

STATE CONSTITUTIONS AND INDIVIDUAL RIGHTS: CONCEPTUAL CONVERGENCE IN SCHOOL FINANCE LITIGATION

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INTRODUCTION

Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.¹

Beginning in earnest with the publication of Justice Brennan's clarion call to state courts, scholars and jurists have both challenged and defended approaches to rights under state constitutions independent of similar rights found in the Federal Constitution.² Through much of history, state courts, construing their own state constitutions, offered the only meaningful protection for individual rights, as the Fourteenth Amendment at first did not exist and was not held to incorporate most of the provisions from the Federal Bill of Rights until the Warren Court era.³ And, as Professor G. Alan Tarr has pointed out, even this protection was anemic at best.⁴ During the Warren

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¹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

² See, e.g., Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502-18 (2005) (reviewing the scholarship of doctrinal divergence and convergence); see also James A. Gardner & Jim Rossi, *Foreword: The New Frontier of State Constitutional Law*, 46 WM. & MARY L. REV. 1231, 1232-34 (2005) (outlining the history of state judicial approaches to enforcement of constitutional norms).

³ See Peter Linzer, *Why Bother with State Bills of Rights?*, 68 TEX. L. REV. 1573, 1575 (1990) ("Until the passage of the fourteenth amendment in 1868, and in large part until the Warren Court radically expanded the application of the Bill of Rights to the states in the 1950s and 1960s, whatever constitutional rights Americans had in nonfederal matters came from their state constitutions." (footnote omitted)); see also ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 113 (2009) (describing this point as a generally held understanding, but one which has been subject to at least one recent scholarly challenge).

⁴ See G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1099, 1101-06 (1997) (explaining that the "standard account" of the New Judicial Federalism, which

Court era, the path changed, and the federal courts and the Federal Constitution became the primary means for defining and protecting individual constitutional rights.⁵ Subsequently, as a reaction to limitations of rights protections during the Burger Court and Rehnquist Court years, litigants began to look to state courts for more vigorous protection of their rights. This move to state courts has been dubbed the “New Judicial Federalism.”⁶

Scholars of state constitutional law have identified two distinct approaches to federal adjudicatory doctrines in construing rights guarantees stemming from constitutional language similar to that found in the federal document.⁷ State courts may adopt federal doctrine in whole or in part—what is sometimes referred to as “convergence”—or they may choose to craft their own doctrine—what has been referred to as “divergence.”⁸ Professor Robert Williams, a leading scholar in this area, explains that much of the work in this area has focused on doctrinal *divergence*, attempting to articulate justifications for when state courts should diverge.⁹ However, Professor Williams has recently cast his own critical eye on doctrinal *convergence*, attempting to better understand it and ascertain where convergence may be warranted. This project has focused on state judicial interpretations of state constitutional provisions with federal analogues, such as state equal protection and uniformity clauses and state search and seizure

holds that state supreme courts have recently rediscovered their roles as individual rights protectors, is largely ahistorical).

⁵ See Linzer, *supra* note 3, at 1575; see also Gardner & Rossi, *supra* note 2, at 1232-33.

⁶ See WILLIAMS, *supra* note 3, at 113. Of course, since this movement began in the early 1970s as a reaction to rulings by the Burger Court, it is no longer “new.” *Id.* at 113-14 (internal quotation marks omitted); see also Tarr, *supra* note 4, at 1098 (“By the late 1990s, then, the new judicial federalism has become an established feature of American federalism.”). Nevertheless, the term has endured as a useful shorthand for assertive state constitutionalism among state supreme courts.

⁷ See, e.g., WILLIAMS, *supra* note 3, at 209-24 (analyzing the “lockstepping” of federal equal protection doctrine where equal protection questions are considered in state courts); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992) (holding out the uncritical adoption of federal precedent as evidence of the failure of state constitutional discourse in the states); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 80 (1998) (critiquing state presumptive adoption of the federal separation of powers doctrine); G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 331 (2003) (calling into question the lockstepping of federal structural constitutional doctrines); Robert F. Williams, *A “Row of Shadows”: Pennsylvania’s Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343, 346-48 (1993) (critiquing the lockstep adoption of federal equal protection doctrine in Pennsylvania); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1016-17 (1997) (questioning the legitimacy of lockstepping).

⁸ See James A. Gardner, *The Positivist Revolution That Wasn’t: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 109 (1998) (coining the term “doctrinal convergence”); see also Williams, *supra* note 2, at 1502-03 (distinguishing between “convergence” and “divergence”). The more derisive term used to describe some forms of convergence is “lockstepping.” See *id.* at 1504.

⁹ See WILLIAMS, *supra* note 3, at 194; Williams, *supra* note 2, at 1501.

clauses.¹⁰ In a recent case study, for example, Professor Williams identifies four principal forms of doctrinal convergence and evaluates the merits of each.¹¹

The forms of convergence that Professor Williams describes range from the “unreflective” adoption of both the meaning of a similarly worded provision and its application; to the more “reflective adoption,” case-by-case, of the meaning of the federal provision; to “prospective lockstepping,” which involves not only adoption of the provision’s federal meaning, but also a ruling that the federal test shall apply in all future cases under the relevant provision; to a more nuanced form of convergence, in which a state court “borrows” a test or form of reasoning from the federal courts, but not necessarily the meaning of the provision or its application.¹²

Studies of the convergence and divergence of state and federal constitutional law doctrine have generally focused on state interpretation or application of state constitutional provisions with analogues in the federal document. As Professor Williams points out, as to such analogous provisions, doctrinal convergence is the overwhelming majority approach among state courts.¹³ However, many provisions of state constitutions have no federal analogues, and several of these unique provisions touch upon individual rights. To date, the literature does not contain much inquiry on the prevalence of federal approaches to rights in these unique contexts.

Several scholars of state constitutions have begun to identify what may be an independent, states-specific doctrinal approach to individual rights in certain policy areas, particularly education.¹⁴ Much of the scholarly work in existence focuses on the justiciability and remediability of “education rights,” or on the quantitative and qualitative entitlements that school child-

¹⁰ See, e.g., WILLIAMS, *supra* note 3, at 209-24 (criticizing the lockstepping form of convergence in equal protection cases); Williams, *supra* note 2, at 1511-13 (discussing the prospective lockstep approach taken by some state supreme courts in search and seizure cases).

¹¹ See Williams, *supra* note 2, at 1504-18 (defining the forms of convergence).

¹² *Id.* at 1505-18 (internal quotation marks omitted).

¹³ See WILLIAMS, *supra* note 3, at 194.

¹⁴ See, e.g., Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057 (1993); Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002) [hereinafter Hershkoff, *Positive Rights and the Evolution*]; Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1132 (1999) [hereinafter Hershkoff, *Positive Rights and State Constitutions*]; Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) [hereinafter Hershkoff, *State Courts and the “Passive Virtues”*]; Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403 (1999) [hereinafter Hershkoff, *Welfare Devolution*]; Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989); see also Sonja Ralston Elder, Note, *Standing up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755 (2007); Josh Kagan, Note, *A Civics Action: Interpreting “Adequacy” in State Constitutions’ Education Clauses*, 78 N.Y.U. L. REV. 2241 (2003).

ren should have pursuant to the state constitution's education clause.¹⁵ This work most often assumes the existence of an "education right," but it does not attempt to conceptualize the nature of any such right, other than to assume that it is an affirmative or positive right.¹⁶ Thus, the scholarship contains many examinations of divergence and convergence of doctrine in adjudicating education claims, but no descriptive or normative inquiries as to the conceptualization of the nature of the "rights"—if any—set up in an education clause.

One possible reason for this gap is the lack of a useful way of calibrating conceptual approaches to rights under state and federal constitutions. Here, this Article offers the framework of "jural relations," initially developed by Wesley Newcomb Hohfeld,¹⁷ as a useful tool for understanding the conceptions of education "rights" employed in both federal and state courts. As will be apparent from the analysis to follow, and as Hohfeld himself showed, when one takes a Hohfeldian view, the word "right" has many possible conceptual meanings, and both scholarship and adjudication of education rights and responsibilities would be improved by a better understanding of which conceptions are actually at work in the cases.

Therefore, this Article begins by reviewing Hohfeld's "fundamental conceptions" and expanding his theory to the arena of state constitutional rights, building on recent work by other scholars.¹⁸ From this foundation, it

¹⁵ See Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 755-61 (2010) (citing articles discussing "education rights"). An early example is Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 308-10 (1991) (arguing for the designation of state content standards as a constitutional entitlement). Scholars of school finance use the term "education clause" to refer to the portion of the state constitution that enumerates a goal or obligation to establish and maintain an education system. See, e.g., *id.* at 308.

¹⁶ See articles cited *supra* note 15. As Professor Robert Williams, one of the leading voices in state constitutional law scholarship, has aptly said: "Many of the persistent questions under state constitutions are concerned with positive rights." Robert F. Williams, *Introduction*, 24 RUTGERS L.J. 907, 909 (1993).

¹⁷ See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710, 717 (1917) [hereinafter Hohfeld, *Applied in Judicial Reasoning*]; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-59 (1913) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions*].

¹⁸ See, e.g., Allen Thomas O'Rourke, *Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law*, 61 S.C. L. REV. 141 (2009). Hohfeld's framework is chosen for two reasons: first, because it is time-tested in other contexts and has stood up to numerous theoretical challenges, retaining its position as a dominant mode of rights analysis; and second, because—since its publication in 1913 and again in 1917—Hohfeld's theory has (at least until recently) been taught to the vast majority of jurists in the United States, and it is likely to exist—at least subconsciously—in the minds of nearly all those rendering decisions on rights in state courts. See generally STEPHEN E. GOTTLIEB ET AL., JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS 303-04, 318-19 (2d ed. 2006) (presenting Hohfeld's theories as the foundation of modern rights discourse). Numerous other leading jurisprudence texts devote significant space to Hohfeld. *But see* Curtis Nyquist, *Teaching Wesley Hohfeld's Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 238

moves to a discussion of the sources of rights to education. The Article then examines the text of relevant state constitutional provisions, as well as the ever-changing landscape of school finance litigation, the principal vehicle through which litigants assert constitutional claims based on ostensible education rights.¹⁹ Next, it systematically analyzes the population of reported cases from the highest state courts to identify Hohfeldian conceptions of education rights held or applied by state courts. Finally, it compares these conceptions to the Hohfeldian conceptions of individual rights and powers exhibited in federal adjudication of claims challenging congressional exercises of legislative power, and it assesses this evidence for the convergence or divergence of rights conceptions in the two systems.

Unlike most prior treatments of convergence and divergence, this Article's inquiry focuses on provisions in state constitutions that have no obvious federal analogues. It considers these affirmatively stated provisions to be uniquely suited to such an inquiry, as one would expect state conceptions of rights to diverge from general federal conceptions of rights where state courts interpret and apply such provisions. In fact, though, this Article identifies substantial convergence between federal and state approaches to individual rights and legislative powers, even where the unit of state constitutional analysis has no federal constitutional analogue. It terms this phenomenon "conceptual convergence."

It is surprising that conceptions of individual rights and legislative powers in state and federal courts largely converge, even where the unit of analysis is a state constitutional enumeration with no federal analogue. Nevertheless, this Article contends that the Hohfeldian conceptions of legal relationships employed in federal courts, when reconfigured in light of the unique textual and structural features of state constitutions, can provide the highest state courts with a ready means for avoiding institutional conflicts

(2002) ("But in law schools today Hohfeld is relatively unknown and, I suspect, seldom mentioned in the classroom."). Although this Article is not the first to attempt this expansion of Hohfeld's framework from private to public law, it is the first to do so in the realm of *state* constitutional rights, and the first to subject to Hohfeldian analysis the category of "affirmative" or "positive" state constitutional rights.

¹⁹ As of this writing, the highest courts of forty-three states have adjudicated direct challenges to state education finance plans. *State by State*, NAT'L ACCESS NETWORK, http://www.schoolfunding.info/states/state_by_state.php3 (last visited Nov. 16, 2010). Of the seven state highest courts that have not yet adjudicated a school finance case, four of these courts (i.e., those in Delaware, Hawaii, Mississippi, and Utah) have seen no judicial activity. *See id.* Nevada's highest court has adjudicated a case brought by the Governor to challenge a legislative impasse that prevented school funding legislation from being passed. *See* *Guinn v. Legislature of Nev.*, 71 P.3d 1269, 1272 (Nev. 2003), *overruled in part by* *Nevadans for Nev. v. Beers*, 142 P.3d 339 (Nev. 2006). Also, South Dakota's highest court has issued a preliminary decision holding that school districts have standing to sue to enforce the education clause. *See* *Olson v. Guindon*, 771 N.W.2d 318, 323 (S.D. 2009). Finally, in New Mexico, a suit challenging the adequacy of capital funding was brought in conjunction with enforcement actions working their way through New Mexico's trial courts. *See* Lynn Carrillo Cruz, *No Cake for Zuni: The Constitutionality of New Mexico's Public School Capital Finance System*, 37 N.M. L. REV. 307, 327-30 (2007) (reviewing the history of the various actions).

while fulfilling their roles as interpreters and protectors of state constitutional rights. It concludes by presenting a foundation for the development of a more protective, yet generally less intrusive, jurisprudence of affirmative rights in state courts.

I. HOHFELD'S FUNDAMENTAL CONCEPTIONS

A. *Jural Correlatives and Jural Opposites*

In the early twentieth century, frustrated with the unstable and shifting uses of the term “right” in judicial decision making, Hohfeld developed a pioneering analytical framework for explaining legal rights.²⁰ He set forth this framework in two seminal law review articles published in the *Yale Law Journal*.²¹ Hohfeld's framework recognizes that what judges (and everyone else) term “rights” actually encompasses eight “fundamental conceptions,” each of which describes a legal status that a person or entity may have, and each of which is related to two of the others, either as a “Jural Correlative” or as a “Jural Opposite.”²²

Numerous articles and books have employed Hohfeld's framework since it was first introduced. Numerous others have critiqued it, countered it, and attempted to improve upon it. Despite this critical activity, or maybe because of it, Hohfeld's framework remains highly influential. A curious aspect of scholarship on Hohfeld, however, is the paucity (until recently) of scholarship attempting to apply Hohfeld's framework to constitutional rights.²³ Even more rare—in fact completely absent—is any scholarship attempting to apply Hohfeld's framework to state constitutions. This scholarly gap is puzzling, given Hohfeld's own focus on state common law rights and relationships. It is also unfortunate in that state constitutions offer unique statements of rights not found in the Federal Constitution, and their

²⁰ See Walter Wheeler Cook, *Hohfeld's Contributions to the Science of Law*, 28 *YALE L.J.* 721, 728 (1919).

