papers.php (dismissing plaintiffs' cause of action under article IX, section 1 because it found that the provision did not "confer[] a direct right on a litigant to sue for its enforcement" and the "language of the provision is addressed to the Legislature").

this provision as a grant of broad discretion to the Legislature to determine the programs and services that will further the identified goals.[55] This view of section 1 is in conformity with the courts' emphasis on the state, and in particular the Legislature, as the arbiter of the education system.

Despite the courts' prior unwillingness to rely on the education clauses to set forth a quality standard, a pending case before the California Court of Appeal directly presents the issue to the court. In a joint appeal, *Robles–Wong v. State of California*[56] and *Campaign for Quality Education v. State of California*[57] ask the court to decide: "Does the fundamental right to an education under article IX of the California Constitution entitle students to an education of a qualitative level . . . ?"[58] Appellants assert that California's education clauses, like those in twenty-two other states, provide a legal right to challenge the quality of education provided to California students.[59] Appellants propose that courts rely on the academic content standards developed by the state as the means by which to assess whether the qualitative right is fulfilled.[60] The appeal is fully briefed and awaits the court's decision. Based on the discussion above, precedent does not weigh in appellants' favor. Nonetheless, if appellants can convince the court to establish a qualitative standard under the education clauses, it could affect the future of education litigation in California.

3. The Role of the Legislature to Educate All California Children

Even though courts have been disinclined to impute a substantive right to a basic education into the education clauses, they have frequently relied on them for the proposition that the state, and in particular the Legislature, is

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[55] *See* Cal. Teachers Ass'n v. Hayes, 5 Cal. App. 4th 1513, 1528 (1992) (interpreting article IX, section 1 as "plac[ing] a similarly broad meaning upon education" and giving the Legislature broad discretion to define required programs and services).

[56] No. A134424 (Cal. Ct. App. appeal docketed Feb. 1, 2012).

[57] No. A134423 (Cal. Ct. App. appeal docketed Feb. 1, 2012).

[58] Corrected Appellants' Opening Brief at 5, Campaign for Quality Educ. v. State of California, No. A134423 (Cal. Ct. App. July 27, 2012), *consolidated with* Robles–Wong v. State of California, No. A134424 (Cal. Ct. App. July 27, 2012). For a detailed discussion of the trial court's decision on the equal protection claim in *Robles–Wong* and *CQE*, *see infra* Part II.C.

[59] *Id.* at 4, 29–30.

[60] *Id.* at 44–45.

the guarantor of education for California's students. The text of the education clauses[61] and the interpretive caselaw demonstrate that the state has authority over the education system and it delegates to the Legislature the task of defining the content of the educational guarantee. As will be discussed in Part I.C, the state and legislative roles prove key to the courts' decision to rely on the Equal Protection Clause as the thrust of the state's education jurisprudence and to the courts' declaration of education as a fundamental right.

A long history of California caselaw supports the proposition that the ultimate responsibility for education and the operation of the public schools lies with the state, rather than local or municipal governments. As early as 1893, the California Supreme Court declared, "education and the management and control of the public schools [are] a matter of state care and supervision."[62] This notion has been repeated and reaffirmed throughout California's history.[63] Courts ground the state's educational duty in the Constitution, specifically article IX, sections 1 and 5.[64] In reaffirming the supremacy of the state in education matters, courts have gone as far as finding the state liable for education violations at the district level. In *Butt v. State of California,*[65] the California Supreme Court upheld the state's duty to ensure that students in one school district received a full school term. After recounting the case history defining the state's preeminent role in the educational system, the *Butt* Court held that the "State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity."[66]

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[61] *See infra* notes 52 to 73 and accompanying text for a discussion of article IX of the California Constitution, which demonstrates a textual commitment of the education system to the state.

[62] Kennedy v. Miller, 97 Cal. 429, 431 (1893).

[63] *See, e.g.,* Hall v. City of Taft, 47 Cal.2d 177, 179 (1956); Esberg v. Badaracco, 202 Cal. 110, 115–16 (1927); Whisman v. S.F. Unified Sch. Dist., 86 Cal. App. 3d 782, 789 (1978).

[64] *See* Piper v. Big Pine Sch. Dist. of Inyo Cnty., 193 Cal. 664, 669 (1924) ("The education of the children of the state is an obligation which the state took over to itself by the adoption of the Constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state.").

[65] 4 Cal.4th 668, 680–81 (1992).

[66] *Id.* at 685. *See also* Vergara v. State of California, No. BC484642, at *6 (Cal. Super. Ct. Dec. 13, 2013) (rejecting state defendants' argument that summary judgment

Within the statewide education system, the Legislature's power over the public schools has been variously described as "exclusive," "plenary," "absolute," "entire," and "comprehensive, subject only to constitutional constraints."[67] Article IX, sections 1 and 5 identify the Legislature as the branch responsible for education.[68] In addition, the Constitution grants the Legislature authority over key aspects of public school structure and governance, including apportioning the State School Fund,[69] incorporating and organizing school districts,[70] and prescribing the qualifications of local superintendents.[71] In this manner, the California Constitution confers on the state legislature the duty to define the content of the educational guarantee.[72] Courts have found that this constitutional authority includes broad discretion to determine the organization, management, and support of the public school system, as well as the programs and services necessary to accomplish the constitutional goals.[73]

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is warranted because local school districts control teacher retention and citing *Butt* for the proposition that "public education is uniquely a fundamental concern of the State").

[67] *See* Hall, 47 Cal.2d at 181; Pass Sch. Dist. v. Hollywood City Sch. Dist., 156 Cal. 416, 419 (1909); San Carlos Sch. Dist. v. State Bd. of Educ., 258 Cal. App. 2d 317, 324 (1968); Town of Atherton v. Superior Court, 159 Cal. App. 2d 417, 421 (1958); s*ee also* Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1134–35 (1999) ("There can thus be no doubt that our Constitution vests the Legislature with sweeping and comprehensive powers in relation to our public schools, including broad discretion to determine the types of programs and services which further the purposes of education.") (internal quotations omitted).

[68] *See* Cal. Const. art. IX, § 5 ("The *Legislature shall* provide for a system of common schools . . . .") (emphasis added); *id.* § 1 ("[T]he *Legislature shall* encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.") (emphasis added).

[69] *See id.* § 6.

[70] *See id.* § 14.

[71] *See id.* § 3.1.

[72] The delegation of educational responsibility to the Legislature is not unique to California. *See* Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education As A Federally Protected Right*, 51 Wm. & Mary L. Rev. 1343, 1402 (2010) ("[T]he language of state educational clauses consistently indicates that the responsibility for providing education rests with the state or, more specifically, with the state legislature.").

[73] *See* MacMillan v. Clarke, 184 Cal. 491, 496 (1920); Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1134–35 (1999) ("There can thus be no doubt that our Constitution vests the Legislature with sweeping and comprehensive powers in relation to our public

The structure of California's education system — with the state ultimately responsible for educating all California children and the Legislature specifically managing public school affairs — provided a foundation for the courts to declare education a fundamental right in California and the state Equal Protection Clause as the mechanism to protect this substantive individual right.

C. LITIGATING EDUCATION RIGHTS UNDER THE CALIFORNIA EQUAL PROTECTION CLAUSE

Although state courts closed off the education clauses as a means for litigating education rights, the California Supreme Court embraced claims for equal educational opportunity under the Equal Protection Clause. Prior to the U.S. Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*,[74] California public school children and their parents challenged the constitutionality of California's public school financing system under the Equal Protection Clauses of the state and federal constitutions in *Serrano I*.[75] In striking down the funding scheme, the California Supreme Court determined that the right to an education in California public schools is a fundamental right which cannot be conditioned on wealth.[76]

The Supreme Court set forth a two-part test to hold education fundamental for California students. At step one, the Court examined the importance of education in the state, identifying its significance to the individual and society.[77] Citing federal and state decisions,[78] the Court concluded that

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schools including broad discretion to determine the types of programs and services which further the purposes of education.") (internal citations omitted); Cal. Teachers Ass'n v. Hayes, 5 Cal. App. 4th 1513, 1528 (1992) (same).

74 411 U.S. 1, 33 (1973) (finding that education is not a fundamental right under the federal constitution).

75 *Serrano I*, 5 Cal.3d 584 (1971) (en banc).

76 *Id.* at 614. An examination of the case's implications for students' minimal education rights is discussed *infra* in Parts I.3 and II.1.

77 *Id.* at 605.