²¹ See Hohfeld, *Applied in Judicial Reasoning*, *supra* note 17, at 710, 717; Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 17, at 30-58 (developing and explaining the analytical framework). Using the analytical framework set forth in these articles, many scholars have built on Hohfeld's ideas. See, e.g., Layman E. Allen, *Formalizing Hohfeldian Analysis to Clarify the Multiple Senses of 'Legal Right': A Powerful Lens for the Electronic Age*, 48 *S. CAL. L. REV.* 428 (1974); Cook, *supra* note 20; Arthur L. Corbin, *Jural Relations and Their Classification*, 30 *YALE L.J.* 226 (1921).

²² Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 17, at 19, 30.

²³ See O'Rourke, *supra* note 18, at 154 (identifying the gap in scholarship applying Hohfeld to public law).

study can therefore illuminate our understanding of rights-based relationships in general. Hohfeld's typology²⁴ unfolds as follows:

(1) *Claim-Right*: A claim correlative to a duty that obligates another to take or refrain from taking action. Its opposite is the absence of a claim-right (i.e., a "no-right");

(2) *Privilege* (or "*Liberty*"): The freedom to engage in action, correlative to another's lack of any claim-right (thus, a no-right) to stop the action. Its opposite is a duty;

(3) *Power*: The ability to change legal relationships (e.g., by contracting), correlative to another's liability to the legal relationship one chooses to create. Its opposite is a disability; and

(4) *Immunity*: A status that creates a correlative disability in another to change one's legal relationships (e.g., a contractual provision forbidding termination of one's employment relationship without cause). Its opposite is a liability.

Viewed graphically in the tables below, conceptions that appear horizontally across from each other are correlatives; conceptions that appear diagonally from each other are opposites.²⁵

Table 1

Claim-Right	Duty
Privilege (Liberty)	No-Right

Table 2

Power	Liability
Immunity	Disability

Looking at Table 1, one can discern the following relations: If I have a claim-right, then someone else has a duty, and I can either compel that person to act, or I can prevent the person from acting. If I have a liberty, then I do not have a duty (either to act or refrain from acting). At the same time, no other person has a right to compel me to act or refrain from acting. For example, if I am in another person's home as a business invitee, I generally have the claim-right to certain guarantees of safety, and this claim-right

²⁴ The framework for analysis begins with typological definitions of the terms that are encompassed by the word "right" in American jurisprudence. See Hohfeld, *Applied in Judicial Reasoning*, *supra* note 17, at 717; Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 17, at 28-58.

²⁵ This tabular form of explicating Hohfeld's conceptions is not new, but it is very useful in simplifying the relationships involved. See, e.g., Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 17, at 30.

allows me to compel the other person to exercise reasonable care to ensure that the home is free of dangerous conditions.²⁶ But if I am an unknown trespasser (and not some child chasing an attractive nuisance), then the owner of the property has a liberty to refrain from inspecting his property or making it safe for me, and I consequently have no right to compel any such activity on his part.²⁷

Looking at Table 2, the following relations are evident: If I have a power to change a legal relationship (e.g., an employer has the default power to terminate workers at will), then I can make another person liable to that power (e.g., by terminating him without cause), unless that person has an immunity (e.g., based on a “just cause” provision in his employment agreement), which would cause me to have a disability (i.e., to terminate without establishing “cause”).²⁸

The important aspect of Hohfeld’s framework is the way in which it proposes to alter our statements of rights as statements of *relationships*. Scholars interpreting Hohfeld have argued that all statements of legal relationships relating to rights conceptions should be reducible to a three-variable arrangement: “A has a right against B for X,” for example.²⁹ If courts were to follow this rule, then ostensible rights-holders would be unable to say “I have a right to a job,” for example, without identifying against whom this ostensible claim-right may be asserted and what may be demanded of that person or entity.³⁰ This is a central question in all law, but its answer is relatively simple in basic, private law relationships, such as the contract and tort examples provided above. In fact, Hohfeld developed his framework to describe private legal relationships,³¹ and the Hohfeld system

²⁶ See, e.g., Joseph Z. Lell, Note, *Landowners or Lifeguards? Degel v. Majestic Mobile Manor, Inc. and Liability for Visitors’ Injuries from Natural Bodies of Water*, 72 WASH. L. REV. 1139, 1141-42 (1997).

²⁷ See, e.g., *id.* at 1142-43 (noting the scope of a landowner’s duty of protection based on entrant’s status as a trespasser).

²⁸ See, e.g., Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997) (“absent a contract of employment for a fixed term, an employer may discharge its employees at will ‘for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.’” (quoting *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 179 S.W. 134, 138 (Tenn. 1915))).

²⁹ GOTTLIEB ET AL., *supra* note 18, at 304 (explaining Hohfeld’s conceptions); see also Hohfeld, *Applied in Judicial Reasoning*, *supra* note 17, at 742-66 (explaining the operation of the fundamental conceptions in hypothetical relationships); O’Rourke, *supra* note 18, at 151 (outlining Professor John Finnis’s observation that every Hohfeldian legal relation has three elements—the legal positions occupied by two persons or entities and a third element called an “act-description,” which states the conduct governed by the two positions (quoting JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 199 (1980)) (internal quotation marks omitted)).

³⁰ GOTTLIEB ET AL., *supra* note 18, at 304.

³¹ See generally Hohfeld, *Applied in Judicial Reasoning*, *supra* note 17, at 757-59, 763-66 (discussing the fundamental conceptions in the context of trust law and equity); Hohfeld, *Some Funda-*

has, during most of its existence, been applied solely to private law questions.

Recently, however, scholars have begun to make attempts at applying the Hohfeld framework in constitutional law.³² Such an application poses difficult problems, as constitutional law often does not involve the relatively simple and individualized party structures common to private transactions and torts.³³ Rather, many constitutional principles and rules seem to inhere in the polity as a whole, and not in any individual, so it seems difficult to map such rules and the obligations they entail onto Hohfeld's relationship-based system. Nevertheless, a few scholars have shown how jural correlatives can be derived from relationships between individuals and the state.

For example, Allen O'Rourke has recently made a significant contribution to this body of literature.³⁴ Building on the work of prior scholars, O'Rourke evaluates familiar federal constitutional principles, including the commerce power, preemption, equal protection, due process, and the prohibition on slavery and involuntary servitude, in Hohfeldian terms.³⁵ A very

mental Legal Conceptions, *supra* note 17, at 19-20, 22-27, 45-47, 49-50 (discussing the fundamental conceptions in the context of property, contract, and tort law).

³² See, e.g., Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 315-28 (2000) [hereinafter Bybee, *Common Ground*]; Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1546-76 (1995) [hereinafter Bybee, *Taking Liberties*]; Maarten Henket, *Hohfeld, Public Reason and Comparative Constitutional Law*, 26 INT'L J. FOR SEMIOTICS L. 202, 202-03 (1996); H. Newcomb Morse, *Applying the Hohfeld System to Constitutional Analysis*, 9 WHITTIER L. REV. 639 *passim* (1988); O'Rourke, *supra* note 18, at 158-70; Frederick Shauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914 (2008).

³³ O'Rourke, *supra* note 18, at 154.

³⁴ See, e.g., *id.* at *passim*.

³⁵ See generally *id.* at 158-70. O'Rourke's recent piece shares many features with two pieces published by then-Professor Jay Bybee. See Bybee, *Common Ground*, *supra* note 32, at 315-28 (analyzing the Bill of Rights, along with Sections 8, 9, and 10 of Article 1, using Hohfeld's terminology); Bybee, *Taking Liberties*, *supra* note 32, at 1546-76. In both of these pieces, Bybee illustrates two Hohfeldian properties of First Amendment "rights": one, that these "rights" are actually properly conceived as disabilities on legislative power; and two, that such disabilities render Congress without "power" to enact laws infringing the First Amendment. See, e.g., Bybee, *Common Ground*, *supra* note 32, at 315. Professor Nicholas Rosenkranz has recently offered a slightly different, but functionally similar, way of reading the First Amendment, among other provisions. See Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1252-53 (2010). Although Rosenkranz does not mention Hohfeld, like Bybee, Rosenkranz focuses on the text of the First Amendment, which explicitly names "Congress" as the subject of the disability it imposes. *Id.* (internal quotation marks omitted). Both Bybee and Rosenkranz argue that this unique feature of the First Amendment, in contrast to the remainder of the Bill of Rights, indicates that the sole governmental entity limited by the First Amendment is Congress. They also both argue that this limit disables Congress from enacting legislation that transgresses the First Amendment, that this conception of the First Amendment means that it is only violated through legislation, and that the remedy for any such violation is limited to invalidation of the legislation. See Bybee, *Common Ground*, *supra* note 32, at 325-26; Bybee, *Taking Liberties*, *supra* note 32, at 1556;

useful aspect of O'Rourke's analysis is his categorization of Hohfeldian conceptions based on H.L.A. Hart's distinction between "primary rules"—those rules that govern conduct itself—and "secondary rules"—those rules that enable or disable conduct's legal effects.³⁶

According to O'Rourke's account, the Hohfeldian conceptions of claim-rights, duties, liberties, and no-rights are primary rules because these rules govern actual conduct.³⁷ If one has a duty, then one is required to act or refrain from acting in a certain way, for example. In contrast, the Hohfeldian conceptions of powers, liabilities, immunities, and disabilities are secondary rules because their presence or absence either enables or disables the legal effects intended by conduct. For example, if one has a power, then one may cause a change in legal relationships by acting (legislatively, for example) in accordance with the power, and the power will enable the legal effect of the action, but if the object of the action has an immunity to the exercise of the power in the intended way, then the intended change—but not the action itself—is legally disabled.

Relatedly, O'Rourke also shows that, in each Hohfeldian relationship, the two positions may be seen as derivative of each other, or even as the same legal status viewed from two mirrored perspectives.³⁸ One position, the "active position," describes the person that the law in question addresses directly. This position may be termed a "[d]uty, liberty, power, [or] disability."³⁹ The other position, the "passive position," describes the person that the law in question addresses indirectly. This position may be termed a

Rosenkranz, *supra*, at 1255. This Article focuses on O'Rourke's analysis because he extends the existing Hohfeldian analyses (and arguably predicts Rosenkranz's reading) by invoking H.L.A. Hart's distinction between primary and secondary rules, a distinction that this Article finds particularly helpful in examining the convergence in approaches to rights under federal and state constitutions. *See infra* notes 36-37 and accompanying text.

³⁶ *See* O'Rourke, *supra* note 18, at 154-56 (quoting H.L.A. HART, *THE CONCEPT OF LAW* 81 (2d ed. 1997)) (internal quotation marks omitted). O'Rourke was not the first to make this connection, but he was the first to do so as part of a systematic analysis of constitutional law. *See, e.g., id.* at 156 (acknowledging Lon Fuller's recognition of the same principle).

³⁷ *Id.* at 146-47. O'Rourke takes this to mean "physical act[s]," but there does not seem to be any distinction between a primary limitation on a physical act, such as striking another person, and a primary limitation on a procedural action, such as engaging in the process of legislating. *See id.* at 147 ("physical actions or inactions"); *id.* at 155 ("physical act"). In a basic sense, Congress and state legislatures, when they are in session, always have the liberty to engage in legislative acts—even to advocate for legislation that may be found to violate the Constitution. The question, from a Hohfeldian perspective, is whether their legislative actions will operate to cause changes to legal relationships. This Article elaborates more on this point in discussing what it considers to be O'Rourke's one interpretive mistake—treating the Equal Protection Clause as a primary rule of limitation on legislative and adjudicatory conduct and thus a source of claim-rights and duties, rather than as a secondary rule of limitation on the effects of legislative acts. *See infra* Part I.A.

³⁸ O'Rourke, *supra* note 18, at 150-52.

³⁹ *Id.* at 151 (emphasis omitted).

“claim, no-claim, liability, [or] immunity.”⁴⁰ If one knows the nature of the position occupied by one person in a rights relationship, then one can deduce the position of the other person because the second position is always correlative to the first.⁴¹

O’Rourke’s analysis is very convincing, and many of its elements are employed in this Article. However, in light of this Article’s focus on legal relationships between individuals and legislative bodies, one point is added for clarification. In the legislative context, the primary “conduct” is the act of legislating. This act encompasses all of the bargaining, drafting, hearings, speech-giving, and voting that the enactment of a piece of legislation entails. The resulting legislation, however, is not “conduct.” Rather, it is the physical manifestation of an alteration of legal relationships pursuant to a power to make such changes. Thus, legislation itself is properly thought of as being the subject of only secondary rules, while the act of making policy, as described above, may properly be the subject of primary rules.

An example will help to clarify the point. Some state legislatures have regulations of decorum. These regulations generally state primary rules as to how one is to conduct oneself while in service in the legislature. For example, the Kentucky Constitution contains a provision that prohibits public office holders from engaging in duels.⁴² It also contains a provision that grants each house of the state legislature the power to expel a member of the house, but subjects this power to two limitations: (1) a two-thirds vote in favor of expulsion; and (2) a prohibition on double jeopardy.⁴³ The first provision—banning dueling—prohibits the primary conduct of engaging in a duel. Thus, it sets up a duty not to duel. The second provision sets up a procedure by which a house of the state legislature may remove a member—for example, one who has engaged in a duel. Thus, the second provision sets up both a power to expel and a disability to expel with less than a two-thirds majority vote.

If the house follows the expulsion procedure, then it will successfully change the legal status of the member from “member” to “expelled.” If, however, the legislature votes to expel by simple majority, then its vote will not accomplish the legal change desired. In both of these cases, the members of the body, as well as the body itself, have engaged in identical prima-

⁴⁰ *Id.*

⁴¹ *See id.* at 153 (explaining how legal relations, correlativity, and deduction allow an observer to derive the nature of the legal position of one party from knowledge of another party’s legal position as to an act description).

⁴² KY. CONST. § 239 (West, Westlaw through 2009) (“Any person who shall, after the adoption of this Constitution, either directly or indirectly, give, accept or knowingly carry a challenge to any person or persons to fight in single combat, with a citizen of this State, with a deadly weapon, either in or out of the State, shall be deprived of the right to hold any office of honor or profit in this Commonwealth . . .”).