78 The *Serrano I* Court spends several pages discussing decisions by the United States Supreme Court and the California Supreme Court that "while not legally controlling on the exact issue before us — are persuasive in their accurate factual description of the significance of learning." *Id.* at 605. The cited cases include: *Brown v. Board of Education*, 347 U.S. 483 (1954), for the proposition that education is one of the most important functions of the state and must be made available on equal terms (*Serrano*

education is "a major determinant of an individual's chances for economic and social success in our competitive society" and influences a "child's development as a citizen and his participation in political and community life."[79] In step two, the Court looked for a nexus between the right to an education and other rights guaranteed under the federal and state constitutions.[80] Specifically, the Court compared the right to education with defendants' rights in criminal cases and the right to vote.[81] The Court found that education has a "greater social significance than a free transcript or a court-appointed lawyer" has to a criminal defendant because education affects more people and supports "every other value" in a democracy.[82] Moreover, there is a link between voting and education as they both are integral to full participation in, and the functioning of a democracy.[83] Here, the Court explicitly relied on one of California's education clauses, article IX, section 1, for the proposition that the drafters of the California Constitution recognized education as "essential to the preservation of the rights and liberties of the people" in the same way that voting preserves other basic civil and political rights.[84]

Two years later, in *Rodriguez* the U.S. Supreme Court upheld Texas' public school financing system, which was substantially similar to California's.[85] In reaching its conclusion, the Court held inter alia that education

I, 5 Cal.3d at 606), *San Francisco Unified School District v. Johnson*, 3 Cal.3d 937 (1971), and *Jackson v. Pasadena City School District*, 59 Cal.2d 876 (1963) — two racial integration cases the Court cited to demonstrate the damaging outcomes resulting from an unequal education, including "unequal job opportunities, disparate income, and handicapped ability to participate in . . . our society" (*Serrano I*, 5 Cal.3d at 606 (quoting *Johnson*, 3 Cal.3d at 950); and *Manjares v. Newton*, 64 Cal.2d 365 (1966), and *Piper v. Big Pine School District of Inyo County*, 193 Cal. 644 (1924), cases where public schools excluded minority students, which portended to the Court that "surely the right to an education today means more than access to a classroom." *Serrano I*, 5 Cal.3d at 607.

79 *Serrano I*, 5 Cal.3d at 605.

80 *Id.* at 607.

81 *Id.*

82 *Id.*

83 *Id.* at 608.

84 *Id.* (quoting Cal. Const. art. IX, § 1).

85 San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 6–17 (1973). Just as in *Serrano I,* in *Rodriguez* parents of public school students claimed that Texas' public school financing system denied equal protection because it produced unequal spending between school districts in the state. The districts collected property taxes on the basis

was not a fundamental interest entitled to strict scrutiny under the federal Equal Protection Clause.[86] The Court asked whether the interest was explicitly or implicitly guaranteed or protected by the terms of the federal constitution.[87] Finding that the Constitution did not include an education clause and that the Court could not imply a federal constitutional education right based on its nexus to other rights, the Court concluded that education was not a fundamental right entitled to strict scrutiny.[88]

The *Rodriguez* Court stated several rationales to support its holding. First, the Court found that it lacked the "specialized knowledge and expertise" necessary to solve the difficult questions of educational policy that these cases presented.[89] Second, federalism counseled against "interference with the informed judgments made at the state and local levels."[90] The Court found that the Texas system and education systems generally are primarily matters of local district control, and therefore, the state has limited responsibility for disparities between school districts.[91] Out of respect for federalism and local control over education, the Legislature and by extension local school districts should be afforded great deference in the way it funds and manages education.[92] Finally, the Court classified unequal education as a social or economic ill, similar to unequal housing or welfare, which warrants only rational basis review.[93] All three of the

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of assessed property values which resulted in sizable disparities in the amount of tax resources available to each school district. Although the state provided contributions to districts to reduce the disparity, substantial inequalities remained. *Id.* at 15–16.

86 *Id.* at 33–34.

87 *Id.* at 33.

88 *Id.* at 35. In rejecting the nexus theory, the Court refused to find that "education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote," explicitly rejecting the argument the California Supreme Court found persuasive in *Serrano I*. *Id.*

89 *Id.* at 42.

90 *Id.*

91 *Id.* at 50.

92 *Id.* at 42, 49–51.

93 *Id.* at 32–33. *See* Black, *supra* note 72, at 1396 ("[T]he [*Rodriguez*] Court treated education as a low-level interest that placed no obligations on the State. In effect, the Court treated education as being equivalent to a state-sponsored bus voucher that the State might freely offer or withhold."); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 Tex. L. Rev. 777, 850 (1985) ("The Court was not persuaded that educational activities in general are more essential to the meaningful exercise

Court's rationales supported its overarching precept that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[94]

The reasoning and outcome in *Rodriguez* prompted the defendants in *Serrano I* to challenge the California Supreme Court's decision that education was a fundamental right. When *Serrano v. Priest* (*Serrano II*)[95] returned to the Supreme Court, it reexamined its analysis and holding that California students' have a fundamental right to equal educational opportunity. Finding that *Rodriguez* removed the federal ground for declaring education a fundamental interest, the Court upheld the *Serrano I* decision on the basis that the state grounds were "wholly intact."[96] The *Serrano II* Court made clear that state equal protection doctrine is "possessed of an independent vitality which . . . may demand an analysis different from that which would obtain if only the federal standard were applicable."[97] The Court rejected the test for fundamentality used in *Rodriguez*[98] and reaffirmed the test and reasoning used in *Serrano I*.[99]

In several respects, the *Serrano II* Court rejected the rationales relied on in *Rodriguez*. First, the California Supreme Court rejected being characterized as an amateur in the field of school financing, and instead relied on the trial record, expert opinions, briefing, and amici curiae to equip it with the necessary knowledge.[100] Second, the Court found federalism

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of constitutional rights than are housing and welfare. The Court expressed concern that application of strict scrutiny to all claims involving education could lead to strict scrutiny for other social welfare programs as well.").

94 *Id.* at 30.

95 *Serrano II*, 18 Cal.3d 728 (1976) (en banc).

96 *Id.* at 763.

97 *Id.* at 764.

98 *Id.* at 767. In rejecting the *Rodriguez* approach for declaring a right fundamental, the *Serrano II* Court stated that whether the right is implicitly or explicitly guaranteed by the California Constitution is immaterial to the Court's determination of whether the right is fundamental. *Id.*

99 *Id.* at 767–68. The Court clarified that the test used in *Serrano I* examines whether the right is one of the "individual rights and liberties which lie at the core of our free and representative form of government." *Id.*

100 *Id.* at 767. This explanation appears specious, as the U.S. Supreme Court was equipped with similar documents, facts, and expert testimony, making both the state

concerns inapposite because the state confronted the constitutionality of its own financing scheme.[101] In addition, in California local school districts do not have ultimate control over the education system; instead, education is within the province of the state.[102] Thus, the *Rodriguez* Court's assumption that education matters should be left in the hands of school district leaders is inapplicable to California where the state has the "constitutional power and responsibility for ultimate control" of the schools.[103] Finally, the *Serrano II* Court affirmed the *Serrano I* Court's application of the two-step test that *Rodriguez* rejected, analyzing the "indispensable role which education plays in the modern industrial state" in determining that education is fundamental.[104] As in *Serrano I,* the *Serrano II* Court in part relied on an education clause in the California Constitution, article IX, section 1, to affirm that education is "essential" to Californians.[105] Although California's education clauses do not provide the legal grounds for the Court's declaration of a fundamental right to education,[106] they do provide support for the Court's decision to reach this holding under the California Equal Protection Clause.[107]

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and federal supreme courts equally expert in the field of school funding. The courts' disparate level of comfort with education policy could stem from the fact that state courts hear education cases more frequently than federal courts. Since state entities enact the majority of education statutes and regulations, state courts have more opportunities to grapple with education policy issues and therefore feel more equipped to handle cases in the field. *See* Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & Educ. 93, 93 (1989) ("In the past decade and a half, however, the federal judicial shadow has begun to shorten, and the state courts have begun to be exposed to the light of judicial challenges which represent the forefront of education litigation.").

101 *Serrano II*, 18 Cal.3d at 767.

102 *See supra* Parts I.2.B and C.

103 Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1135 (1999).

104 *Serrano I*, 5 Cal.3d 584, 605 (1971) (en banc).

105 *See Serrano II*, 18 Cal.3d at 767–68, 775 (discussing in part Cal. Const. art. IX, § 1).

106 *See supra* Part I.B.

107 *Cf. Serrano II*, 18 Cal.3d at 678 n.48 ("We do not suggest, of course, that the treatment afforded particular rights and interests by the provisions of our state Constitution is not to be accorded significant consideration in determination of [whether a right is fundamental]. We do suggest that this factor is not to be given conclusive weight."). As discussed in note 98, *Serrano II* refused to adopt the fundamental rights test used in *Rodriguez* which required the Court to examine whether the right was

1. The Equal Protection Clause, Not the Education Clauses, Protects Students' Fundamental Right to Education

California courts have not provided a clear justification for allowing claims to basic educational opportunity under the Equal Protection Clause, as opposed to the education clauses. However, guidance from federal precedent, the pull of equality arguments, and the constitutionally-defined structure of California's education system provide support for California courts' embrace of the Equal Protection Clause as a means to define students' education rights.

If they chose to rely on state education clauses as the main source for education rights, California courts would have to generate constitutional interpretations, doctrine, and principles where none existed before. This places an enormous burden on state judges tasked with defining the meaning of a constitutional clause for the first time. Instead of inventing state constitutional doctrine, state courts can apply established equal protection concepts found in federal constitutional caselaw.[108] In the area of equality litigation specifically, federal law is substantially more developed than state law.[109] State courts are grateful for the guidance and structure provided by federal equal protection doctrine when analyzing education equality claims. Moreover, as a general rule, courts avoid devising new constitutional principles when established principles will dispose of the

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implicitly or explicitly guaranteed by the Constitution. The Court feared that this test could be used to declare every affirmative right mentioned in the California Constitution as fundamental. Therefore, for the *Serrano II* Court, the explicit inclusion of education clauses in the Constitution was persuasive evidence of the right's fundamental status, but it was not sufficient.