⁴³ *Id.* § 39 (“Each House of the General Assembly may . . . with the concurrence of two-thirds, expel a member, but not a second time for the same cause . . .”).

ry conduct—voting. Yet, even if all of the members of the house agree that only a bare majority will be required to expel, the simple majority vote will not accomplish the expulsion because this result is disabled by the constitutional text. Another aspect of this relationship is the immunity held by the member subject to the expulsion vote. The member possesses an immunity from expulsion, correlative to the disability to expel, unless the expulsion is supported by a two-thirds majority vote in the house. Thus, the rule against expulsion with less than a two-thirds majority is a secondary rule disabling the legal effects of the primary legislative conduct of voting.

The foregoing clarification is necessary because this Article's inquiry is limited to the legal relationships that exist between the individual and the legislative bodies of the states and the federal government. This limitation isolates the rights-based inquiry that courts must make in school finance litigation, which uniformly presents state constitutional challenges by individuals against state legislative action or inaction.⁴⁴

In Hohfeldian terms, the vast majority of the legal relationships set up in the U.S. Constitution between individuals and legislative bodies are relationships of powers, liabilities, immunities, and disabilities—in other words, secondary rules.⁴⁵ For example, Article I, Section 8 grants Congress the power to enact laws to regulate interstate commerce.⁴⁶ If Congress enacts such a law, and it is deemed a regulation of interstate commerce, then each of us has a liability to its legal effects. If one of the legal effects is to require each of us to keep our garage doors closed during the daylight hours, then each of us has a Hohfeldian duty to do so. However, if the subject of the enacted law (i.e., garage door positioning) falls outside the commerce power (as it undoubtedly does under current jurisprudence⁴⁷), then each of us has an immunity to the legal changes it intends, including the duties it purports to impose.

How do we know this? For one thing, in the context of enumerated powers, the text appears to compel a powers/immunities interpretation. Congress is explicitly granted “[p]ower”⁴⁸ to regulate commerce, which matches the Hohfeldian conception of “power”—the ability to alter legal relationships.⁴⁹ For example, under current interpretations of the Commerce Clause, Congress may exercise its commerce power by forbidding us to use or sell marijuana, thereby altering our legal status from “free to use or sell

⁴⁴ Litigation challenging the conduct of non-legislative actors undoubtedly presents different Hohfeldian problems. Future scholarship should address how these differences play out under state constitutional law.

⁴⁵ See O'Rourke, *supra* note 18, at 158.

⁴⁶ U.S. CONST. art. I, § 8, cl. 3.

⁴⁷ See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (explaining that Congress may only regulate within three broadly-defined categories of activities under the Commerce Clause).

⁴⁸ U.S. CONST. art. I, § 8, cl. 1, 3.

⁴⁹ See Morse, *supra* note 32, at 639 & nn.1-2 (outlining the terminological similarities between U.S. Constitutional text and Hohfeld's legal positions).

marijuana” to “prohibited from using or selling marijuana.”⁵⁰ Conversely, the current interpretation of the commerce power does not provide Congress with the power to directly regulate public education, as public education is thought to reside beyond the definition of “interstate commerce.”⁵¹ However, the commerce power’s limitations do not prevent Congress from actually enacting a particular piece of legislation seeking to directly regulate public education (i.e., they do not prohibit the *conduct* of enacting unconstitutional legislation). Instead, these limitations prevent such legislation that transgresses the Constitution from being effective in causing the intended changes to legal relationships.

But what about the more familiar rights-based ideas expressed in the Bill of Rights? These are nearly uniformly stated as prohibitions⁵² or general negative guarantees.⁵³ It is tempting, therefore, to view them as Hohfeldian duties not to act.⁵⁴ In the context of state action other than legislation, some of these provisions arguably do create such Hohfeldian duties. For example, if one reads the Fourth Amendment’s search and seizure provisions in light of the individual cause of action provided by 42 U.S.C. § 1983, then one can reasonably conclude that each officer of the law has a Hohfeldian duty not to apply excessive force in seizing a person through arrest. In the context of legislative action, though, our constitutional jurisprudence has enforced the commands of the Bill of Rights as immunities and disabilities, rather than as claim-rights and duties. Take the First Amendment’s Free Exercise Clause, for example. Despite the text of the First Amendment, which states that “Congress shall make no law . . . prohibiting the free exercise [of religion],” Congress and state legislatures have been found to possess only disabilities to effect abridgements of individual religious liberties, which correlate with immunities in the people to have to comply with laws that so abridge.

In the case of as-applied challenges⁵⁵ based on the First Amendment, the courts have focused on individual immunities. For example, the Wis-

⁵⁰ See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

⁵¹ See *Lopez*, 514 U.S. at 563-64, 567-68. Of course, Congress accomplishes nearly identical, and often more far-reaching, results by way of its conditional spending power, which is subject to arguably less stringent limitations; but to use this power, Congress must at least appropriate some funds to the states. See *South Dakota v. Dole*, 483 U.S. 203, 206, 211-12 (1987).

⁵² E.g., U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

⁵³ E.g., *id.* amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

⁵⁴ See, e.g., David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864-65 (1986).

⁵⁵ It should be noted here that, in acknowledging the possibility of an as-applied challenge to legislation based on the First Amendment, this Article parts ways with Professor Rosenkranz and then-Professor Bybee, who both perceived the First Amendment as being amenable only to facial challenges. See Bybee, *Common Ground*, *supra* note 32, at 332 (concluding that, under his theory of the First

consin compulsory attendance law in *Wisconsin v. Yoder*⁵⁶ was an otherwise validly enacted public policy promulgated by a state legislature with the power to promulgate such laws.⁵⁷ But in describing the claims put before it, the Supreme Court explained that “[i]t is the parents who are subject to prosecution here for failing to cause their children to attend school, and *it is their right of free exercise*, not that of their children, *that must determine Wisconsin’s power* to impose criminal penalties on the parent.”⁵⁸ Thus, in *Yoder*, the Court set up the Yoders’ Free Exercise “rights” as immunities, correlating with a disability that limited the “power” of the Wisconsin legislature to accomplish a definition or change to the Yoders’ legal status. When the Yoders prevailed, the statute was not ordered repealed, and the state legislature was not collectively held “liable” to the Yoders.⁵⁹ Instead, the Yoders were allowed to assert an individual immunity to the statute’s legal effects and to withdraw their son from high school.⁶⁰

These principles apply even more clearly to facially unconstitutional enactments. To understand this better, it is useful to imagine a statute, such as a statute requiring schools to be segregated by race, ruled facially unconstitutional under the Equal Protection Clause. Under our current jurisprudence, it would be unthinkable for the Supreme Court to order a state legislature to pass an act repealing a statute that denies equal protection, and the Court has never done so.⁶¹ Instead, the statute is simply declared

Amendment, a decision in favor of the Yoders should have required invalidation of the challenged statute, rather than a judicially created exemption from its application); Rosenkranz, *supra* note 35, at 1268 (concluding that all Free Exercise Clause challenges under the First Amendment should be facial challenges). These perspectives rely on a conception of the First Amendment as a source of Hohfeldian disabilities, but (apparently) not as a source of individual immunities. There is no reason that the text of the First Amendment should be read to compel this conclusion, which conflicts with the natural Hohfeldian correlative arrangement. Though both Rosenkranz and Bybee have made a strong case that the First Amendment limits only legislative actors, accepting this conclusion does not compel the further conclusion that legislation can never be read to have unconstitutional effects that were not contemplated at the time such legislation was passed. Nevertheless, a comprehensive refutation of Rosenkranz’s and Bybee’s readings of the First Amendment is beyond the scope of this Article. Accordingly, and because the following examination of federal constitutional jurisprudence has a descriptive purpose, this Article leaves interpretive disputes for another day.

⁵⁶ 406 U.S. 205 (1972).

⁵⁷ *See id.* at 236.

⁵⁸ *Id.* at 230-31 (emphasis added).

⁵⁹ *Id.* at 236.

⁶⁰ *Id.* at 234 & n.22.

⁶¹ Numerous practical problems would arise from such a ruling. For example, if the legislature failed to repeal, would the entire body then be subjected to a contempt citation? Just the members who voted against repeal? What about abstainers? Undoubtedly, because of such practical problems, most states follow a presumptive rule that mandamus cannot lie against the legislature. *See, e.g., Colegrove v. Green*, 328 U.S. 549, 555 (1946) (“It never occurred to anyone that this Court could issue mandamus to compel Congress to perform its mandatory duty to apportion.”); *Lamson v. Sec’y of the Commonwealth*, 168 N.E.2d 480, 484 (Mass. 1960) (“Mandamus of course does not lie against the Legislature.”). Also, it is a bedrock principle of law that a statute may remain on the books after being ruled unconstitu-

unconstitutional, and the legislature is thereby disabled from making the change in legal relationships sought through the statute. That Congress or a state legislature may in the future choose not to enact similar legislation does not confer upon any individual a claim-right to stop it from doing so.

In fact, many states currently maintain in their codes statutes and even constitutional provisions that are patently and facially unconstitutional.⁶² The continued existence of these laws in written form creates a moral and political dilemma, but even this dilemma does not create a Hohfeldian duty for the legislature to repeal such statutes. Similarly, it does not prevent the legislature from enacting similar statutes—perhaps as part of a theory that the current constitutional law jurisprudence is mistaken. While this theory would of course be far-fetched in the segregation context, state legislatures, for example, enact abortion-related laws of dubious constitutional value all the time based on the theory that the law is actively changing in the area or based on a desire to “test” the law or move it in a desired direction.⁶³ At most, legislatures collectively—and legislators individually—have the moral duty, based on their oaths, to approach legislation in fidelity to constitutional principles, but they do not have Hohfeldian legal duties to do so.

Thus, it is incorrect to say that “no state shall deny” means that each state legislature has a “duty” not to enact such a statute, or a “duty” to re-

tional, and the only real debate over this seems to be whether the statute can be “revived” if the Court reverses itself later without a new enactment of the statute. *See, e.g.*, William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of “Unconstitutional” Statutes*, 93 COLUM. L. REV. 1902, 1915-24 (1993) (assuming that judgments declaring statutes unconstitutional simply deny their enforcement, but arguing that subsequent overruling of such constitutional judgments should not revive statutes without further legislative action, due to the reliance interests that arise from years of respect for the prior constitutional decision); *see also* Earl T. Crawford, *The Legislative Status of an Unconstitutional Statute*, 49 MICH. L. REV. 645, 645-46 (1951) (reviewing numerous state supreme court decisions declaring statutes unconstitutional, many of which explain that, though the statutes remain on the books, they have no legal effect).

⁶² *See, e.g.*, ALA. CONST. art. XIV, § 256 (“To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide.”); KY. REV. STAT. ANN. § 158.175 (LexisNexis 2006) (providing for the voluntary, but teacher-directed, recitation of the Lord’s Prayer at the beginning of each school day, along with the pledge of allegiance and a designated moment of silence). These provisions attempt to effect a legal result that has been specifically held to be unconstitutional, thus rendering them ineffective, but they may still exist as law on the books. In a forthcoming article, William Baude identifies several unconstitutional federal statutes that remain in the United States Code, unenforced and unenforceable, but subject to no efforts at repeal. *See* William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. (forthcoming 2011) (manuscript at 17), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1665161.

⁶³ *See, e.g.*, L.B. 1103, 101st Leg., 2d Sess. (Neb. 2010) (prohibiting abortions during or after the twentieth week of pregnancy based on a theory of fetal “pain,” which arguably would limit abortion rights beyond the Supreme Court’s current “viability” standard). Although this provision may be shown to violate the Constitution, this possibility does not create a Hohfeldian “duty” to avoid enacting such legislation. Rather, it disables the legal changes sought to be made through the legislation.

peal an invalid statute, even though the text would seem to call for that interpretation. Rather, it means that if a state legislature enacts the statute, it is challenged, and it cannot stand up to strict scrutiny, then it will not be enforced. The Hohfeldian way of saying this is that the state legislature may enact the statute, but the legislature is disabled from accomplishing the change in legal relationships intended by the statute. This is a system of secondary rules.

Nearly all of the rules we cling to as “rights” against legislation under the U.S. Constitution are really immunities, and many of the “negative duties” we recognize are actually disabilities, because the legal relationships set up in the U.S. Constitution are overwhelmingly secondary rules.⁶⁴ The question remains, however, whether this is the character of the state constitutional system in each, or all, of the fifty states. Before addressing this question, though, a predicate distinction must be acknowledged—that between so-called “negative rights” and so-called “positive rights.”

B. “Positive” and “Negative” Hohfeldian Relationships

Like the Federal Constitution, state constitutions contain individual rights guarantees, and many of these guarantees read similarly to those in the federal document—as prohibitions. Considering the well-documented doctrinal convergence phenomenon, one would expect that no distinction in Hohfeldian terms would exist between the federal “rights” outlined above and those set forth in many state constitutional provisions, as currently understood. Nevertheless, many other state constitutional provisions are textually distinct and have no analogue in the federal document. One of these distinctions is the existence in state constitutions of provisions that can be said to create “positive rights.” As Professor David Currie has explained, positive rights are entitlements to governmental action, and they contrast with the negative rights familiar to most constitutional discourse that generally act as prohibitions or limitations.⁶⁵

Rights may also be conceptualized as “positive” or “negative” within the Hohfeldian system, but Hohfeldian analysis clarifies the consequences of adopting a positive or negative conception of a right. As outlined above, in

⁶⁴ As O’Rourke points out, the Thirteenth Amendment is different in that it actually proscribes the *conduct* of enslavement of others. Each person and entity in the United States, therefore, has a Hohfeldian *duty* to refrain from taking the prohibited action. In this limited sense, and in no other, the federal document reflects primary Hohfeldian relationships.

⁶⁵ Currie, *supra* note 54, at 864 (recounting Judge Richard Posner’s explanation of this distinction in *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-06 (7th Cir. 1983)). *But see* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1324-26 (1984) (questioning the distinction and criticizing defenses of it as largely semantic when applied to justify a governmental entity’s decision to allocate resources based on a potential recipient’s exercise of constitutional rights).

Hohfeldian terms, a constitutional negative right may take the form of either an immunity to certain government action, which creates a disability on the part of the government to change one's legal relationships by taking such actions, or a claim-right that allows one to compel the government to refrain from acting in a prohibited way. In contrast, a positive right, in Hohfeldian terms, can only take the form of a claim-right to compel the government to act in a certain way toward the holder of the right.⁶⁶ That is, where a person possesses a legal entitlement to government action, that person must have a claim to compel such action. An affirmative right to receive could only correlate to an affirmative duty to provide. None of the other Hohfeldian relationships map cleanly onto the right to receive an entitled action, service, or set of resources. Therefore, a principal distinction, from a Hohfeldian perspective, between positive and negative rights is that the former generate only primary rules, while the latter may generate either primary or secondary rules.