[108] *See* Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading As Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. Pitt. L. Rev. 231, 288 (1998) ("[S]tate decisions regarding provisions in the state constitution similar to clauses in the Federal Constitution are often interpreted under the same analytic framework utilized by the Supreme Court."); Robert F. Williams, *Equality Guarantees in State Constitutional Law,* 63 Tex. L. Rev. 1195, 1196–97 (1985); Note, *Developments in the Law: The Interpretation of State Constitutional Rights,* 95 Harv. L. Rev. 1324, 1344–49 (1982).

[109] *See* Molly McUsic, *supra* note 24, at 312 ("Most state courts have little state history or previous case authority to rely on when interpreting their equal protection clauses."); Ratner, *supra* note 93, at 829 n.215; Williams, *supra* note 108, at 1218 ("The [state] courts developed relatively little in the way of equality 'doctrine.'").

case.[110] State courts therefore may shy away from new education clause jurisprudence, knowing that they could reach the outcome under established equal protection principles. Finally, state courts face considerable pressure to harmonize their decisions with federal precedents.[111] Some of this pressure may come from the state judges' and citizens' sense that the federal judiciary is more qualified, thorough, or experienced. Historically, civil rights cases guaranteeing equality were filed in federal court under the U.S. Constitution. Thus, judges and litigants turn to federal, and not state, precedent to interpret the meaning of equality. Recognizing state courts' reliance on federal jurisprudence, a state court judge noted, "We simply cannot reason or argue about what state constitutional law should be without resort to principles of federal constitutional law, for the very vocabulary of constitutional law is a federal vocabulary."[112]

A second explanation for the courts' reliance on equal protection doctrine as opposed to the text found in the state's education clauses is the strong pull equality arguments have on our legal and political sensibilities.[113] Because the Equal Protection Clause has long been used in support of basic civil rights,[114] arguments that conform to the style and structure of equal opportunity resonate with the public. The shared societal belief in equality provides further explanation for the California courts' reliance on the Equal Protection Clause in education cases.

A final justification for the courts' selection of equal protection principles is the constitutionally-defined structure of California's education

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110 *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–49 (1936) (Brandeis, J., concurring).

111 *See* Note, *supra* note 108, at 1460 ("Most education claims . . . are decided by some method that relates state constitutional law to the 'higher' law in our system — the federal Constitution."); Brennan, *The Bill of Rights and the States, supra* note 2, at 551 ("As tempting as it may be to harmonize results under state and national constitutions, our federalism permits state courts to provide greater protection to individual civil rights and liberties if they wish to do so."); *see also* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result,* 35 S.C. L. Rev. 353, 356 (1984).

112 The Honorable Edmund B. Spaeth, Jr., *Toward A New Partnership: The Future Relation Ship of Federal and State Constitutional Law*, 49 U. Pitt. L. Rev. 729, 736 (1988).

113 *See* Enrich, *supra* note 36, at 143.

114 *See* Plyer v. Doe, 457 U.S. 202 (1982); Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

system. The education clauses assign the state legislature and state executive officials plenary authority over the provision and content of education.[115] The separation of powers doctrine, found in article III, section 3, restrains the courts' authority to interfere with the constitutional roles of the executive and Legislature.[116] Given these constitutional constraints, courts hesitate to restrict the state's exclusive ability to determine what constitutes a "system of common schools"[117] or the suitable "promotion of intellectual, scientific, moral, and agricultural improvement."[118] As outlined in the education clauses and the separation of powers clause, courts must respect the discretion committed to the other branches and officials to determine the content and structure of education.[119] This structure forced judges to look elsewhere in the Constitution to protect education rights.

More broadly, courts interpreting the California Constitution have repeated:

> Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in

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115 *See supra* notes 52 to 73 and accompanying text.

116 Cal. Const. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").

117 *Id.* art. IX, § 5.

118 *Id.* § 1.

119 *See, e.g.,* Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1137 (1999) (holding that the Charter Schools Act was within the Legislature's discretion and deferring to the Legislature's finding that charter schools are part of the public school system under article IX); Cal. Teachers Ass'n v. Hayes, 5 Cal. App. 4th 1513, 1533 (1992) (relying on the state's constitutional structure and deferring to the legislative determination that funds granted to early childhood education and child development agencies were within the scope of the constitutional provision requiring moneys be applied "for the support of school districts"). Courts in states with education clauses similar to California's likewise grant legislatures wide discretion to enact education legislation. *See* Hubsch, *supra* note 11, at 1326 ("The single most difficult issue facing advocates of educational entitlement is state judicial deference to the state legislatures' efforts to establish and maintain a state-wide system of education. . . . [S]ome state supreme courts have cited explicit constitutional language, which they interpret as favoring exclusive legislative responsibility for education, as justification for deferring to such legislatures.").

> the Legislature, and that body may exercise any and all legislative powers which are not expressly, or by necessary implication denied to it by the Constitution . . . . Secondly, all intendments favor the exercise of the Legislature's plenary authority: If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.[120]

This understanding of the state constitution undergirds the courts' hesitation to rely on the education clauses to strike down education legislation. The first consequence identified by the courts mirrors the language and interpretation of the education clauses. That is, the Legislature is vested with the entirety of the education powers. The second consequence supports the courts' willingness to grant the Legislature full discretion to act pursuant to the education clauses, and to bar legal challenges to state action under these clauses. Not only is the Legislature vested with full educational authority, but the court also construes all doubt in favor of the legislative enactment. Moreover, the court will not read into the constitutional language any restrictions that are not plainly evident from the text. Therefore, the court must interpret the education clauses — which are phrased as positive grants of legislative authority and do not include any restrictive or limiting language — in the manner most favorable to the Legislature. Should plaintiffs challenge the Legislature's ability to act or its failure to act pursuant to the education clauses, the court will likely uphold the Legislature's decision, as there are no explicit restrictions on the Legislature's education clause powers.[121] Given the text of the education clauses, the separation of powers

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[120] *Hayes*, 5 Cal. App. 4th at 1531–32 (quoting Pac. Legal Found. v. Brown, 29 Cal.3d 168, 180 (1981)) (internal citations omitted). *See also* William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 Va. L. Rev. 1639, 1656–57 (1989) ("[W]hile the federal Constitution is one of limited powers — the federal government can only do those things explicitly or implicitly specified in the document — state constitutions establish limitations on otherwise unlimited power; the states can do anything except that prohibited by the federal or state constitutions.").

[121] In *Arcadia Unified School District v. State Department of Education*, 2 Cal.4th 251 (1992), plaintiffs challenged a statute authorizing school districts to charge fees for

doctrine, and the interpretation of the California Constitution, the education clauses were not a feasible means for the courts to identify students' right to basic educational opportunities.

Unlike the education clauses, the Equal Protection Clause does not limit the courts' ability to override the Legislature's educational determinations. First, the Equal Protection Clause is a restriction and limitation on the Legislature's power, not a positive grant of authority. "A person *may not be* . . . denied equal protection of the laws . . . ."[122] Moreover, California courts reiterate that the Legislature's power over the public school system is "plenary, subject only to constitutional restraints."[123] Since the constitutional restraints noted by the courts are not found in the education clauses, as discussed above, they must find their source in non-education sections, such as the Equal Protection Clause. The historical role of the equal protection doctrine as an external limit on the exercise of legislative power supports this construction.[124] In two key education cases, the California Supreme Court stated that the Equal Protection Clause limits the Legislature's control

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pupil transportation. *Id.* at 259–60. The California Supreme Court upheld the statute under the free schools clause of the California Constitution in part because "it is our duty to uphold [the legislative enactment] unless its unconstitutionality is clear and unquestionable." *Id.* at 265. Thus, the *Arcadia* Court echoed that the education clauses should be resolved in favor of the legislative action. This case also involved challenges under the Equal Protection Clause which is discussed more fully at notes 179 to 185 and accompanying text.

122 Cal. Const. art. I, § 7(a) (emphasis added). The Equal Protection Clause of the California Constitution incorporates several clauses. *See Butt*, 4 Cal.4th at 678 (defining the equal protection guarantee of the California Constitution as including article I, sections 7 (a), (b) and article IV, section 16).

123 *Wilson*, 75 Cal. App. 4th at 1134 (citing Hall v. City of Taft, 47 Cal.2d 177, 180–81 (1956) and *Hayes*, 5 Cal. App. 4th at 1524); *Butt*, 4 Cal.4th at 681.

124 For a survey of the early history of the Equal Protection and Due Process Clauses as a judicial check on legislative action, *see* Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations of Legislatures*, 3 Tex. L. Rev. 1, 23 (1924) ("Due process and equal protection, then, combined were being construed with broad enough scope to prevent all arbitrary legislative and administrative acts, and like certain other implied limits on legislatures, the equal protection principle was made an essential part of the concept of due process of law."). *See also* Sonja Ralston Elder, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 Duke L.J. 755, 766 (2007) ("It is precisely because each branch of government is charged with different duties that the courts' deference to the legislative and executive branches must have limits: without

over education.[125] In both cases, the Court declares that legislative actions authorized by the education clauses are nonetheless subject to constitutional invalidation under the Equal Protection Clause.[126]

2. Declaring Students' Minimum Right to Education under the Equal Protection Clause

In *Serrano I* and *II,* the California Supreme Court settled on the Equal Protection Clause as the means to litigate students' education rights. In subsequent caselaw, California courts have expanded equal protection principles to permit claims alleging both inequity and inadequacy in the public school system.