Under the U.S. Constitution, no clear positive rights have been recognized, although certain negative rights have been remediated through affirmative orders for government action. For example, equal protection violations generally consist of government action that affirmatively mistreats individuals based on suspect classifications (e.g., those based on race and national origin).⁶⁷ However, no individual has the right to compel the government to guarantee him equal treatment by others.⁶⁸ Instead, we each have some right to prevent the government from treating us unequally from those similarly situated but who are distinguished from us based on race or national origin.⁶⁹ The government need not engage in efforts to cause equal effects upon us, nor must it act affirmatively to remedy inequalities that exist between us due to factors outside its own actions.⁷⁰ Rather, it must refrain from creating invidious classifications.⁷¹

The fact that each of us who is aggrieved by actions violating this provision may seek a judicial remedy that may require certain affirmative actions to be performed—for example, to eliminate vestigial harms—does not change the character of our right to an entitlement to such performance.⁷² Related to the primary immunity against unequal treatment by non-legislative actors may sometimes be a remedial interest to see past unequal

⁶⁶ See Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 866 (2001) (arguing that a right cannot be considered affirmative or positive unless it can be violated even in the complete absence of government action).

⁶⁷ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (reviewing federal equal protection doctrine).

⁶⁸ See Cross, *supra* note 66, at 873.

⁶⁹ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (holding that laws segregating public school children based solely on race deprived them of equal protection of the laws).

⁷⁰ See Currie, *supra* note 54, at 884.

⁷¹ See *id.* at 880.

⁷² See Cross, *supra* note 66, at 873 (distinguishing between positive and negative rights).

treatment prospectively remedied to remove its vestiges.⁷³ However, nothing about the right itself compels such vestigial remediation, and at a certain level, a judge's power to order a vestigial remedy is indeed limited by the right itself.⁷⁴ Rather, where it exists against a legislative body of the state or federal government, what we call a "right to equal protection" is actually an immunity against statutes that create invidious classifications, and where this immunity has been ignored or transgressed for decades, the vestigial harms thereby created sometimes necessitate affirmative remedial actions.

Even the more debatable or ambiguous categories of federal constitutional rights, such as the right to have counsel provided at the expense of the government in a substantial criminal prosecution,⁷⁵ all can be traced

⁷³ In drawing this distinction, this Article does not mean to say that the primary right is "substantive" and that the remedial right is "procedural." In fact, each right is clearly substantive in at least one way: each has the potential to alter the primary conduct of non-judicial actors. *Cf.* JOHN NORTON POMEROY, *REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION, ACCORDING TO THE REFORMED AMERICAN PROCEDURE: A TREATISE* 129 (1876) (distinguishing between the "primary right of ownership" and the "remedial right of possession," which might include a remedial right of forcible ejection); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *COLUM. L. REV.* 857, 861, 889-913 (1999) (introducing the theory of "remedial equilibration," which holds that remedies inherently alter the content of the rights with which they are associated through the effects of incorporation (prophylactic remedies define the right), deterrence (troubling remedies deter courts from expanding rights), and substantiation (the value of remedies most often determines the value of rights) (internal quotation marks omitted)); Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 *U.C. DAVIS L. REV.* 673, 687-95 (2001) (explaining a "unified right theory of remedies," where each has the substantive character of a right). These arguments are forceful, but the indistinguishability of rights and remedies favored by the legal realists seems to fall apart where courts engage in remediation without identifying a right that has been violated. *See* Bauries, *supra* note 15, at 741 (describing several cases in state supreme courts where the courts explicitly rejected a notion of individual rights to education, but nevertheless ordered remedial action from the legislature to improve educational funding). This Article adheres to the view that, at some level, rights and remedies can and should be thought of distinctly. The most basic distinction is that the primary right is present and the remedial right is inchoate and conditional. That is, a remedial right becomes "perfected" only when a primary right has been violated, and the content of a remedial right, especially in public law litigation, is subject to significant ad hoc judicial discretion—which includes the discretion not to order a remedy at all. *See* Charles F. Sable & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *HARV. L. REV.* 1015, 1067-73 (2004) (explaining an iterative process in public law litigation that allows for significant construction of remedies for constitutional violations among many stakeholders, with the court as a facilitator); Bauries, *supra* note 15 at 725 (discussing judicial use of "remedial abstention" to avoid ordering remedial legislative action where state constitutional rights have been violated (internal quotation marks omitted)); *see also* *Brown*, 347 U.S. at 495 (holding segregated schooling unconstitutional, but failing to order the desegregation of any schools).

⁷⁴ *See* *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (stating that the "principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself" (quoting *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977)) (internal quotation marks omitted)).

⁷⁵ *See* *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

back to a negative rights-based conception.⁷⁶ For example, in the case of the right to counsel, the ostensible “positive right” of a defendant to have an attorney provided for him is relational—it does not arise unless the government subjects the defendant to prosecution.⁷⁷ Thus, the positive right to counsel at the expense of the government is really a negative immunity disabling legal changes to the defendant’s life, liberty, or property unless he is first provided counsel. The fact that the most common means of remediating the widespread violation of this right is the expedient of providing public defenders for the indigent does not change the character of the right itself—for an equally effective remedial measure (i.e., equally effective at remediating the violation of the right, not at protecting against crime) would be to just forbid prosecution of defendants who cannot afford counsel.⁷⁸

As Professor Frank Cross has illustrated, an easy way to distinguish between positive and negative rights is to imagine a world without government. In such a world, any negative right against state action (e.g., a right to freedom of speech or to the free exercise of religion) would automatically be fulfilled because there would be no government to infringe the right.⁷⁹ In contrast, in such a world, *no* positive right (e.g., the right to a minimally adequate living standard) would *automatically* be fulfilled.⁸⁰ Rather, some action would be required of government to fulfill such a right, and in the absence of any government, this would be impossible. Thus, to identify a truly positive constitutional right, one must identify a situation where, even in the *complete* absence of governmental action (e.g., action to institutionalize a person, action to imprison a person, action to prosecute a person, or action to classify a person), an individual would still have a claim against the government. And this claim would have to be the Hohfeldian form of

⁷⁶ See Cross, *supra* note 66, at 869; Currie, *supra* note 54, at 873-74.

⁷⁷ See Currie, *supra* note 54, at 874.

⁷⁸ This Article does not mean to argue that the *practical* character of the right is not altered by a remedy that is consistently ordered in the lower courts. In fact, the remedy of requiring funding of public defender’s offices is so pervasive that it may have even become part of the practical meaning of the right. But the *legal* meaning of the right to counsel is simply that a conviction without counsel fails to provide a defendant with due process of law—the *real* right—which is a negative prohibition.

⁷⁹ Cross, *supra* note 66, at 866. As Professor Cross also points out, without government, one’s ability to freely practice one’s religion might be practically diminished (e.g., due to the strong-arming behavior of private actors), but the right against government interference with religious expression—the constitutional right—would automatically not be subject to infringement in a world without government. *Id.* at 868.

⁸⁰ *Id.* Again, in a world without government, one might nevertheless obtain a minimally adequate living standard through one’s own private actions or through the charity of others, but it would not be correct to say that one has a constitutional right against oneself, and it would be similarly incorrect to say that one has a constitutional right to sufficient private charity such that one might obtain a minimally adequate living standard. Rather, if such a right exists under the Constitution, it exists against the federal government.

claim-right—an entitlement to action.⁸¹ With these examples in mind, it is difficult to identify any truly positive federal constitutional rights that inhere in individuals.

In contrast, as introduced in the previous section, state constitutions often contain statements of legislative duties, goals, or obligations that can be—and have been—construed to create truly positive, non-relational rights in individuals.⁸² For example, New York’s constitution contains a provision requiring that aid to the poor “shall be provided by the state.”⁸³ Alabama’s document declares that “[i]t shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor,” requiring both aid to the poor and delegation of this duty.⁸⁴ Montana’s constitution states: “The legislature may provide such economic assistance and social and rehabilitative services for those who, by reason of age, infirmities, or misfortune are determined by the legislature to be in need.”⁸⁵ Wyoming’s provides: “Such charitable, reformatory and penal institutions as the claims of humanity and the public good may require, shall be established and supported by the state in such manner as the legislature may prescribe.”⁸⁶ Several other state constitutions contain similar provisions, some relying on unambiguous, duty-based language,⁸⁷ others stating hortatory goals and placing explicit discretion on the legislature,⁸⁸ and still others placing mandates on local governmental bodies, rather than on the state legislative branch.⁸⁹

The important question for this Article’s purposes is whether these duty- and goal-based provisions provide enough of a foundation to say that individuals possess affirmative Hohfeldian *claim-rights* to compel the performance of such duties or the pursuance of such goals. By and large, the scholarly commentary has concluded that the answer to this question is or

⁸¹ See *id.* at 864 (describing a positive right as “a claim to something” (quoting CHARLES FRIED, *RIGHT AND WRONG* 110 (1978)) (internal quotation marks omitted)).

⁸² See Hershkoff, *Positive Rights and State Constitutions*, *supra* note 14, at 1138-39 (outlining New York’s provision); Neuborne, *supra* note 14, at 893-95 (collecting state welfare provisions, some of which are phrased in positive duty terms, and contrasting them with federal rights).

⁸³ N.Y. CONST. art. XVII, § 1 (West, Westlaw through 2010).

⁸⁴ ALA. CONST. art. IV, § 88 (West, Westlaw through Apr. 8, 2010 amendments).

⁸⁵ MONT. CONST. art. XII, § 3(3) (West, Westlaw through 2008).

⁸⁶ WYO. CONST. art. VII, § 18 (West, Westlaw through Nov. 4, 2008 amendments).

⁸⁷ See, e.g., MISS. CONST. art. IV, § 86 (West, Westlaw through 2009) (“It shall be the duty of the legislature to provide by law for the treatment and care of the insane . . .”).

⁸⁸ See, e.g., N.C. CONST. art. XI, § 3 (West, Westlaw through 2010) (“Such charitable, benevolent, penal, and correctional institutions and agencies as the needs of humanity and the public good may require shall be established and operated by the State under such organization and in such manner as the General Assembly may prescribe.”).

⁸⁹ See, e.g., OKLA. CONST. art. XVII, § 3 (West, Westlaw through Sept. 1, 2010 amendments) (“The several counties of the State shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of the county.”).

should be “yes,” either by way of assumption or by way of little more than conclusory normative analysis, and it has moved on to normatively defend the enforceability, justiciability, and remediability of such rights.⁹⁰

These papers put the cart before the horse. It is, in fact, a serious and debatable question whether and to what extent duty- and goal-based language in a state constitution creates individual claim-rights, where such language is typically directed at legislative actors and is often coupled with the language of near-absolute legislative discretion. To answer this question, one must examine both the textual sources of education rights and the judicial conceptions of such sources. In the next two Parts, this Article defines the main sources of evidence from which one may determine the nature of education’s constitutional status in the states and examines, from a Hohfeldian perspective, what that status appears to be in each state.

II. SOURCES OF EDUCATION RIGHTS

A. *State Constitutional Text*

As introduced above, state constitutions are distinct from the federal document in part because they contain provisions arguably mandating the making of public policy in certain areas, including education. Much of this policy-directive language is drafted in the style of a statutory code, rather than a constitution, and some of this policy-directive language operates to place strict procedural limitations on legislative action. For example, a provision of the education article in the Louisiana Constitution requires the state legislature to negotiate with the state board of education to arrive at an agreed level of state and local expenditures on education each budget year.⁹¹

⁹⁰ See Feldman, *supra* note 14, at 1076; Hershkoff, *Positive Rights and the Evolution*, *supra* note 14, at 830; Hershkoff, *Positive Rights and State Constitutions*, *supra* note 14, at 1137; Hershkoff, *State Courts and the “Passive Virtues”*, *supra* note 14, at 1890-91; Hershkoff, *Welfare Devolution*, *supra* note 14, at 1432-33; Neuborne, *supra* note 14, at 893-98; see also Elder, *supra* note 14, at 757; Kagan, *supra* note 14, at 2257.

⁹¹ Compare LA. CONST. art. VIII, § 13(B) (West, Westlaw through Jan. 1, 2010 amendments), with VA. CONST. art. VIII, § 2 (West, Westlaw through 2010). Virginia’s constitution provides for far more legislative discretion:

Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly.

The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds.

VA. CONST. art. VIII, § 2 (West, Westlaw through 2010). For an analysis of Louisiana’s provision in the context of school reform in New Orleans following Hurricane Katrina, see Scott R. Bauries, *State Constitutional Design and Education Reform: Process Specification in Louisiana*, 40 J.L. & EDUC.

Based on this provision, it would certainly be proper to say that the Louisiana legislature has a “duty” to negotiate, but this duty is not Hohfeldian because it does not run to any identified person or entity.⁹² That is, no one possesses a claim-right to force the negotiation to occur, and no identifiable interest is violated if the negotiation does not occur, so long as schools are funded nonetheless. Rather, based on this text, the Louisiana legislature possesses a Hohfeldian power to establish a level of funding for education each year, which is subject to the proviso that the level of funding established must result from a negotiation with the state board of education.

Most state education provisions read more generally, and Louisiana’s constitution itself contains a more general mandate as well.⁹³ The more general provisions in all state constitutions tend to require or strongly encourage the legislature to fund and maintain an education system. These provisions may create Hohfeldian duties, which may also correlate logically with individual claim-rights. If so, then an individual in the state should be able to say, “I have a right against the state legislature that educational services be provided to me at state expense.” This statement would contain the required three Hohfeldian elements of two legal positions (i.e., the individual’s claim-right and the legislature’s duty) and one conduct statement (i.e., provision of educational services at state expense).⁹⁴ The question is whether and to what extent the education clauses in state constitutions can be read to impose this Hohfeldian set of relationships.

To begin, then, it is necessary to analyze the text of the education provisions of the fifty state constitutions. The clearest Hohfeldian relationships would seem to arise from the overwhelming majority of state constitutions that provide explicitly for a legislative duty to establish and maintain an educational system. For example, the Minnesota Constitution provides that

(forthcoming 2011) (manuscript at 40-46), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707143.

⁹² Although individual rights give rise to correlative duties, duties do not necessarily give rise to correlative individual rights. See Joel Feinberg, *Duties, Rights, and Claims*, 3 AM. PHIL. Q. 137, 142 (1966); David Lyons, *Rights, Claimants, and Beneficiaries*, 6 AM. PHIL. Q. 173, 173-74 (1969). But the lack of an individual right correlative to the duty in this case can be explained in Hohfeldian terms as the result of misconception of the true legal relationships inherent in the relevant Louisiana constitutional provision. The “duty” to negotiate is not actually a “duty” at all, for the legislature may choose in any year not to negotiate with the state board, in which case the prior year’s funding model and spending levels would become the current year’s by default. See LA. CONST. art. VIII, § 13(B) (West, Westlaw through Jan. 1, 2010 amendments). Rather, the “duty” to negotiate simply places a condition on the legislature’s power to change legal relationships through new, prospective legislation. If the legislature fails to negotiate and agree with the state board, it is disabled from causing the desired changes in relationships through any such new legislation.

⁹³ LA. CONST. art. VIII, § 1 (West, Westlaw through Jan. 1, 2010 amendments) (“The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system.”).

⁹⁴ See *supra* Part I.A (explaining the Hohfeldian statement of rights relationships based on two position holders and a conduct statement).

“it is the duty of the legislature to establish a general and uniform system of public schools.”⁹⁵ Most of the other state education clause provisions take similar forms, using duty-based terms such as “shall” to impose obligations and directing these terms toward the establishment and maintenance of a system of schools.⁹⁶ In providing for explicit duties to establish and maintain support for educational systems, it would seem that such provisions set up Hohfeldian duties that potentially correlate with individual claim-rights of the children in a particular state, who should theoretically be able to compel the performance of such duties through judicial processes.

Not all state constitutions so provide, however. Several state constitutions employ terms that appear to provide for duties and obligations, such as “shall,” but direct the force of such duties to hortatory purposes, such as to “encourage” education. For example, the California Constitution provides: “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,

⁹⁵ MINN. CONST. art. XIII, § 1 (West, Westlaw through June 30, 2010).

⁹⁶ ALASKA CONST. art. VII, § 1 (West, Westlaw through 2010); ARIZ. CONST. art. XI, § 6 (West, Westlaw through 2010); ARK. CONST. art. XIV, § 1 (West, Westlaw through 2010); COLO. CONST. art. IX, § 2 (West, Westlaw through Nov. 4, 2008 amendments); CONN. CONST. art. VIII, § 1 (West, Westlaw through Feb. 2010 amendments); DEL. CONST. art. X, § 1 (West, Westlaw through 2010); FLA. CONST. art. IX, § 1(a) (West, Westlaw through Nov. 4, 2008); GA. CONST. art. VIII, § 1 (West, Westlaw through 2010); HAW. CONST. art. X, § 1 (West, Westlaw through 2010 amendments); IDAHO CONST. art. IX, § 1 (West, Westlaw through 2010); ILL. CONST. art. X, § 1 (West, Westlaw through Apr. 1, 2010); IND. CONST. art. IX, § 1 (West, Westlaw through 2010); KAN. CONST. art. VI, § 1 (West, Westlaw through 2009); KY. CONST. § 183 (West, Westlaw through 2009); LA. CONST. art. VIII, § 1 (West, Westlaw through Jan. 1, 2010 amendments); ME. CONST. art. VIII, pt. 1st, § 1 (West, Westlaw through 2009); MD. CONST. art. VIII, § 1 (West, Westlaw through 2010); MASS. CONST. ch. V, § II (West, Westlaw through Sept. 1, 2010 amendments); MICH. CONST. art. VIII, §§ 1, 2 (West, Westlaw through Nov. 2008 amendments); MISS. CONST. art. VIII, § 201 (West, Westlaw through 2009); MO. CONST. art. IX, § 1(a) (West, Westlaw through Nov. 4, 2008); MONT. CONST. art. X, § 1 (West, Westlaw through 2008); NEB. CONST. art. VII, § 1 (West, Westlaw through 2010); NEV. CONST. art. XI, § 2 (West, Westlaw through 2009); N.J. CONST. art. VIII, § 4, para. 1 (West, Westlaw through Nov. 3, 2009 amendments); N.M. CONST. art. XII, § 1 (West, Westlaw through 2010); N.Y. CONST. art. XI, § 1 (West, Westlaw through 2010); N.C. CONST. art. IX, § 2(1) (West, Westlaw through 2010); N.D. CONST. art. VIII, §§ 1, 3, 4 (West, Westlaw through 2009); OHIO CONST. art. VI, § 2 (West, Westlaw through 2010); OKLA. CONST. art. XIII, § 1 (West, Westlaw through Sept. 1, 2010 amendments); OR. CONST. art. VIII, §§ 3, 8(1) (West, Westlaw through May 18, 2010 amendments); PA. CONST. art. III, pt. B, § 14 (West, Westlaw through 2010); R.I. CONST. art. XII, § 1 (West, Westlaw through Jan. 2009); S.D. CONST. art. VIII, § 1 (West, Westlaw through 2010); TENN. CONST. art. XI, § 12 (West, Westlaw through 2010); TEX. CONST. art. VII, § 1 (West, Westlaw through 2009); UTAH CONST. art. X, § 1 (West, Westlaw through 2010); VA. CONST. art. VIII, § 1 (West, Westlaw through 2010); WASH. CONST. art. IX, §§ 1, 2 (West, Westlaw through Nov. 3, 2009 amendments); W.VA. CONST. art. XII, §§ 1, 12 (West, Westlaw through 2010); WIS. CONST. art. X, § 3 (West, Westlaw through July 15, 2010 amendments). For the complete text of each state’s education clause, see R. CRAIG WOOD, EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES 103-08 (3d ed. 2007).

scientific, moral, and agricultural improvement.”⁹⁷ A few other state constitutions use similar combinations of mandatory and hortatory terms.⁹⁸ These clauses may admit of a Hohfeldian duty-based reading, but textually, any such duty would seem difficult to define (e.g., asking at what point has a legislature “encouraged” education?). In Vermont, the commitment to education is presented in *purely* hortatory terms, suggesting that no duty can possibly be created by the text alone.⁹⁹ More explicitly, in Alabama, the education clause uses entirely permissive terms and even specifies that the clause is not to be construed as creating any individual right to schooling at state expense.¹⁰⁰

In stark contrast, in Florida, North Dakota, Texas, and Virginia, in addition to placing an explicit duty on the state to provide for education, the state constitutions specify detailed requirements for the provision of educational services. Florida’s provision—the most detailed by far—provides for maximum class sizes and free preschool.¹⁰¹ North Dakota’s provision directs the inclusion of specific curricular content.¹⁰² Texas’s provision mandates sufficient money to ensure free text books for the school children of the state.¹⁰³ Virginia’s provision also provides for free textbooks, but only for children who have no ability to pay for them.¹⁰⁴ Each of these provisions may be read to impose a very specific duty on the state. Thus, in Florida, for example, a child should be able to make a claim against the legislature if he is denied access to preschool without charge or if his science class has

⁹⁷ CAL. CONST. art. IX, § 1 (West, Westlaw through 2009). Note that the California Constitution also has a more directive provision, mandating the maintenance of a public school in each district for at least six months of each year. *Id.* § 5. This latter provision has not figured prominently in any school finance case as of yet.

⁹⁸ IOWA CONST. art. IX, 2d, § 3 (West, Westlaw through Nov. 4, 2008); NEV. CONST. art. XI, § 1 (West, Westlaw through 2009); N.H. CONST. pt. 2d, art. 83 (West, Westlaw through Aug. 12, 2010); N.C. CONST. art. IX, § 1 (West, Westlaw through 2010); WYO. CONST. art. I, § 23 (West, Westlaw through Nov. 4, 2008 amendments).

⁹⁹ VT. CONST. ch. II, § 68 (West, Westlaw through 2008) (“Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth.”).

¹⁰⁰ See ALA. CONST. art. XIV, § 256 (stating that “nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense”).

¹⁰¹ FLA. CONST. art. IX, § 1(a)-(b) (West, Westlaw through Nov. 4, 2008).

¹⁰² N.D. CONST. art. VIII, § 3 (West, Westlaw through 2009) (“In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind.”).

¹⁰³ TEX. CONST. art. VII, § 3(b) (West, Westlaw through 2009).

¹⁰⁴ VA. CONST. art. VIII, § 3 (West, Westlaw through 2010).

thirty-five pupils registered. Few state constitutions contain such provisions.¹⁰⁵

Importantly, only in New Mexico, North Carolina, Oklahoma, and Wyoming are the education clauses drafted—at least in part—to specifically mention school children as individual targets of the legislative duty.¹⁰⁶ Of these, only Wyoming’s constitution explicitly states that its citizens have a “right” to education.¹⁰⁷ Further, Wyoming is also the only state to include its education provision within its “Declaration of Rights” article.¹⁰⁸ In all other states, the education provisions are set off from the rest of the constitution in a separate article and focused on the state government—usually the legislative branch—rather than on individuals.¹⁰⁹

Taken together, then, most state constitutions provide a strong textual basis for an explicit Hohfeldian *duty* to provide for education, and these documents can reasonably be read to allow for correlative *claim-rights*, but this latter conclusion is not inevitable.

B. *School Finance Litigation*

For all of the differences and subtleties that exist among the states, constitutional text relating to education is relatively free of important variation—at least from a Hohfeldian perspective.¹¹⁰ However, constitutional text

¹⁰⁵ For an argument that reform-minded litigants should consider these provisions as a means to surmount justiciability concerns, see Scott R. Bauries, *Florida’s Past and Future Roles in Education Finance Reform Litigation*, 32 J. EDUC. FIN. 89, 103-04 (2006).

¹⁰⁶ N.M. CONST. art. XII, § 5 (West, Westlaw through 2010) (“Every child of school age and of sufficient physical and mental ability shall be required to attend a public or other school during such period and for such time as may be prescribed by law.”); N.C. CONST. art. IX, § 3 (West, Westlaw through 2010) (“The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means.”); OKLA. CONST. art. XIII, § 4 (West, Westlaw through Sept. 1, 2010) (“The Legislature shall provide for the compulsory attendance at some public or other school, unless other means of education are provided, of all the children in the State who are sound in mind and body . . .”). By virtue of directing that education be made compulsory, each of these states can be said to have established a right to attend, at least.

¹⁰⁷ WYO. CONST. art. I, § 23 (West, Westlaw through Nov. 4, 2008 amendments) (“The right of the citizens to opportunities for education should have practical recognition.”).

¹⁰⁸ See *id.* at art. I (entitled “Declaration of Rights”). The first article of a state constitution is typically the Declaration of Rights, which contains several (often numerous) sections, each protecting a certain category of individual rights. These rights are often similar, in content and character, to those found in the Bill of Rights of the United States Constitution. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 11-12 (1998).

¹⁰⁹ See WOOD, *supra* note 96, at 103-08 (listing the education clauses of the fifty states).

¹¹⁰ A good deal of well-respected scholarship has reviewed and analyzed the textual differences in state constitutional education clauses and has argued that such textual differences should effect the level of the legislature’s duty to provide education in each state. The most authoritative work in this area has been done by Professor William Thro. See, e.g., William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597,

is only the starting point for the meaning of an education clause. The real content of the clause is most often determined through school finance litigation. This litigation has taken two basic forms (though much overlap remains): equality litigation and quality litigation.

1. Equality Litigation

School finance litigation began with concerns over basic equality. Plaintiffs sought to equalize resources, funding, and local tax bases.¹¹¹ In many ways, *Brown v. Board of Education*¹¹² was a school finance case. Of course, the most famous direct federal court treatment of actual funding and distribution issues in state school systems was *San Antonio Independent School District v. Rodriguez*,¹¹³ in which the Supreme Court held that education is not a federal fundamental right and that wealth is not a suspect classification for equal protection purposes.¹¹⁴

Under the Hohfeldian paradigm outlined above, both *Brown* and *Rodriguez* can be thought of as cases about powers and immunities. In *Brown*, by virtue of their membership in a suspect classification, the plaintiff students were found to have an immunity to state legislation requiring segregated schools.¹¹⁵ In *Rodriguez*, in part due to the absence of such impermissible classifications, the plaintiffs were found to have a liability to Texas's power to allocate school funding to serve the interest of local control.¹¹⁶

Rodriguez had the effect of moving equality-based school finance litigation exclusively into state courts. There, many cases were brought asserting similar equality-based claims under state constitutional provisions either identical or analogous to the Federal Equal Protection Clause.¹¹⁷ Thus, the inquiry in Part III first considers whether doctrinal or conceptual convergence—or both—exists in these equality cases, where each should be most prevalent due to the similarities in constitutional text and claims.

605-06 (1994) (dividing the state education clauses into four categories, based on the level of duty each ostensibly imposes). However, none of this work has focused on the question whether the language of such provisions imposes a duty at all.

¹¹¹ See, e.g., WOOD, *supra* note 96, at 65 (discussing *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241 (Cal. 1971)); Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2437 (2004) (“Prior to 1989, those challenging school finance systems generally sought to equalize resources among districts within a state.”).

¹¹² 347 U.S. 483 (1954).

¹¹³ 411 U.S. 1 (1973).

¹¹⁴ *Id.* at 18.

¹¹⁵ See *Brown*, 347 U.S. at 487-88.

¹¹⁶ See *Rodriguez*, 411 U.S. at 50-51.

¹¹⁷ See, e.g., WOOD, *supra* note 96, at 62-69 (discussing the history of education finance litigation).

2. Quality Litigation

In the late 1980s, partly out of frustration with the failure of equality litigation to cause the sweeping reforms desired by plaintiff groups, litigants began to focus their theories of state constitutional harm on the *quality* of education in a state, rather than on its mere *equality*.¹¹⁸ At first, these cases brought remarkable and high-profile victories for plaintiff groups, but this trend has been unstable, and most recent decisions have gone in favor of state defendants.

In quality litigation, state supreme courts have taken varied approaches to justiciability, adjudication, and remediation.¹¹⁹ Several courts have held claims to be non-justiciable.¹²⁰ Others have held them to be justiciable but have abstained from remediation once a constitutional violation was identified.¹²¹ Still others have engaged in both adjudication and directive remediation.¹²² The reasons that courts give for choosing among these approaches often center on discussions of education's constitutional status and the legal relationships set up by the education clause in a state's constitution. Because these education clauses mostly use the language of duty, as outlined above, one would plausibly expect most of them to be read to create correlative individual claim-rights to education and even to adequate education. The next Part considers whether they have been so read.