When the Court finds that a legislative action impinges on a fundamental right, strict scrutiny prohibits a difference in treatment unless it is necessary to achieve a compelling government interest.[127] In *Serrano I*, the Court found that the state's education finance system impinged on students' fundamental right to education because the quality of a child's education differed depending on the wealth of her parents and neighbors.[128]

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such limits, the courts could not fulfill their function as the ultimate protector of the people's rights.").

[125] *See Butt*, 4 Cal.4th at 685 ("The State claims it need only ensure the six-month minimum term guaranteed by the free school clause . . . . Whatever the requirements of the free school guaranty, the equal protection clause precludes the State from maintaining its common school system in a manner that denies the students of one district an education basically equivalent to that provided elsewhere throughout the State."); *Serrano II*, 18 Cal.3d 728, 775 (1976) (en banc) ("[A]rticle IX, section 1 . . . neither mandate[s] nor approve[s] a [finance] system such as that before us, and therefore the only conflict which here appears is that between the requirements of our state equal protection provisions and the proven realities of the present, legislatively created California public school financing system — a conflict which the trial court, by holding that system to be invalid, properly resolved").

[126] *See Serrano II*, 18 Cal.3d at 772–73 ("By its exercise of [its article IX] power, [the Legislature] has created a system whereby disparities in assessed valuation per ADA among the various school districts result in disparities in the educational opportunity available to the students within such districts. . . . It is that action, which we reiterate is the product of Legislative determinations, that we today hold to be in violation of our state provisions guaranteeing equal protection of the laws.").

[127] *See id*. at 761; *see also* Hardy v. Stumpf, 21 Cal.3d 1, 7 (1978) ("[W]hen state action . . . abridges some fundamental right, such action becomes subject to strict judicial scrutiny and the state must show a compelling state interest in justification.").

[128] *See Serrano I*, 5 Cal.3d 584, 614 (1971) (en banc).

In other words, the education offered to students in a low-income district, such as Baldwin Park, was unequal to the education provided to students in, for example Beverly Hills, where property values were high.[129] Applying strict scrutiny to the unequal system, the Court found the funding scheme was not necessary to achieve any compelling state interest.[130]

Twenty years later in *Butt v. State of California*,[131] the Court revisited the constitutional standard set forth in *Serrano I* and *II* and expanded its protection of students in cases implicating a fundamental right to education. In *Butt*, a school district intended to close six weeks early due to fiscal mismanagement and insufficient funding.[132] The California Supreme Court stated the closure would deny the district's students their right to "basic educational equality" and ordered the state to ensure the schools remained open for the remainder of the prescribed school year.[133] In this manner, the Court expanded on the traditional analysis employed in equal protection cases, namely, comparing similar groups of students to determine whether one or more were denied educational opportunities available to others.[134] The Court supplemented this equality inquiry with an adequacy standard. In order to identify whether a class of students was denied an educational opportunity, the Court asked whether the "quality of the [educational] program, viewed as a whole, falls fundamentally below prevailing statewide standards."[135] If an identifiable group receives an educational program which fails to meet this adequacy standard, the Court applies strict scrutiny to the action.[136] In declaring that all students are entitled to "basic educational equality," the *Butt* Court established a minimum level of educational

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129 *Id.* at 594–95.

130 *Id.* at 610–11.

131 4 Cal.4th 668 (1992).

132 *Id.* at 673.

133 *Id.* at 704.

134 *See* Cooley v. Superior Court, 29 Cal.4th 228, 253 (2002) ("The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.") (internal citations omitted).

135 *Id.* at 686–87.

136 *See id.* at 692 ("Because education is a fundamental interest in California, denials of basic educational equality on the basis of district residence are subject to strict scrutiny.").

quality which the state is obligated to provide all California students on equal protection grounds.[137]

Uniquely, the California courts have used the state's Equal Protection Clause to establish a baseline, or minimum standard for educational quality in the state.[138] Traditionally, the Equal Protection Clause was only a vehicle for educational equality arguments, including, for example, claims of disparate resources or funding among schools or districts throughout the state. The California Supreme Court expanded equal protection doctrine declaring that California students deserve a basic level of education and the state is responsible for providing it. The California courts thus transformed the state's fundamental right to education under the Equal Protection Clause, construing it not only as a basis for equality arguments but also as a basis for adequacy arguments.[139] According to the Court, all California students deserve an education which does not fall fundamentally below statewide standards.[140] However, California courts have not set forth any criteria to identify "prevailing statewide standards" or established any guidelines for

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137 *Id.* at 692 ("[T]he State is obliged to intervene when a local district's fiscal problems would otherwise deny its students basic educational equality, unless the State can demonstrate a compelling reason for failing to do so.").

138 *But see* Serrano v. Priest (*Serrano III*), 20 Cal.3d 25, 36, n.6 (1977) ("The equal protection-of-the-laws provisions of the California Constitution mandate nothing less than that all such persons shall be treated alike. If such uniformity of treatment were to result in all children being provided a low-quality educational program, or even a clearly *inadequate* educational program, the California Constitution would be satisfied.") *Serrano III* ruled on plaintiffs' claim for attorneys' fee; therefore, this footnote is arguably dicta. Nevertheless, *Butt*, 4 Cal.4th 686 (1992), impliedly overrules this footnote in *Serrano III* by incorporating adequacy language into its holding.

139 *See* Enrich, *supra* note 36, at 114 (In *Butt*, "[t]he court strained to avoid casting the issue in adequacy terms, relying instead on students' rights to "'basic' educational equality," even where the result was to provide a spendthrift school district with a disproportionate share of state funds. Still, the case serves as a reminder that solutions focused on equalization do not resolve, and may in fact exacerbate, concerns about adequacy."). For a similar conflation of adequacy and equality arguments by the New Jersey Supreme Court, *see Robinson v. Cahill*, 62 N.J. 473 (1973), where the court characterized its constitutional education requirement in terms of equality, and then declared a qualitative standard: "A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command." *Id.* at 513.

140 *See Butt*, 4 Cal.4th at 687.

examining students' "basic educational equity."[141] The goal of the remainder of this article is to explore the courts' varied holdings on "basic educational equality" under the state's Equal Protection Clause and to suggest arguments which may push the court to raise the minimum bar.

II. THE EQUAL PROTECTION CLAUSE

A. THE COURTS GIVE: EXPANDING STUDENTS' RIGHTS UNDER CALIFORNIA'S EQUAL PROTECTION CLAUSE

There are three precedential cases which upheld claims to enforce students' right to basic educational equity. The three courts addressed whether an allegedly inadequate educational program or service should be incorporated into California's right to basic educational equity. Although their factual scenarios differ, the courts' analyses can similarly be broken down into a two-part test.[142] First, the court factually compares the students who purportedly lack a given resource with students whose educational program includes said resource.[143] The court asks whether the allocation of the resource to the district or school falls fundamentally below the distribution made to its peers.[144] The courts' analysis under the first part can involve numeric or statistical comparisons: for example, the amount of money districts spend on education. Second, the court examines whether a deficiency in the given resource results in inferior educational quality

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[141] *See* Thro, *supra* note 26, at 544 (arguing that if the court establishes that education is a fundamental right, "then the analysis must proceed to determining the nature of that standard or right").

[142] This test is not explicitly identified by the courts. Instead, it is the author's interpretation of the caselaw viewed through modern cases and looking backward. This test is an attempt to harmonize the reasoning from the precedent in order to provide litigants with a cogent means of understanding the court's past jurisprudence and uniformly applying it to upcoming and potential cases.

[143] *See Butt*, 4 Cal.4th at 686 ("A finding of constitutional disparity depends on the individual facts.").

[144] *Id.* at 685 ("[T]he equal protection clause precludes the State from maintaining its common school system in a manner that denies the student of one district an education basically equivalent to that provided elsewhere throughout the state."). In a straightforward example, the court may ask whether a school's average number of instructional minutes per day falls fundamentally below the number of minutes spent by all other schools in the district.

outcomes. In essence, the court looks for a link between the unequal distribution of the resource and unequal educational attainment.[145] If the court answers both parts of the test affirmatively, then it applies strict scrutiny to the state action and will likely find that the students' fundamental right to education has been infringed and strike down the statute or action.

In the *Serrano* cases, the California Supreme Court found that the state's education finance system deprived students of equal educational opportunities in violation of their fundamental right to education.[146] First, the Court compared the results of the state funding formula in districts with large and small local tax bases, examining the monetary disparities in per-pupil expenditures.[147] The Court found that "districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts."[148] Thus, some students had access to schools with substantial monetary resources, while other students did not. Second, the Court equated the revenue disparity between school districts with an equivalent differential in educational quality.[149] The Court held that the state financial aid distribution formula was unconstitutional because it made the quality of a child's education dependent upon the resources of her school district, where students in

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145 Building on the example in note 144, the court can ask whether the reduction in instructional minutes results in insufficient preparation for state exams, ineligibility for promotion to the succeeding grade, or an inability to cover key educational material.

146 *See Serrano II*, 18 Cal.3d 728, 765–66 (1976) (en banc); *Serrano I*, 5 Cal.3d 584, 614 (1971) (en banc).

147 *See Serrano I*, 5 Cal.3d at 594–95. The Court described that under the funding formula Baldwin Park Unified School District expended $577.49 to educate each student, while Beverly Hills Unified School District paid out $1,231.72 per pupil. *Id.*

148 *Id.* at 598.