III. JUDICIAL CONCEPTIONS OF EDUCATION'S CONSTITUTIONAL STATUS

In the following sections, this Article reviews the judicial activity in the state highest courts in school finance litigation for the purpose of gleaning from these judicial opinions the conceptions of education rights and legal relationships that predominate under state constitutions. The analytical goal is to fit each state's apparent conception of education's constitutional status into one of the four familiar Hohfeldian correlative pairs: (1) liberty/no-right; (2) immunity/disability; (3) claim-right/duty; and (4) power/liability. This Part begins by briefly addressing the liberty/no-right correlative pair and why it cannot be applicable to school finance litigation.

¹¹⁸ *Id.* at 70-71.

¹¹⁹ *See generally* Bauries, *supra* note 15, at 746-55 (outlining the different state supreme court approaches and empirically analyzing these approaches in light of separation of powers provisions in state constitutions).

¹²⁰ *See id.* at 714-15, 715 n.67 (citing states dismissing school finance cases for nonjusticiability).

¹²¹ *See id.* at 742 & n.224 (citing states that engage in adjudication of school finance cases but abstain from remediation).

¹²² *See id.* at 742-43, 742 n.225 (citing states that have ordered or authorized remedial action).

A. *A Brief Note on Liberties and No-Rights*

Although this Article attempts to distill the proper Hohfeldian conceptions of the state constitutional status of education, it is clear from the outset that the Hohfeldian conception of “liberty,” which Hohfeld termed “privilege,”¹²³ has little place in the context of this Article. Hohfeld’s conception of what we now most commonly refer to as a “liberty” gives its holder the right to take a certain action or to not take that action, as he sees fit, free from the legitimate interference of any other actor. If we set up this legal relationship hypothetically between the individual and the state as to education, we might phrase it as, “John has a liberty to seek education.” Correlatively, “the state has no right to prevent John from seeking education.”

This set of relationships certainly exists, at least in the form of John’s basic human right to seek knowledge on his own, but it does not map well onto the kinds of claims presented in school finance litigation.¹²⁴ Rather, it would seem more appropriate for claims to preserve the liberty to choose homeschooling or private schooling as alternatives to public schooling¹²⁵ or the liberty to read what one wishes. There, at least, the claimants seek to act, and their claims depend on a finding that no person or entity may prevent their action. In school finance litigation, plaintiffs seek resources and claim that the education clause provides an entitlement to such resources. The entity in the “active position,” therefore, must be the entity responsible for providing the resources.¹²⁶ But it simply fits poorly to say that John has a “liberty” to a certain amount of educational resources because this statement does not govern John’s conduct.

Not surprisingly, the Hohfeldian conceptions of liberty and the correlative no-right are absent from school finance decisions. Accordingly, the discussion below focuses on the remaining Hohfeldian relationships. The next Section begins with equality-based decisions and then moves on consider the more recent phenomenon of quality litigation.

B. *Immunities and Disabilities in Equality Litigation*

Until recently, most state school finance suits presented only equality-based claims, similar to those first asserted in federal court under the Four-

¹²³ Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 17, at 36 (emphasis omitted) (internal quotation marks omitted).

¹²⁴ Interestingly, the Hohfeldian opposite, that John does not have the duty to seek education, is generally not true, as each state has a compulsory education law. *See, e.g.*, MD. CODE ANN., EDUC. § 7-301(a)(1) (West 2010).

¹²⁵ *See, e.g.*, *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (affirming the liberty of parents to send their children to private schools).

¹²⁶ *See supra* Part I.A.

teenth Amendment.¹²⁷ As others have pointed out, adoption of federal doctrine is prevalent in school finance equality litigation.¹²⁸ However, in school finance litigation, it has nevertheless been possible to achieve different results on the same facts, even where courts have adopted federal adjudicatory doctrines.

For example, the California Supreme Court, in applying to its own constitution's equality provisions the rational basis/strict scrutiny dichotomy familiar to Fourteenth Amendment jurisprudence, held in *Serrano v. Priest* ("Serrano I")¹²⁹ in 1977 that the state's system of financing education was not necessary to achieve a compelling government interest and was thus unconstitutional.¹³⁰ The court had initially held in 1971, in the same case, that the system was in violation of the Fourteenth Amendment, but that ruling was issued prior to the Supreme Court's ruling in *San Antonio v. Rodriguez*.¹³¹

When the California Supreme Court reviewed *Serrano* again following *Rodriguez*, the court recognized that the Supreme Court's decision had effectively overruled its own 1971 decision in *Serrano v. Priest* ("Serrano I")¹³² as to the Fourteenth Amendment.¹³³ The court also held that the state constitution's two equality provisions were properly construed as coextensive with the Equal Protection Clause.¹³⁴ Nevertheless, in contrast with *Rodriguez*, the California court in *Serrano II* held that (1) education is a "fundamental interest" under the California Constitution, and (2) wealth is a suspect classification in California.¹³⁵ Based on these preliminary hold-

¹²⁷ See discussion *supra* Part II.B.1 (discussing *Brown* and *Rodriguez*).

¹²⁸ See Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 CONN. L. REV. 675, 679-83 (1992) (criticizing the approach in Connecticut school finance decisions).

¹²⁹ *Serrano v. Priest* (*Serrano II*), 557 P.2d 929 (Cal. 1977), *opinion supplemented by* 569 P.2d 1303 (1977). This case was decided several years after *Serrano v. Priest* ("Serrano I"), which had initially held that the school finance system in the state violated the Equal Protection Clause of the Fourteenth Amendment. *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1244 (Cal. 1971).

¹³⁰ See *Serrano II*, 557 P.2d at 947, 949 (construing the "uniformity" and "equal protection" provisions of the California Constitution as "'substantially the equivalent' of the equal protection clause of the Fourteenth Amendment to the federal Constitution" (quoting *Serrano I*, 487 P.2d at 1249 n.11)).

¹³¹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Serrano I*, 487 P.2d at 1254.

¹³² 487 P.2d 1241 (Cal. 1971).

¹³³ *Serrano II*, 557 P.2d at 949.

¹³⁴ This holding was qualified, though, as the court also held that the individual rights guarantees in the California Constitution could, in certain cases, exceed the scope of those defined in "persuasive" federal authority. *Id.* at 950 ("Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law." (quoting *People v. Longwill*, 538 P.2d 753, 758 (Cal. 1975)) (internal quotation marks omitted)).

¹³⁵ *Id.* at 951. The court explained in full:

ings, the court held that the legislature's school financing system, which was heavily influenced by differences in local property wealth, exceeded the legislature's authority over education and appropriations.¹³⁶

The *Serrano II* court held that the California State Legislature, in exercising its "power" to establish school districts and their boundaries by "dr[awing] the school district boundary lines, thus determining how much local wealth each district would contain," exceeded the limitations placed on its legislative acts by creating and maintaining immense wealth disparities.¹³⁷ These actions violated the independent limitations placed on the legislature's actions by the state's equal protection clause.¹³⁸ In Hohfeldian terms, then, the legislature acted in contravention of a disability placed on its power by sections of the California Constitution guaranteeing equal protection of the laws.¹³⁹ The legislature's actions thus transgressed the individual immunities against unequal treatment held by children in property-poor districts.

Several other state courts have followed similar disability- and immunity-based approaches when presented with equality-based arguments. Most have applied the federal conceptual and adjudicatory approaches in complete "lockstep," adopting a secondary-rules paradigm of disabilities and immunities, applying the rational basis/strict scrutiny dichotomy and parroting the holdings of *Rodriguez* as to the non-fundamental nature of education rights and the non-suspect nature of wealth-based classifications.¹⁴⁰

For these reasons then, we now adhere to our determinations, made in *Serrano I*, that for the reasons there stated and for purposes of assessing our state public school financing system in light of our state constitutional provisions guaranteeing equal protection of the laws (1) discrimination in educational opportunity on the basis of district wealth involves a suspect classification, and (2) education is a fundamental interest.

Id.

¹³⁶ *Id.* at 952-53.

¹³⁷ *Id.* at 955-56 (quoting *Serrano v. Priest (Serrano I)*, 487 P.2d 1241, 1254 (Cal. 1971)) (internal quotation marks omitted).

¹³⁸ *Id.*

¹³⁹ See *Serrano II*, 557 P.2d at 956 ("A constitutional provision creating the duty and power to legislate in a particular area always remains subject to general constitutional requirements governing all legislation unless the intent of the Constitution to exempt it from such requirements plainly appears."); *id.* at 957 ("Accordingly the Legislature, in its exercise of the subject power in conjunction with other powers possessed by it, was obliged to act in a manner consistent with such limitations.").

¹⁴⁰ See *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1022-23 (Colo. 1982) (applying rational basis review to uphold the state system); *McDaniel v. Thomas*, 285 S.E.2d 156, 167-68 (Ga. 1981) (explicitly applying *Rodriguez's* holdings as persuasive in upholding the system under rational basis review); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1196 (Ill. 1996) (applying rational basis review to uphold the system based on local control); *Exira Cmty. Sch. Dist. v. State*, 512 N.W.2d 787, 793-95 (Iowa 1994) (explicitly relying on *Rodriguez* in applying rational basis review to uphold a challenge based on equal protection and due process to an "open enrollment" scheme, based on the legitimate goal of providing children with "access to educational opportunities which are not available to [them] because of where they live" (quoting IOWA CODE § 282.18(1) (1993)) (internal quotation marks omitted)); *Sch. Admin. Dist. No. 1 v. Comm'r of Educ.*, 659 A.2d 854, 858 (Me. 1995) ("We apply the

Others have adopted the federal adjudicatory approach to differing levels of scrutiny, but they have held that, under their respective state constitutions, education is a fundamental right or interest or that wealth is a suspect classification.¹⁴¹

A few courts have diverged in counter-intuitive ways, holding education to be a fundamental right but upholding their state systems under strict scrutiny¹⁴² or (inexplicably) rational basis review.¹⁴³ One court adopted the federal approach of recognizing differing levels of scrutiny but crafted its own “intermediate level of heightened scrutiny” for what it termed the “important substantive right” to education.¹⁴⁴ Another court rejected the approach to equal protection scrutiny under the federal school desegregation

rational basis test and affirm the court’s finding that the funding reductions in the Act are rationally related to a legitimate governmental interest.”); *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 458 A.2d 758, 786-87, 789 (Md. 1983) (rejecting the *Rodriguez* test for determining the existence of a fundamental right, but also declining to declare education fundamental, or wealth suspect, and upholding the system under rational basis review); *Skeen v. State*, 505 N.W.2d 299, 312, 316 (Minn. 1993) (holding that “basic education” is a fundamental right, but upholding the state system under a rational basis test based on the distinction that the fundamental right does not reach disparities over and above the basic level of funding); *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 490 (Mo. 2009) (en banc) (“Education is not a fundamental right under the United States Constitution’s equal protection provision. And, although Missouri’s Constitution may contain additional protections, Missouri courts have followed the general federal approach to defining fundamental rights.” (citation omitted)); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 62 (R.I. 1995) (upholding the system based on local control).

¹⁴¹ *Serrano II*, 557 P.2d at 951 (holding education to be a fundamental interest and wealth to be a suspect classification); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W.Va. 1979) (holding education to be a fundamental right).

¹⁴² *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994) (“[W]e agree with the trial court that education is a fundamental right under the Constitution. Even applying a strict scrutiny test, as urged by the Students, however, we hold that nowhere does the Constitution require equal, or substantially equal, funding or programs among and within the Commonwealth’s school divisions.”).

¹⁴³ *Vincent v. Voight*, 614 N.W.2d 388, 414-15 (Wis. 2000) (explicitly relying on *Rodriguez* in upholding the state system under rational basis review, despite holding that the state’s children possess a “fundamental right to an equal opportunity for a sound basic education”); *see also Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973) (same).

¹⁴⁴ *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 257 (N.D. 1994). The North Dakota Supreme Court explained:

Although the statutory method for distributing funding for education may not totally deprive any student of access to the fundamental right to education, we believe the method of distributing funding for that fundamental right involves important substantive matters similar to those rights involved in cases in which we have applied the intermediate level of scrutiny. Accordingly, we analyze these equal protection claims under the intermediate level of scrutiny, and we require the distribution of funding for education to bear a close correspondence to legislative goals.

Id. at 259; *see also Idaho Schs. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 733 (Idaho 1993) (holding that education is not a fundamental right, but that intermediate scrutiny nonetheless applied to classifications that blatantly discriminated); *id.* at 732-33 (“Although the sections in our state constitution which impose a duty upon the government might be said to invest a derivative right in those to whom the duty is owed, the inclusion of those derivative rights in our definition of fundamental rights would be overly broad.”).

cases, exchanging it for the burden-shifting approach followed in federal voting rights cases.¹⁴⁵ In still another case, the standard was never clearly specified, but the court inquired extensively as to whether challenged wealth discrepancies could amount to “invidious discrimination” by the state legislature, ultimately answering in the negative.¹⁴⁶ Finally, some state courts have adopted the federal adjudicatory approaches to rational basis, non-fundamentality, and non-suspect classifications but have nevertheless overturned their state systems due to spending disparities that were held to render the system irrational.¹⁴⁷

In each of these cases, in addition to the doctrinal convergence indicated by the near-unanimous adoption of the federal judicial approach to differing levels of scrutiny, there is also evidence of a conceptual convergence. In each case, the court focused on whether legislative action was taken in excess of the limitations placed on it by the state constitutions. In Hohfeldian terms, these limitations are legislative disabilities—that is, they operate to disable the effects of legislative exercises of power that transgress the stated limitations. These disabilities correlate with individual immunities against unequal treatment. The level of invidiousness required to invalidate legislative action differed among the states, but the conception of

¹⁴⁵ See *Horton v. Meskill*, 486 A.2d 1099, 1106 (Conn. 1985). In *Horton*, the court explained:

We conclude that, like legislative apportionment plans, educational financing legislation must be strictly scrutinized using a three-step process. First, the plaintiffs must make a prima facie showing that disparities in educational expenditures are more than de minimis in that the disparities continue to jeopardize the plaintiffs’ fundamental right to education. If they make that showing, the burden then shifts to the state to justify these disparities as incident to the advancement of a legitimate state policy. If the state’s justification is acceptable, the state must further demonstrate that the continuing disparities are nevertheless not so great as to be unconstitutional.