149 *See Serrano II*, 18 Cal.3d at 747 ("Substantial disparities in expenditures per pupil among school districts cause and perpetuate substantial disparities in the quality and extent of availability of educational opportunities."); *Serrano I*, 3 Cal.3d at 600–01 ("[P]oorer districts are financially unable to raise their taxes high enough to match the educational offerings of wealthier districts."); *see also id.* at 601 n.16. *But see* Buszin, *supra* note 26, at 1630 ("Evidence indicates that equalizing finances between districts in California did not equalize educational outcomes among students across districts in the wake of the Serrano school finance decisions.").

wealthy districts could obtain a higher quality of education compared to their peers in lower-income districts.[150]

In *Butt,* the Court held the state responsible for ensuring that a school district had the necessary funds to complete the final six weeks of the school term.[151] The Court found that the local district's "unplanned truncation" of the school year fell fundamentally below prevailing statewide standards and denied students basic equality of educational opportunities.[152] The Court first compared the length of the contested school year in the Richmond Unified Schools to the duration at most other schools.[153] The Court found that nearly every other school district in California held classes on at least 175 days, while Richmond would lose approximately one-fifth of that time.[154] Based on teachers' declarations, the Court linked this disparity in instructional days to "extreme and unprecedented disparities in educational service and progress," thereby impeding academic promotion, high school graduation, and college entrance.[155] Because plaintiffs would lose an unprecedented amount of instruction time compared to their statewide peers, the Court found that the district's program fell fundamentally below prevailing statewide standards and that the state had the ultimate responsibility to ensure that plaintiffs' school did not violate their constitutional right to receive a basic equality of educational opportunity.[156]

Under a broad but plausible reading of *Butt,* the case stands for the proposition that students' basic right to education necessarily includes the opportunity to receive relatively equal instruction time. Alternatively, *Butt* may provide students with an equal protection claim against the state when a state or local action causes an unplanned and substantial reduction

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150 *See Serrano II,* 18 Cal.3d at 748 (finding that students in high-wealth districts had access to a "higher quality staff, program expansion and variety, beneficial teacher-pupil ratios and class sizes, modern equipment and materials, and high-quality buildings"); *id.* ("[D]ifferences in dollars do produce differences in pupil achievement.").

151 *See Butt*, 4 Cal 4th at 692.

152 *Id.* at 686.

153 *Id.* at 686–87.

154 *Id.* at 687 n.14.

155 *Id.* at 687. The teachers' declarations evidenced that the unplanned closure would prevent teachers from completing necessary instruction and grading required for, for example, success on the SATs, eligibility for advanced-level courses, promotion to the succeeding grade, and awarding of high school diplomas. *Id.* at 687 n.14.

156 *Id.* at 692.

in educational services. The latter interpretation of *Butt* provides litigants with a forceful basis to challenge state actions which impinge on students' basic right to educational equity.

Most recently, in *O'Connell v. Superior Court,*[157] the California Court of Appeal addressed students' fundamental right to education under the Equal Protection Clause. Plaintiffs moved to enjoin the state from denying diplomas to public high school students who were otherwise eligible to graduate, but had not passed the California High School Exit Exam ("CAHSEE").[158] The court noted that over 40,000 students in the class of 2006, more than nine percent had not passed the CAHSEE. Non-passage was even higher among vulnerable subgroups.[159] The students claimed that the disparity in passage rates was due to the state's failure to provide non-passing students with the educational resources necessary to enable them to do well on the exam.[160] Affirming the trial court's conclusion that plaintiffs established a likelihood of success on their equal educational opportunity claim, the appeals court accepted the lower court's finding that the resources available to students in schools serving English learners and economically needy neighborhoods were unequal to the resources available to students in non-disadvantaged schools.[161] Due to the schools' scarcity of resources, non-passing students did not have an equal opportunity to learn the tested material.[162] In an unusually broad pronouncement of the content of students' basic education right, the appeals court accepted the trial court's implicit conclusion that the "right of equal access to education includes the right to receive equal and adequate instruction regarding all specific high school graduation requirements imposed by the state, including passing both portions of the CAHSEE."[163]

Serrano I and *II*, *Butt*, and *O'Connell* are successful challenges to state actions which failed to provide students with basic educational equity. In

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157 141 Cal. App. 4th 1452 (2006).

158 *Id.* at 1457.

159 *Id.* at 1460 n.5. Among the noted subgroups, Hispanics had a 15 percent non-passage rate, African Americans were at 17 percent, economically disadvantaged students were at 14 percent, and 23 percent of English language learners failed the exam. *Id.*

160 *Id.* at 1464.

161 *Id.* at 1465.

162 *Id.*

163 *Id.*

these cases, the courts apply an implicit two-part test to examine whether the state's laws or policies compromise students' fundamental right to equality of the educational experience. Litigants can adapt this test and the positive precedent to novel education claims under the Equal Protection Clause.

B. THE COURTS TAKE AWAY: ELIMINATING STUDENTS' RIGHTS FROM CALIFORNIA'S EQUAL PROTECTION CLAUSE

After the state court declared education a fundamental right protected by the Equal Protection Clause, litigants petitioned the courts to recognize several concomitant benefits which are integral to enjoying the right granted in *Serrano* and similarly require the application of strict scrutiny. In one case after another, the California courts struck down these attempts, thereby limiting students' education rights to a strict conception of only those resources, programs, and services which are inherently incorporated in the educational character of primary and secondary schooling.

In the *Serrano I* opinion, the Court hints at its unwillingness to expand the Equal Protection Clause to include any benefits beyond education. The state asked the Court to follow the District of Massachusetts which held that Boston did not violate the Equal Protection Clause when it failed to provide federal subsidized lunches at all of its schools.[164] The Court found the Massachusetts decision inapplicable because it did not concern the right to an education.[165] "Availability of an inexpensive school lunch can hardly be considered of such constitutional significance."[166] Thus, free and reduced school lunches, even for low-income and needy students, are not included in California's fundamental right to education.

In 1981 in *Gurfinkel v. Los Angeles Community College District*,[167] the court addressed whether the fundamental right identified in *Serrano*

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164 *Serrano I*, 5 Cal.3d 584, 598 n.13 (1971) (en banc).

165 *Id.*

166 *Id.*

167 121 Cal. App. 3d 1 (1981). In *Gurfinkel*, plaintiff entered the United States from France and subsequently married a California resident. *Id.* at 4. Plaintiff registered to attend classes at a community college and was required to pay greater student tuition

encompassed college and/or community college education.[168] The court found that the state's equal protection doctrine did not encompass a fundamental right to higher education, relying on the fact that college is not compulsory and extends into adulthood.[169] Without much explanation, the court excised a student's right to higher education from the fundamental right to public school education.[170]

A few years later in *Steffes v. California Interscholastic Federation,*[171] a high school student claimed that an athletics rule that rendered the student ineligible to play varsity sports for one year after his transfer to a new school was unconstitutional.[172] The student argued strict scrutiny should apply because it implicated the fundamental right to a public school education, which includes the right to participate in interscholastic athletics.[173] The court found otherwise, declaring that participation in athletic activities is not encompassed in students' fundamental right to education and upholding the rule under rational basis review.[174] To reach its holding, the court relied on the majority opinion in *Hartzell v. Connell*,[175] which had the opportunity but chose not to "address the question whether extracurricular activities are encompassed within the *Serrano* concept of education

because she was classified as a nonresident. *Id.* Plaintiff challenged the nonresident tuition statutes arguing they placed an unconstitutional burden on her fundamental right to a community college education. *Id.*

168 *Id.* at 5.

169 *Id.* at 6.

170 The *Gurfinkel* court suggested that it might recognize a fundamental right to higher education if the plaintiff provided evidence to support it or if the Legislature defined it. *Id.* at 6 n.3. The court found plaintiff's evidence insufficient because she did not provide any proof that a college education was necessary to function in society or to compete in the job market. *Id.* The court felt that the "ascertainment of such data could well be the subject of a legislative fact-finding hearing." *Id. See* Schoenfeld, *supra* note 26, at 208–10 (arguing that an application of the *Serrano* criteria to higher education in California's contemporary political economy would likely result in the court's finding that it was a fundamental right or at least a very important one).

171 176 Cal. App. 3d 739 (1986).

172 *Id.* at 743.

173 *Id.* at 746.

174 *Id.* at 748.

175 35 Cal.3d 899 (1984).

as a fundamental right."[176] Instead, the *Hartzell* Court struck down the district's imposition of extracurricular fees under the free schools clause.[177] Since *Hartzell* did not conclude that extracurricular activities are encompassed within the fundamental right, the *Steffes* court refused to declare that participation in athletic activities was entitled to the highest degree of constitutional protection.[178]

Finally, in *Arcadia Unified School District v. State Department of Education,*[179] the California Supreme Court upheld a statute that allowed a school district to charge parents for the transportation of their students to school. Plaintiffs argued that the statute violated California's Equal Protection Clause because it classified families on the basis of wealth and burdened the students' exercise of their fundamental right to education.[180] The Court disagreed holding that the transportation fees did not discriminate against the poor because the statute, on its face, did not prevent any child from attending school due to his or her inability to pay.[181]

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176 *Steffes*, 176 Cal. App. 3d at 746–47 (discussing *Hartzell*, 35 Cal.3d 899). A detailed concurrence by Chief Justice Bird, who also authored the majority opinion, argued that the fees imposed by the district affected students' fundamental interest in education. *Hartzell*, 35 Cal.3d at 921 (Bird, C.J., concurring). Justice Bird described that the fundamentality of a given activity is not dependent upon "the formalities of credit, grading, or diplomas." *Id.* at 922. Rather, participation in extracurricular activities confers benefits on the individual and society, including the development of leadership and citizenship, preparedness for future employment, and growth of teamwork and cooperation. *Id.* at 923. Justice Bird also found that the imposition of the fee classified on the basis of wealth. *Id.* at 924–26. The structure and form of Justice Bird's opinion opens up the possibility that courts may be willing to include subsidiary benefits within a students' fundamental right to an education.

177 *Steffes*, 176 Cal. App. 3d at 747 (quoting *Hartzell*, 35 Cal.3d at 911). *See supra* notes 30 to 36 and accompanying text for a fuller discussion of the *Hartzell* court's analysis under the free schools clause.

178 *See Steffes*, 176 Cal. App. 3d at 748; *see also* Jones v. Cal. Interscholastic Fed'n, 197 Cal. App. 3d 751 (1988) (upholding under rational basis review an athletic rule that precluded a student repeating a grade from participating in the varsity football program). *Cf.* Ryan v. Cal. Interscholastic Fed'n-San Diego Section, 94 Cal. App. 4th 1048 (2001) (extending the holding in *Steffes* and finding that under the state due process clause a plaintiff who was excluded from interscholastic athletics failed to identify the deprivation of a statutorily conferred benefit or interest).

179 2 Cal.4th 251 (1992).

180 *Id.* at 266.

181 *Id.*

The statute included a categorical exemption from the charges for indigent parents.[182] If plaintiffs could identify children who were unable to attend school because they could not afford to pay the fees, the Court left open the possibility of an as-applied challenge.[183] The dictum in *Arcadia* begs the question: Would the failure to provide any school transportation violate the Equal Protection Clause of the California Constitution if children are deprived of the ability to attend school?[184] *Arcadia* upholds the right to charge for transportation, but it does not definitively exclude transportation from a students' fundamental right to education, particularly if the provided transportation or lack thereof effectively excludes a student from receiving an education. Nevertheless, *Arcadia's* holding bars claims for free transportation under a student's right to basic educational equity.[185]

The cases exclude education-related rights from students' fundamental right to equal access to education. Basic educational equality does not include school lunch, higher education, athletic activities, or free transportation. Litigants must therefore use the gaps in existing caselaw to push courts to recognize resources that are essential for students to benefit from basic educational equity. The final section of this article explores some of these gaps using three recent California cases which provide insight into litigation strategies which build on the test outlined in Part II.A.

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182 *Id.* at 255 n.4.

183 *Id.* at 266. For an early California case in which the Court required a school district to provide bus service to eight remote students, *see Manjares v. Newton*, 64 Cal.2d 365 (1966). The Court concluded that the board's refusal to provide transportation to these students was an abuse of discretion because it completely deprived the students of their right to attend school. *Id.* at 374. The Court described that no other children in the district were similarly situated, and therefore the board placed an unjustifiable burden on plaintiffs' education. *Id.* The holding and reasoning in *Manjares* analogizes to the as-applied challenge offered by the *Arcadia* court.

184 *See Arcadia*, 2 Cal.4th at 264 n.11. Based on California precedent, the answer is likely yes. *See Manjares v. Newton*, 64 Cal.2d 365 (1966) (summarized at note 183); Piper v. Big Pine Sch. Dist. of Inyo Cnty., 193 Cal. 644 (1924) (exclusion of an Indian girl from local school district violated her right to attend school).

185 The plaintiffs in *Arcadia* also brought a claim under the free schools clause. *See Arcadia*, 2 Cal.4th at 259–60. The Court rejected the claim that students are entitled to free transportation under *Hartzell* because transportation is not an "activity [that] is educational in character." *Id.* at 262.

C. WHERE DO WE GO FROM HERE? ADAPTING THE POSITIVE PRECEDENT TO NEW CLAIMS FOR BASIC EDUCATIONAL EQUITY

In May 2010, two sets of plaintiffs filed actions in California Superior Court alleging that the state's education finance system violated California equal protection doctrine by failing to "provide all California school children equal access to the State's prescribed educational program and an equal educational opportunity to become proficient in the State's academic standards."[186] The court heard the two actions, *Robles–Wong v. State of California* and C*ampaign for Quality Education v. State of California* (*CQE*), together and after a series of amended pleadings, the court ruled on the state's demurrers on July 26, 2011.[187]

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[186] Robles–Wong v. State of California, No. RG10-515768, at *54 ¶ 7 (Cal. Super. Ct. May 20, 2010). The companion case which alleges similar causes of action albeit on slightly different facts is *Campaign for Quality Education v. State of California*, No. RG10524770, at ¶ 218 (Cal. Super. Ct. August 4, 2010) (alleging that the state's funding system fails to ensure that plaintiffs have "an equal opportunity to obtain an education that prepares them to learn the content standards and for civic, economic, and social success").

[187] The procedural history of the cases is lengthy. A selected chronology of the cases helps sequence the issues discussed herein:

Robles–Wong and *CQE* filed actions in summer 2010, pleading several causes of action under the education clauses, article IV, section 8(a) implicating the duty to set apart monies to support the school system, and, at issue here, California's Equal Protection Clause. *See* Robles–Wong v. State of California, No. RG10-515768, at 53–54 ¶¶ 1–9 (Cal. Super. Ct. May 20, 2010); Campaign for Quality Educ. v. State of California, No. RG10524770, at ¶¶ 197–209 (Cal. Super. Ct. July 12, 2010). After minor amendments to the complaints, the Superior Court issued two orders on January 14, 2011 dismissing all causes of action, but granting leave to amend the equal protection claims. *See* Robles–Wong v. State of California, No. RG10-515768 (Cal. Super. Ct. Jan. 14, 2011); Campaign for Quality Educ. v. State of California, No. RG10524770 (Cal. Super. Ct. Jan. 14, 2011). Both plaintiffs groups filed amended complaints on March 16, 2011, which stated one cause of action under California's Equal Protection Clause. *See* Robles–Wong v. State of California, No. RG10-515768 (Cal. Super. Ct. Mar. 16, 2011); Campaign for Quality Educ. v. State of California, No. RG10524770 (Cal. Super. Ct. Mar. 16, 2011). On July 26, 2011, the court again dismissed plaintiffs' equal protection claims with leave to amend. *See* Robles–Wong v. State of California, No. RG10-515768, 2011 WL 3322890 (Cal. Super. Ct. July 26, 2011); Campaign for Quality Educ. v. State of California, No. RG10524770 (Cal. Super. Ct. Aug. 2, 2011) (incorporating the *Robles–Wong* order in full). This article deals with the most recent set of pleadings and the subsequent court orders dismissing the equal protection claims [continued next page].

Relying on California's Equal Protection Clause, plaintiffs in *Robles–Wong* and *CQE* contend that California's school funding system renders schools unable to provide all of their students with an "adequate and equal opportunity" to learn the state-mandated academic content standards and to obtain a meaningful education that prepares them for participation in the economic, social and civic life of our society.[188] The conflation of equality and adequacy standards was successful in *Butt*; however, in these cases, the trial court was reticent to rely on *Butt* to declare a broad adequacy standard using equal protection principles. This article suggests that the court's inability to harmonize plaintiffs' argument with the two-part test defined above caused the dismissal of the claims. The court's repeated dismissals of plaintiffs' equal protection claims with leave to amend buttresses the notion that the court needed plaintiffs to restructure their theory of the case in conformity with a familiar analysis and rationale.[189]

First, the trial court could not factually compare students with and without sufficient funding or educational resources to determine whether plaintiffs' schools fell fundamentally below what most other students

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Plaintiffs in both cases declined to amend their complaints and instead filed a joint appeal on January 25, 2012. *See* Corrected Appellants' Opening Brief at 26, Campaign for Quality Educ. v. State of California, No. A134423 (Cal. Ct. App. July 27, 2012), *consolidated with* Robles–Wong v. State of California, No. A134424 (Cal. Ct. App. July 27, 2012). The appeal seeks review of the lower court's determination solely as to plaintiffs' causes of action under the education clauses. *See id.* at 26–27; *see also supra* notes 56–60 and accompanying text.

188 *See* Campaign for Quality Educ. v. State of California, No. RG10524770, ¶ 126 (Cal. Super. Ct. Mar. 16, 2011); *see also* Robles–Wong v. State of California, 2011 WL 3322890, at 3 (because the document, as reproduced by Westlaw, is not internally paginated, the article cites the page numbers available on the printable version of the document). *CQE*'s Second Amended Complaint specifically identifies inadequate resources which render the school system unconstitutional, including insufficient and undertrained staff, inadequate instructional programs, inadequate data systems and teacher quality, lack of access to preschool. *See* Campaign for Quality Educ. v. State of California, No. RG10524770, ¶¶ 127–44 (Cal. Super. Ct. Mar. 16, 2011).

189 *See supra* note 187 discussing the procedural history of the cases; *see also* John Fensterwald, *Robles–Wong Lawyers Reframe Case*, Thoughts on Pub. Educ. (Mar. 17, 2011), http://toped.svefoundation.org/2011/03/17/robles-wong-lawyers-reframe-case (noting that the trial judge "left open the opportunity for the plaintiffs to take a different, though narrower, tack and make the case that all students must have an equal opportunity to master the standards that the state has deemed to be basic elements of a sound education").

received.[190] The court rebuked plaintiffs for failing to plead facts showing the resources which are "actually provided" in plaintiffs' school and in other schools across the state.[191] Instead, plaintiffs supplied evidence comparing the funding and resources California public schools currently provide with that provided in the past.[192] Since prevailing statewide standards can change over time, the court found these facts failed to state an equal protection claim. Plaintiffs also attempted to compare the resources California students actually receive, with those needed to master academic standards.[193] Because the latter calculation was theoretical and unquantifiable, the court could not engage in a direct comparison.