Id. Compare *id.* (permitting the state to justify differences in educational expenditures while in pursuit of a legitimate state goal), with *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (allowing population deviations within state legislative districts following a showing by the state that the plan is necessary to pursue other legitimate considerations), and *Mahan v. Howell*, 410 U.S. 315, 324-25, *modified*, 411 U.S. 922 (1973) (same). Connecticut has also derived an independent claim-right to compel the legislature to remedy de facto segregation by race or ethnicity, such as in *Sheff v. O’Neill*, 678 A.2d 1267, 1283 (Conn. 1996), but this sort of right is different enough from the others studied in this Article to make inappropriate the inclusion of any deep comparative analysis of *Sheff*. Such an inquiry is left to other scholars on other days. It suffices to say for the purposes of this Article that *Sheff* is a good illustration of a state supreme court’s ability to find rights in the state constitution that, although similar to federal constitutional rights, require far more from the state and guarantee far more to the individual, as Justice Brennan hoped. See *infra* Part IV.

¹⁴⁶ *Milliken v. Green*, 212 N.W.2d 711, 715, 721 (Mich. 1973) (en banc) (overruling *Milliken v. Green*, 203 N.W.2d 457 (Mich. 1972), which had held the state system unconstitutional).

¹⁴⁷ *Dupree v. Alma Sch.* Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) (overturning the state system and rejecting “local control” as a governmental objective sufficient to satisfy rational basis review); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 153, 156 (Tenn. 1993) (stating that “[the Tennessee Supreme] Court has followed the framework developed by the United States Supreme Court for analyzing equal protection claims” prior to overturning the system due to spending disparities that the court held to be irrational).

legal relationships was the same in each from a Hohfeldian perspective, and this set of conceptions was identical to the secondary rule-based conceptions of rights and powers applied in the federal courts under the U.S. Constitution.

Adopting federal adjudicatory tests in equality-based claims under state constitutional provisions analogous to the Federal Equal Protection Clause is certainly defensible, as long as such adoption is not unreflective.¹⁴⁸ In the same vein, the convergence of rights conceptions held in state and federal courts does not appear to be problematic in this context. In each system, the equality requirement seeks to protect the individual from actively unequal legislative treatment. If this is the case, then it is entirely appropriate for courts in each system to view equality as a relationship of immunities and disabilities. The more interesting and novel questions addressed in the following sections are whether and to what extent such conceptual convergence is present in adequacy-based cases, which stem from state constitutional provisions with no federal analogues, and whether such convergence is normatively desirable.

C. *Claim-Rights and Duties*

Beginning in 1989 with *Rose v. Council for Better Education, Inc.*¹⁴⁹ in Kentucky, state courts began to focus more on education clauses than on equal protection and uniformity provisions, and they began to focus more on educational adequacy than equality.¹⁵⁰ Accordingly, their analytical ap-

¹⁴⁸ See Williams, *supra* note 2, at 1514-18 (discussing the prospective adoption of a federal test, but not necessarily its application).

¹⁴⁹ 790 S.W.2d 186 (Ky. 1989).

¹⁵⁰ The most common way of describing this shift is by designating the federal efforts and the state equality-dominated efforts as the first two “waves” of reform-based litigation and the recent move to education clauses and adequacy as the dominant focus as the “third wave.” See William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 530 n.14 (1998) (outlining the “waves” metaphor); Thro, *supra* note 110, at 600-03 (same); see also Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 (1995) (adopting the “wave” metaphor). But see William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1187-88, 1283-96 (2003) (explaining that no clear line divides equality theories from adequacy theories and that, in fact, both theories are present in most education finance cases); James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1237 (2008) (calling into doubt the distinctions made between the second and third “waves”); but see also William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 547 (2006) (making the prescriptive case for returning to equity as the dominant theory).

proaches began to move away from evaluating legislative transgressions upon disabilities and immunities.¹⁵¹

For example, the courts of New Jersey have approached the education clause in the New Jersey Constitution as a font of individual claim-rights, and the state supreme court has often issued remedial orders compelling legislative action to remedy violations of such claim-rights. The operative opinions are numerous, so deriving a single conception of legal relationships presents challenges. But when reading the opinions together, one comes away with an understanding that, in New Jersey, education is about individual claim-rights against the legislature for access to adequate resources.¹⁵²

The history of litigation over school finance in New Jersey is truly breathtaking. The most recent opinion of the New Jersey Supreme Court in *Abbott v. Burke*¹⁵³ was that court's *twentieth opinion* over as many years in the state's *second line of cases* dealing with school finance.¹⁵⁴ The prior line of cases, referred to as *Robinson v. Cahill*,¹⁵⁵ also yielded several opinions over the course of twenty years. After so many opinions, the court has long since dispensed with stating a standard of legislative conduct or articulating the proper standards for judicial review.¹⁵⁶

In the early *Robinson* litigation, though, the court focused on a facial evaluation of legislation enacted to establish the education system, asking whether it was "thorough and efficient," as commanded in the state consti-

¹⁵¹ A few of the cases discussed in the previous Section contain some analysis of adequacy-based concepts, but none of the decisions were ultimately based on any such concepts. See *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994) (holding that the Virginia Constitution establishes adequacy-based rights, but explaining that plaintiffs made no claims based on such rights); *Vincent v. Voight*, 614 N.W.2d 388, 407, 411 (Wis. 2000) (deriving a "fundamental right" to a "sound basic education" from the text of the education clause, but holding that no evidence of the violation of the right exists).

¹⁵² See, e.g., *Abbott v. Burke (Abbott XIX)*, 960 A.2d 360, 362 (N.J. 2008) (per curiam) ("Since the early 1970s, pupils attending some of New Jersey's poorest school districts have come to the courts of this state to obtain fulfillment of their right to a thorough and efficient education guaranteed by the New Jersey Constitution." (citing N.J. CONST. art. VIII, § 4)); *Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 439 (N.J. 1997) ("This continued deprivation of the constitutional right to a thorough and efficient education necessitates a remedy."), *opinion clarified by* 751 A.2d 1032 (2000); *id.* ("Accordingly, the interim remedy that we mandate to effectuate that right is the improvement of regular education through increased funding."); *id.* ("We emphasize that plaintiffs' right is one of thorough and efficient educational opportunity; parity is simply one judicial remedy that can help to create that opportunity.").

¹⁵³ *Abbott XX*, 971 A.2d 989 (N.J. 2009).

¹⁵⁴ *Id.* at 991 (speaking only of New Jersey Supreme Court decisions, stating that "[t]oday's decision marks the twentieth opinion or order issued in the course of the Abbott litigation").

¹⁵⁵ *(Robinson IV)*, 351 A.2d 713 (N.J. 1975); see also, e.g., *id.* at 724 (ordering, for the first time, legislative action to remedy the constitutional violation); *Robinson v. Cahill (Robinson I)*, 303 A.2d 273, 295 (N.J. 1973) (finding the state system unconstitutional under the state education clause, due to large disparities in funding).

¹⁵⁶ See *Abbott XX*, 971 A.2d at 1002 ("[W]e do not find the State's approach to the formulation of per-pupil costs and additional weights used as the foundation for SFRA's funding formula to be constitutionally infirm.").

tution.¹⁵⁷ The *Robinson v. Cahill* (“*Robinson V*”)¹⁵⁸ court focused its inquiry on the legislature’s duty under the education clause, which it summarized succinctly: “The Constitution imposes upon the Legislature the obligation to ‘. . . provide for the maintenance and support of a thorough and efficient system of free public schools’ The imposition of this duty of course carries with it such power as may be needed to fulfill the obligation.”¹⁵⁹ Thus, the New Jersey Supreme Court found in the education clause a “duty,” but any duty to take affirmative action obviously must be accompanied by the power to take the required action, or the duty is meaningless. It is clear that the *Robinson V* court saw the “duty” as the enforceable component of the legal relationship where the plaintiffs facially challenge education legislation.

In recent years, the court has approached the ongoing case as an as-applied challenge, focusing on certain “special needs districts,” and it has accordingly refined its approach to focus on the enforcement of individual claim-rights correlative to this legislative duty identified in *Robinson V*.¹⁶⁰ In all of the recent substantive opinions rendered in the *Abbott* litigation, the question has been whether the plaintiffs’ “right to a thorough and efficient education” has been met.¹⁶¹ Each time that the court has decided this question in the negative, it has ordered the legislature to increase or reallocate expenditures, thus directing the performance of the affirmative duty correlative to the claim-rights of the children in the special needs districts.¹⁶²

¹⁵⁷ *Robinson v. Cahill* (*Robinson V*), 355 A.2d 129, 132-33 (N.J. 1976) (per curiam).

¹⁵⁸ (*Robinson V*), 355 A.2d 129 (N.J. 1976) (per curiam).

¹⁵⁹ *Id.* at 135 (alterations in original). The court continued:

As we stated above, *Robinson I* warned that if the State’s obligation were delegated to local bodies, provision must be made to compel, if necessary, such local units to raise such funds as might be deemed essential. We have found that the present statute does make such provision. But *Robinson I* went on to say that “if the local government cannot carry the burden, the State must itself meet its continuing obligation.”

Id. at 137 (quoting *Robinson I*, 303 A.2d at 294).

¹⁶⁰ *Abbott v. Burke* (*Abbott IV*), 693 A.2d 417, 420 (N.J. 1997) (internal quotation marks omitted), *opinion clarified by* 751 A.2d 1032 (2000); *see, e.g., id.* (“Plaintiffs are children attending public schools in school districts located in poor urban areas, classified as ‘special needs districts.’ For many years they have been denied their constitutional right to a thorough and efficient education.”).

¹⁶¹ *Id.* at 420; *see also id.* at 443 (“Of course, the right to a thorough and efficient education does not ensure that every student will succeed. It must, however, ensure that every child in New Jersey has the opportunity to achieve.”). In dissolving the orders rendered during the past twenty years of judicial opinions, the New Jersey Supreme Court in *Abbott XX* stated:

The Court’s one goal has been to ensure that the constitutional guarantee of a thorough and efficient system of public education becomes a reality for those students who live in municipalities where there are concentrations of poverty and crime. . . .

The legislative and executive branches of government have enacted a funding formula that is designed to achieve a thorough and efficient education for every child, regardless of where he or she lives.

Abbott XX, 971 A.2d at 1009.

¹⁶² *E.g., Abbott IV*, 693 A.2d at 456 (ordering the legislature to appropriate additional funds to what the court then referred to as the “Abbott districts” (internal quotation marks omitted)).

The court's ultimate conclusions are certainly subject to legitimate criticism, but the court has rarely wavered in its focus on the individual as a rights claimant, both in defining the court's role and in fashioning remedies. In contrast to the federal judicial approach, the courts of New Jersey have fashioned a system of Hohfeldian duties and claim-rights that allow their holders to compel actions in performance of the identified duties. Rather than conceptual convergence, as is evident in the equality cases, New Jersey provides an example of conceptual divergence. This divergent approach seems the proper one where one considers the lack of any conceivable federal analogue to the education clause in the New Jersey Constitution. However, as this Article will show, conceptual divergence is a minority approach—few state courts have applied it.

One such court is the New York Court of Appeals, which opted for conceptual divergence in an adequacy-based challenge in *Campaign for Fiscal Equity, Inc. v. State* (“*Campaign I*”).¹⁶³ In *Campaign I*, the court adopted its earlier dicta in an equity-based appeal in *Board of Education v. Nyquist*¹⁶⁴ to hold that the state constitution's education clause established a constitutional duty for the legislature to provide a “sound basic education.”¹⁶⁵ Like many in the equity era, the claim in *Nyquist* failed due to the court's lockstep adoption of the *Rodriguez* doctrinal test, but the *Nyquist* court's articulation of a minimal quality standard left open the door to future adequacy-based challenges to New York's education funding system—at least those alleging “gross and glaring inadequacy.”¹⁶⁶

The first such challenge was heard in the New York Court of Appeals in 1995 in *Campaign I*.¹⁶⁷ There, the court held that New York's school-age children possessed certain substantive “entitlements” under the education clause:

Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.¹⁶⁸

¹⁶³ (*Campaign I*), 655 N.E.2d 661 (N.Y. 1995). This case came before the court on a motion to dismiss for failure to state a claim, but in resolving the issue of whether a claim had been pled, the court chose to provide substantive content to the state's education clause. *Id.* at 664-68.

¹⁶⁴ 439 N.E.2d 359 (N.Y. 1982).

¹⁶⁵ *Campaign I*, 655 N.E.2d at 665 (quoting *Nyquist*, 439 N.E.2d at 359) (internal quotation marks omitted).

¹⁶⁶ *Nyquist*, 439 N.E.2d at 369.

¹⁶⁷ See *Campaign I*, 655 N.E.2d at 667.

¹⁶⁸ *Id.* at 666.

This language was carried through the remainder of the litigation, and it is clear that the New York Court of Appeals has relied on this conception of an individual claim-right to education as the foundation for judicial review of the legislature's correlative duty to provide a "sound basic education."¹⁶⁹

In more recent years, the court considered the merits of the case again, holding that the plaintiffs had established that the state was not providing a sound basic education to school-age children of New York City and ordering the legislature to determine the cost of remedying the situation.¹⁷⁰ In the latest opinion, the court approved the state's responsive expenditure increases based on the cost study.¹⁷¹

Like the courts in New Jersey, the courts in New York have therefore approached the state's education clause as a source of duties held by the legislature and correlative claim-rights held by each individual student in New York. The court has stated a conception of the education clause as a guarantee of individual entitlements to certain basic levels of resources. Accordingly, where it has determined that these entitlements have not been provided, the court has not resisted ordering specific remedial action on the part of the political branches.

The Supreme Court of North Carolina has followed a similar conceptual approach in *Hoke County Board of Education v. State*.¹⁷² The court in *Hoke* upheld most of the trial court's decision holding that the state system of funding public education was unconstitutional because it allowed for the result that students in the plaintiff district did not receive a "sound basic education."¹⁷³ However, the court reversed a portion of the trial court's remedial order based on separation of powers principles, holding that an order imposing a preschool requirement was premature on the evidence presented.¹⁷⁴ Importantly, though, the court remained committed to the principle that, if the evidence were to support it, the trial court would be empowered to order any remedy, including compelled legislative action, and that separation of powers concerns would not prevent such judicial action.¹⁷⁵ In

¹⁶⁹ See *Campaign for Fiscal Equity, Inc. v. State (Campaign II)*, 801 N.E.2d 326, 328 (N.Y. 2003).

¹⁷⁰ *Id.* at 348. As it turns out, this assumption contradicted the Kentucky court's actual remedial approach, which was to abstain. See *infra* Part III.D.2.