In *Butt*, on which the *Robles–Wong* court primarily relies, the court of appeal held that a district's failure to meet prevailing statewide standards could only be determined by examining the individual facts.[194] Plaintiffs tried to sidestep this factual determination by arguing that the prevailing statewide standard may be established by legislation alone. Plaintiffs argued that by adopting statewide academic standards, requiring that schools teach to these standards, and demanding students' proficiency in these standards, the Legislature established a measurable prevailing standard to assess basic educational equity.[195] The court rejected this argument, insisting that the prevailing statewide standard be based on a factual showing of the level of education actually provided to most students in the state.[196] Outside of *Butt*, the court's understanding of the prevailing statewide standards test originates in the education clauses. As discussed in Part I.B, California's interpretation of the education clauses gives the Legislature broad discretion to determine the content of education in

190 *See Robles–Wong*, 2011 WL 3322890, at 4 ("The question, then, is whether plaintiffs have pleaded facts showing that plaintiff districts and students in plaintiff districts are receiving fewer educational resources compared to most other students and/or students in most other districts. They have not, in several respects.").

191 *See id.*

192 *See id.* at 5 (explaining that the pleadings allege that California schools suffered reductions in resources compared to what they previously enjoyed).

193 *See id.* at 3–4.

194 Butt v. State of California, 4 Cal.4th 668, 686 (1992) ("A finding of constitutional disparity depends on the individual facts.").

195 *See Robles–Wong*, 2011 WL 3322890, at 6 n.3.

196 *Id.* at 4.

the state, including statewide standards. Part of this broad discretion includes the Legislature's ability to change its chosen standards to conform to changing social, economic, or political pressures.[197] However, constitutional standards are not so flexible. If courts linked legislatively-created education standards to the constitutional prevailing statewide standard, then the constitutional standard becomes a moving target, changing with the whims of the Legislature. Not only is this standard judicially unmanageable, but it also creates a surge in education litigation, as plaintiffs can plead new claims with each statutory change.[198] Thus, the court was reasonably reticent to accept plaintiffs' claim linking the state content standards to the prevailing statewide standards. Because the court was unable to apply part one of the test, it could not find that the facts plausibly alleged that students' fundamental right was impinged.

The *Robles–Wong* court also found insufficient facts to allege a violation of the second part of the test. Drawing all inferences in favor of plaintiffs, the court could not identify whether the alleged deficiency in funding and resources resulted in inferior education outcomes.[199] The pleadings provided statistics comparing California students' performance with students in other states. As the court noted, this comparison is useless under the California Equal Protection Clause.[200] The complaints also supplied swaths of statistics showing that millions of California students, specifically minority, poor, and language learners, fail to achieve proficiency on

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197 *See* Cal. Teachers Ass'n v. Hayes, 5 Cal. App. 4th 1513, 1528 (1992) ("[U]nder our Constitution the Legislature is given broad discretion in determining the types of programs and services which further the purposes of education."); *Butt*, 4 Cal.4th at 688 ("The Constitution has always vested 'plenary' power over education not in the districts, but in the State, through its Legislature, which may create, dissolve, combine, modify, and regulate local districts at pleasure.").

198 *See, e.g.*, Lilliam Mongeau, *Common Core Standards Bring Dramatic Changes to Elementary School Math*, EdSource (Jan. 20, 2014), http://edsource.org/2014/common-core-standards-bring-dramatic-changes-to-elementary-school-math-2/63665#.VH_P8DHF9yw ("The new standards, adopted in California and 44 other states, have ushered in a whole new set of academic standards for math, with significant changes in the early grades . . . .").

199 *See Robles–Wong*, 2011 WL 3322890, at 5.

200 *Id.*

state standardized tests and fail to graduate from high school.[201] However, the pleadings failed to link poor student performance with resource deficiencies, including low per-pupil spending.[202] Plaintiffs allege that millions of California students lack basic skills and that California schools have subpar and erratic student spending, but they do not allege a connection between underfunded schools and unprepared students.[203] Without a causal or at least corollary link between the resource and an outcome, the court cannot find an equal protection violation.[204]

In sum, the court was unable to identify facts in the complaints which could plausibly satisfy either part of the test proposed by this article. The court summarizes plaintiffs' failure on both parts: "The Amended Complaints, if true, establish neither that plaintiffs' educational opportunity is inferior to the opportunity enjoyed by most other California students, nor that, as a result, students in plaintiffs' districts perform worse on the CST/CAHSEE standards than most other California students."[205]

By comparison, in *Reed v. State of California*,[206] plaintiffs' claims neatly tracked the two-part test, resulting in the trial court's grant of a preliminary injunction that paved the way for a successful settlement.[207] Teacher layoffs in 2009 heavily affected the three middle schools attended

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201 *See* Campaign for Quality Educ. v. State of California, No. RG10524770, ¶¶ 80–94 (Cal. Super. Ct. Mar. 16, 2011).

202 *See id.* ¶¶ 111–13.

203 Arguably, such a connection does not exist. *See* Buszin, *supra* note 26, at 1630 & nn.120–21 ("[E]conomists have found that increases in per-pupil expenditures have not led to better academic achievement over the course of three decades.").

204 Instead of comparing resources to outcomes, at the trial level and on appeal, plaintiffs argue that the allocation of funds to districts lacks rationality or coherence and fails to align with the state's academic content standards. *See* Corrected Appellants' Opening Brief at 2, Campaign for Quality Educ. v. State of California, No. A134423 (Cal. Ct. App. July 27, 2012), *consolidated with* Robles–Wong v. State of California, No. A134424 (Cal. Ct. App. July 27, 2012). However, an irrational funding system does not necessarily violate equal protection. Rather, the funding system must include a classification that affects two or more similarly situation groups in an unequal manner. *See* Cooley v. Superior Court, 29 Cal.4th 228, 253 (2009). Because the pleadings fail to show the effect of the funding scheme on any group or groups of students, the claim must fail.

205 *See Robles–Wong*, 2011 WL 3322890, at 5.

206 No. BC432420 (Cal. Super. Ct. filed Feb. 24, 2010).

207 Reed v. State of California, No. BC-432420 (Cal Super. Ct. May 13, 2010).

by the *Reed* plaintiffs.[208] Plaintiffs claimed that the dramatic reduction in the schools' educators violated their right to basic educational equity, as the teaching force in other schools in the district remained relatively unscathed.[209] *Reed* plaintiffs brought a class action suit to enjoin the school district from laying off teachers at the three middle schools.[210]

First, the trial court pointed to numerous statistics demonstrating that plaintiffs lacked a full teaching staff, while other district schools experienced limited or no change in the number of full-time teachers. Of the teaching staffs at plaintiffs' three middle schools, 60, 48, and 46 percent received layoff notices, while the districtwide layoff average was only 17.9 percent.[211] In addition, the court notes that at the start of the school year the three schools had eighteen, twenty-six, and sixteen vacant teaching positions, while other district middle schools had no or few vacancies.[212] Finally, to highlight the disparity still further, the number of educators assigned to teach courses for which they were untrained was rising at plaintiffs' schools, while dropping at other district middle schools.[213] The data clearly demonstrates that plaintiffs' middle schools fell below prevailing district standards in terms of number of layoffs, vacancies, and misassigned teachers. Plaintiffs' schools lacked teachers, while most comparable schools were replete with teachers.

Next, the court went into detail describing the dire education outcomes that resulted from the inadequate teaching force at plaintiffs' schools. Purely in terms of standardized tests, plaintiffs' middle schools ranked in the bottom ten percent of all schools statewide.[214] More to the point, the court qualitatively described the inferior educational opportunities available to students at the affected schools, demonstrating a direct relationship between high teacher turnover and substandard educational opportunities.[215] Quoting from plaintiffs' declarations, the trial court indicates that in classes where substitutes took the place of full-time teachers, "little or

208 *Id.* at 1.
209 *Id.*
210 *Id.* at 7–8.
211 *Id.* at 3.
212 *Id.*
213 *Id.* at 4.
214 *Id.* at 2.
215 Id. at 4.

no instruction took place," substitutes "failed to test the students" or "gave tests but never graded them," and "showed movies during class."[216] The cumulative effects of continuous substitute teachers resulted in students' missing large units of instruction in core academic subjects, severe academic disruption, and adverse social and psychological effects.[217] Using plaintiff's detailed factual record embodied in the complaint and amended declarations, the trial court was easily able to identify a clear link between the lack of a full-time teaching staff and detrimental effects on students' learning and achievement. The court found "a distinct relationship between high teacher turnover and the quality of educational opportunities afforded" and concluded that the unequal distribution of layoffs deprived students faced with an unstable teaching staff of their fundamental right to education.[218]

Once the court identified sufficient evidence to show "a real and appreciable impact on plaintiff's fundamental right to equal educational opportunity," it proceeded to apply strict scrutiny.[219] The lower court found that the district's asserted interest in laying off teachers in accordance with the seniority system was not compelling.[220] The court found that teachers do not have a vested interest in the application of a layoff system that results in equal protection violations.[221] Thus, the court granted plaintiffs' motion for a preliminary injunction and enjoined future layoffs at the three middle schools.[222]

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216 *Id.* at 5.

217 *Id.* at 5–6.

218 *Id.* at 4.

219 *Id.* at 6–7.

220 *Id.* at 7. Through their union, teachers bargained for the application of the last in, first out policy ("LIFO"), which resulted in strict seniority-based layoff. LIFO was also incorporated into the state Education Code. *See* Cal. Educ. Code § 44955.

221 Reed v. State of California, No. BC-432420, at 7 (Cal Super. Ct. May 13, 2010).

222 *Id.* at 9–10. Subsequent to the issuance of the preliminary injunction, the parties entered into a consent decree to prevent teacher layoffs at forty-five district schools. *See* Press Release, *Judge Approves Landmark Settlement in Reed v. State of California*, ACLU of Southern California, Jan. 21, 2011, *available at* http://www.aclu-sc.org/releases/view/103060. The trial court approved the consent decree and entered judgment. *See* Reed v. United Teachers Los Angeles, 208 Cal. App. 4th 322, 328 (2012), *review denied* (Oct. 24, 2012). The Los Angeles teachers' union, United Teachers Los Angeles ("UTLA"), objected to the consent decree at the trial level and appealed the judgment.

At first glance, it is possible to conclude that the failure of *Robles–Wong* and the success of *Reed* have less to do with the framework provided by the two-part test and more to do with the inclusion of adequacy elements in *Robles–Wong*, and their exclusion from *Reed*. However, a closer look at *Reed* reveals that it also included adequacy claims that, as in *Butt*, were upheld by the court. In *Butt*, the issue of adequacy arose when the Court held that a school year with 145 school days fell fundamentally below the standard 175-day school year, which the parties agreed was adequate.[223] The adequacy question was simple: Was a 145-day school year basically equivalent to a 175-day term? The answer was equally simple: No. The *Butt* Court further addressed the adequacy question in reasoning that the minimum standard of education required that schools operate without "extensive educational disruption."[224]

The adequacy question also arose in *Reed*. The resource compared in *Reed* was teachers, and the question was whether an inexperienced or substitute teacher was equivalent to a full-time, senior teacher.[225] The court's answer was also: No. To reach that answer, the court had to do more than count missing instructional days. As in *Butt*, the *Reed* court examined the "educational disruption" caused by teacher turnover and an influx of

See id. The court of appeal sided with UTLA, holding that since the consent decree potentially abrogated union members' seniority rights, out of respect for due process, the union was entitled to a decision on the merits. *Id.* at 329–30. The appeals court remanded the action to the trial court for further proceedings. *Id.* at 338. Thereafter, in April 2014, all parties, including UTLA, reached a second settlement agreement. Reed v. State of California, No. BC-432420 (Cal Super. Ct. May 9, 2014), *available at* http://achieve.lausd.net/cms/lib08/CA01000043/Centricity/domain/381/reed%20v.%20lausd%20et%20al/Reed%20-%20Final%20Settlement%20and%20Release%20of%20all%20Claims.pdf. The revised settlement applies to thirty-seven schools and provides them with additional administrators, counselors, instructional coaches, mentor teachers, professional development, and principal retention and recruitment bonuses. *Id.* at 3–8. The settlement permits the district to "maintain staffing stability and continuity of instruction" at the settlement schools in the event of future teacher layoffs, but it does not require the district to comply. *Id.* at 9. Thus, the settlement is less protective of students' fundamental right to education than the preliminary injunction issued by the trial court.

223 *See* Butt v. State of California, 4 Cal.4th 668, 688 n.14 (1992).

224 *Id.* at 687.

225 *Reed*, No. BC-432420, at 3–6 (Cal Super. Ct. May 13, 2010).

untrained and short-term teachers.[226] The court found that the instruction provided by plaintiffs' teachers was appalling and teacher turnover harmed educational continuity and teacher–student relationships.[227] From this evidence, the court concluded that a student's basic right to educational equity includes the right to be taught by a "stable, consistent teacher corps."[228] Since the merits of the case never reached an appellate court, *Reed* provides no precedential value. Nevertheless, litigants can embrace the structure employed by the court in order to incorporate adequacy principles into California's equal protection education jurisprudence.

In another plaintiffs' victory, the superior court in *Vergara v. State of California*[229] recently struck down five California statutes as unconstitutional under the state Equal Protection Clause. Plaintiffs challenged statutes which guarantee teachers tenure after two years, require a lengthy and expensive process to dismiss teachers, and lay off teachers in order of seniority.[230] Plaintiffs claimed these statutes result in "grossly ineffective teachers obtaining and retaining permanent employment, and that these teachers are disproportionately situated in schools serving predominately low-income and minority students."[231]

After an eight-week bench trial, the court issued a game-changing opinion which relies heavily on the two-part test to explicitly incorporate adequacy standards into the equal protection doctrine.[232] First, the court identified the resource at issue — grossly ineffective teachers — and compared students assigned such teachers and those who are not.[233] The undisputed evidence showed that at minimum one to three percent of California teachers are grossly ineffective, equaling between 2,750 and 8,250

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226 *See id.*

227 *See id.*

228 *Id.* at 5.

229 No. BC484642 (Cal. Super. Ct. judgment entered Aug. 27, 2014), *available at* http://studentsmatter.org/wp-content/uploads/2014/08/SM_Final-Judgment_08.28.14.pdf.

230 *Id.* at 3.

231 *Id.*

232 *Id.* at 2 ("[T]his Court is directly faced with issues that compel it to apply [equal protection] principles to the quality of the educational experience.").

233 *Id.* at 8; *see* Vergara v. State of California, No. BC484642, at 7 (Cal. Super. Ct. Dec. 13, 2013), *available at* http://studentsmatter.org/wp-content/uploads/2013/12/MSJ-Tentative.pdf.

educators.[234] Thus, students taught by a grossly ineffective teacher are a discrete minority allocated a resource which falls fundamentally below the vast majority of their peers who receive an effective (or at least not grossly ineffective) teacher. Unlike in prior cases, where plaintiffs defined the resource neutrally (school days, teacher turnover, funding), the *Vergara* plaintiffs framed the resource as a detriment which necessarily harmed their education. Once the court accepted this premise, it simplified the analysis in part two of the test. Unlike in some earlier cases, the parties agreed that "grossly ineffective teachers substantially undermine the ability of that child to succeed in school."[235] Thus, the parties conceded the link between the resource and inferior educational outcomes. Finding that the inferior educational outcomes caused by grossly ineffective teachers constituted a denial of students' fundamental right to education, the court highlighted the lost learning opportunities for students with incompetent teachers and the cost to students' lifetime earnings.[236]

In sum, the court found that "the employment of grossly ineffective teachers [] results in an equal protection violation in every instance that a student is assigned such a teacher."[237] The court went on to analyze whether there was a causal link between the challenged statutes and the employment of grossly ineffective teachers.[238] Concluding that such a link existed, the court applied strict scrutiny to each statute and found them unconstitutional under the Equal Protection Clause of the California Constitution.[239]

Vergara marks another step toward the inclusion of quality-based standards into California's equal protection analysis. The *Vergara* court accepted the argument that failed in *Robles–Wong*. Relying on the education clauses, *Vergara* explicitly added an adequacy component to the standard outlined in *Butt:* "[T]he Constitution of California is the ultimate guarantor of a *meaningful, basically equal educational opportunity* being afforded to the students of this state."[240] The import of this notable shift in

234 *Vergara*, No. BC484642, at 8 (Cal. Super. Ct. Aug. 27, 2014).
235 *Id*. at 7.
236 *Id*.
237 Vergara v. State of California, No. BC484642, at 7 (Cal. Super. Ct. Dec. 13, 2013).
238 *Vergara*, No. BC484642, at 3 (Cal. Super. Ct. Aug. 27, 2014).
239 *Id*. at 9–14.
240 *Id*. at 7 (emphasis added).

analytical focus remains unclear, as defendants appealed the lower court's decision on August 29, 2014.[241]

A comparison of plaintiffs' litigation strategies in *Reed, Robles–Wong*, and *Vergara* demonstrates that courts are willing to uphold new claims under students' fundamental right to education. However, those claims are more likely to be successful if the pleading, form, and underlying factual basis conform to the two-part test implicitly used by the *Serrano, Butt,* and *O'Connell* courts. Moreover, if litigants plead in conformity with the two-part test, providing sufficient factual evidence to support both prongs, the court may be willing to uphold adequacy arguments within the framework of the equal protection doctrine.

CONCLUSION

Although California courts overlook the education clauses in cases involving students' qualitative rights to education, they have not relinquished their role as a check on the state's actions or inactions involving the public schools. The Equal Protection Clause has assumed prominence in California's case history and continues to define and refine students' fundamental right to an education. While the cases appear disconnected and inconsistent, this article suggests that an application of a two-part test, which examines (1) whether plaintiffs substantially lack an education resource as compared to their peers and (2) whether this resource deficiency results in inferior education outcomes, may provide some clarity in identifying whether students' fundamental right has been infringed. The structure and predictability of the two-part test may provide a blueprint for future litigators to use when making claims under students' right to basic educational equity. The most recent cases in this area expose the possibility that equal protection jurisprudence, employing the two-part test in particular, is flexible enough to incorporate qualitative claims and to set a minimum educational standard for California students.

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241 Vergara v. State of California, No. B258589 (Cal. Ct. App. appeal docketed Sept. 4, 2014).