¹⁷¹ *Campaign for Fiscal Equity, Inc. v. State (Campaign III)*, 861 N.E.2d 50, 59-60 (N.Y. 2006). The case presented only challenges to the adequacy of remedial measures taken and proposed by the Governor and the General Assembly in response to the court's order in *Campaign II*. *Id.* at 55. The court fashioned a standard for the review of the remedial proposals. *Id.* at 59. This standard was one of reasonableness. *Id.* That is, as long as the estimates of the costs of providing a "sound basic education" promulgated by the Governor and the General Assembly were reasonable, they would be upheld. *Id.* Applying this standard, the court reversed the lower courts' rejections and modifications of the remedial proposals and ordered that they be put into action, as initially presented. *Id.* at 59-60.

¹⁷² 599 S.E.2d 365 (N.C. 2004).

¹⁷³ *Id.* at 372.

¹⁷⁴ *Id.* at 391-93.

¹⁷⁵ *Id.* at 393.

so holding, the North Carolina court defined both a positive claim-right and a correlative legislative duty.

The Supreme Court of Arkansas expressed a similar conception in its most recent challenge, in which it ruled for the plaintiffs.¹⁷⁶ Throughout its discussion, the court referred to the education clause provisions as establishing a “duty,”¹⁷⁷ a “responsibility,”¹⁷⁸ and even “an absolute duty.”¹⁷⁹ In construing the duty of the state to provide adequate education, the court held that this “absolute duty” runs “to each school child.”¹⁸⁰ Thus, the court set up a Hohfeldian relationship of legislative duty and numerous individual claim-rights. In its most recent appeal, the court reissued its decision and ordered the state legislature to commission an adequacy cost study.¹⁸¹

The Wyoming Supreme Court, expressing a duty-right conception of education rights, has generally ruled in favor of the plaintiffs in its school finance opinions in the cases initially styled *Campbell County School District v. State*.¹⁸² In the final case, *State v. Campbell County School District (“Campbell III”)*,¹⁸³ the court invalidated the system for a third time.¹⁸⁴ The court ordered increased funding for capital facilities and retained jurisdiction to monitor legislative compliance with the ruling.¹⁸⁵

The Washington case of *Seattle School District No. 1 v. State*¹⁸⁶ was the first state high court appeal in which educational adequacy in the absolute—not relative—sense was addressed.¹⁸⁷ The Washington court engaged in an analysis of the nature of the rights and duties set forth in the state education clause as a means of determining whether judicial review of the education clause was appropriate.¹⁸⁸ As the principal basis for its appeal, the State contended that the trial court had overreached in adjudicating the substantive terms in the education clause and declaring the legislature to be

¹⁷⁶ *Lake View Sch. Dist. No. 25 v. Huckabee (Huckabee I)*, 91 S.W.3d 472, 495 (Ark. 2002), *opinion supplemented by* 189 S.W.3d 1 (Ark. 2004).

¹⁷⁷ *Id.* at 492.

¹⁷⁸ *Id.* at 500.

¹⁷⁹ *Id.* at 492.

¹⁸⁰ *Id.* at 495.

¹⁸¹ *Lake View Sch. Dist. No. 25 v. Huckabee (Huckabee III)*, 220 S.W.3d 645, 654-54, 657 (Ark. 2005).

¹⁸² 907 P.2d 1238, 1264 (Wyo. 1995) (“Constitutional provisions imposing an affirmative mandatory duty upon the legislature are judicially enforceable in protecting individual rights, such as educational rights.” (emphasis added)), *reh’g granted*, 32 P.3d 325 (Wyo. 2001).

¹⁸³ 32 P.3d 325 (Wyo. 2001).

¹⁸⁴ *Id.* at 326-27.

¹⁸⁵ *Id.* at 330-31.

¹⁸⁶ 585 P.2d 71 (Wash. 1978).

¹⁸⁷ See Scott R. Bauries, *Foreword: Rights, Remedies, and Rose*, 98 KY. L.J. 703, 709 n.39 (2010) (noting that *Seattle* was an early adequacy case, but arguing that it failed to generate the “paradigm shift” to adequacy in state education reform litigation accomplished by the Kentucky Supreme Court’s decision a decade later in *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989)).

¹⁸⁸ *Seattle*, 585 P.2d at 83-90.

in violation of them.¹⁸⁹ The court rejected this contention, engaging in the most lengthy and comprehensive analysis of the question of state constitutional education rights found among all school finance cases.¹⁹⁰

The court quickly disposed of the State's contention that the education clause, even if not a "mere preamble," imposed no affirmative duty upon the legislature.¹⁹¹ This portion of the opinion was the easiest for the court, as the Washington Constitution contains another provision specifically stating that "[t]he provisions of this Constitution are *mandatory, unless by express words they are declared to be otherwise.*"¹⁹² Finding no language in the education clause declaring it non-mandatory, the court held that it was mandatory and therefore imposed "affirmative duties o[n] the State."¹⁹³

The court later explained how it arrived at the conclusion that education is a positive, individual right under the Washington Constitution. The court recognized that the education clause had placed on the State "a *paramount duty* to make ample provision for the education of all children residing within the State's borders."¹⁹⁴ Explicitly discussing Hohfeldian jural correlatives, the court held that the existence of an affirmative duty of the State gives rise to an affirmative correlative right to compel the State's actions, which runs equally to each individual state resident.¹⁹⁵

The court went on to hold, in broad terms, that the state constitution mandates a particular standard of quality of education:

Consequently, the State's constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas.¹⁹⁶

Ultimately, the court held that the legislature was compelled to define the nature of the education that met the constitutional standard and determine a reliable, state-centric source of funding for such an education.¹⁹⁷ Since its decision in *Seattle*, the court has not addressed a further challenge to educational adequacy, but it has clearly settled that education is both a legislative duty and an individual, affirmative claim-right.

¹⁸⁹ *Id.* at 83.

¹⁹⁰ *Id.* at 83-93 (analyzing the propriety of judicial review in light of separation of powers concerns, as impacted by the nature of the rights and duties set forth in the education clause).

¹⁹¹ *Id.* at 85.

¹⁹² *See id.* (quoting WASH. CONST. art. I, § 29) (internal quotation marks omitted).

¹⁹³ *Id.* at 86.

¹⁹⁴ *Seattle*, 585 P.2d at 91 (citing WASH. CONST. art. 9, § 1).

¹⁹⁵ *See id.* at 91 & n.10 (citing Allen, *supra* note 21; Cook, *supra* note 20; Corbin, *supra* note 21; Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 17).

¹⁹⁶ *Id.* at 94.

¹⁹⁷ *Id.* at 96-97.

The cases from the six states reviewed in this Section provide the few examples of state supreme courts approaching the education clauses in their state constitutions as sources of Hohfeldian claim-rights correlative to legislative duties. In each case, the court articulated both the duty and the individual right, and each court further illustrated the primary-rule nature of this relationship by entering a remedial order either compelling the performance of the legislative duty on behalf of the plaintiffs or approving prospectively the imposition of a similar remedial order in the trial court. These courts exemplify a state judicial approach to rights conceptually divergent from the federal approach—arguably what one would expect in the context of affirmative state constitutional provisions with no federal analogues. However, this conceptual divergence is a minority approach. As discussed below, the overwhelming majority of state supreme courts conceptualize education in the state constitution as a set of secondary rules of power and liability.

D. *Powers and Liabilities*

The language of the state constitutions cited in Part II, even upon a cursory glance, overwhelmingly seems to compel a general conception of education weighted toward the Hohfeldian conceptions of duty and claim-right, or at least “duty” in isolation, and the cases reviewed in the previous Section appear to bear out this conception. Nevertheless, as shown below, the dominant conception of education among the state courts is one of legislative powers and individual liabilities, with the main differences being the absoluteness of the legislative power. Both the conceptual focus on legislative power and the differences in absoluteness are apparent from judicial decisions relating to nonjusticiability (i.e., complete abstention), remediation (i.e., remedial abstention), and merits review.

1. Complete Abstention and Legislative Power

In much of modern school finance litigation, courts grant strong deference—often absolute deference—to legislative decision-making power. One form of exhibiting this deference is through abstention from the merits of litigation. In fact, state courts often completely abstain from reviewing the merits of state constitutional challenges grounded in education clauses due to a stated conception of the terms therein as conferring power or unreviewable discretion to the legislature. These cases seem to fit the Hohfeldian correlatives of “power” and “liability,” and if so, the power described within the opinions is as near to absolute as can be conceived.

For example, the Supreme Court of Rhode Island has encountered one challenge to the state's school finance system based on the state constitution's education clause.¹⁹⁸ The court addressed the state constitution's education clause, focusing initially on the language of the clause itself, of which the court stated: "[A] more comprehensive or discretionary grant of power is difficult to envision."¹⁹⁹ The court also held that any judicial intervention would violate the separation of powers principles set forth in the Rhode Island Constitution because a decision would require the court to enforce constitutional provisions for which there were no "judicially manageable standards,"²⁰⁰ thus applying the political question doctrine without naming it as such.²⁰¹ In making its determination, the court conceded that some "right" to education existed under the state constitution, but it held that this right was unenforceable in the judiciary because it was committed to the legislature's "virtually unreviewable discretion."²⁰² This latter statement illustrates the strong preference in Rhode Island for a conception of education as a Hohfeldian power, correlative to individual liabilities.

Similar decisions of nonjusticiability—based on very similar justifications of virtually unreviewable legislative discretion—"sole" legislative authority, or "textual commitment of responsibility" were handed down in early cases in Alaska²⁰³ and Louisiana,²⁰⁴ and in more recent cases in Oklahoma,²⁰⁵ Alabama,²⁰⁶ Florida,²⁰⁷ Nebraska,²⁰⁸ Pennsylvania,²⁰⁹ and Illinois.²¹⁰

¹⁹⁸ *City of Pawtucket v. Sundlun*, 662 A.2d 40, 42-43 (R.I. 1995).

¹⁹⁹ *Id.* at 56.

²⁰⁰ *Id.* at 58.

²⁰¹ The seminal U.S. Supreme Court decision in *Baker v. Carr*, 369 U.S. 186 (1962), provided the fullest description of a nonjusticiable political question, stating:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217 (emphasis added).

²⁰² *Sundlun*, 662 A.2d. at 57, 60 ("[E]ducation is not generally a judicially-enforceable right under article 12, section 1, of our State Constitution.").

²⁰³ See *Hootch v. Alaska State-Operated Sch. Sys.*, 536 P.2d 793, 805 (Alaska 1975) ("So long as they are not violative of equal protection, the nature and proper means of overcoming the disadvantages present questions for the legislature.").

²⁰⁴ See *La. Ass'n of Educators v. Edwards*, 521 So. 2d 390, 394 (La. 1988) ("[T]he legislature possesses the sole authority to set the level of funding of the 'minimum foundation program,' subject only to the constitutional mandate that the funds be sufficient to insure a 'minimum foundation program in all public elementary and secondary schools' . . ." (quoting LA. CONST. art VIII, §13(B))).

²⁰⁵ See *Okla. Educ. Ass'n v. State*, 158 P.3d 1058, 1066 (Okla. 2007) ("When the methods for carrying out this duty are challenged, 'the only justiciable question is whether the Legislature acted within its powers.'" (quoting *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1150 (Okla. 1987))).

In each of these more recent cases, the court held that state constitutional separation of powers provisions²¹¹ prevented the court from engaging in any substantive review of educational funding decision making in the legislature, as the legislature was imbued with near total discretion—and thus nearly unlimited Hohfeldian power.

2. Remedial Abstention and Legislative Power

Another set of cases reflects weaker deference to legislative power in merits adjudication but near-absolute deference to legislative power in re-

²⁰⁶ See *Ex parte James*, 836 So. 2d 813, 819 (Ala. 2002) (“Continuing the descent from the abstract to the concrete, we now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature.”); *id.* at 817 (“[T]he pronouncement of a specific remedy ‘from the bench’ would necessarily represent an exercise of the power of that branch of government charged by the people of the State of Alabama with the sole duty to administer state funds to public schools: the Alabama Legislature.”).

²⁰⁷ See *Coal. for Adequacy & Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400, 406-08 (Fla. 1996) (per curiam) (“[E]ach branch of government has certain delineated powers that the other branches of government may not intrude upon. . . . [T]he legislature has been vested with enormous discretion by the Florida Constitution to determine what provision to make for an adequate and uniform system of free public schools.”).

²⁰⁸ See *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 176 (Neb. 2007) (explaining that the separation of powers prevents the judiciary from hearing controversies that are entrusted to other branches of government by the Constitution); *id.* (“[The] court does not sit as a superlegislature to review the wisdom of legislative acts.’ That restraint reflects the reluctance of the judiciary to set policy in areas constitutionally reserved to the Legislature’s plenary power.” (footnote omitted) (quoting *Gourley v. Neb. Methodist Health Sys.*, 663 N.W.2d 43, 68 (Neb. 2003))); *id.* at 179 (“Nebraska’s constitutional history shows that the people of Nebraska have repeatedly left school funding decisions to the Legislature’s discretion.”).

²⁰⁹ See *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 111-12 (Pa. 1999). The *Marrero* court stated:

[T]his court is . . . unable to judicially define what constitutes an “adequate” education or what funds are “adequate” to support such a program. These are matters which are exclusively within the purview of the General Assembly’s powers, and they are not subject to intervention by the judicial branch of our government.

Id. at 113-14 (quoting *Marrero ex rel. Tabalas v. Commonwealth*, 709 A.2d 956, 965-66 (Pa. Commw. Ct. 1998)).

²¹⁰ See *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1190 (Ill. 1996). The court explained: In reviewing legislation, the role of the courts is now, as before, to ensure that the enactment does not exceed whatever *judicially enforceable* limitations the constitution places on the General Assembly’s power. Courts are no more capable of defining “high quality educational institutions and services” under our present constitution than they were able to define a “good common school education” under the 1870 Constitution.

Id.; see also *id.* at 1192 (“For the reasons already stated, . . . we will not ‘under the guise of constitutional interpretation, presume to lay down guidelines or ultimatums for [the legislature].’” (second alteration in original) (quoting *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 128 (Wash. 1978) (Rosellini, J., dissenting))).

²¹¹ Unlike the U.S. Constitution, many state constitutions contain specific provisions mandating the separation of powers. See TARR, *supra* note 108, at 14; Bauries, *supra* note 15, at 743-45.

medial decision making. In several states, the courts have adjudicated the merits in favor of plaintiffs, often articulating duty-based conceptions of the education clause. But these courts have ultimately decided that the violation of the duty is not subject to court-ordered remediation due to separation of powers concerns.²¹² In such cases, it would appear that because no plaintiff may judicially compel the duty's performance, no person possesses a claim-right correlative to the duty. Looking more closely at these cases, however, it becomes apparent that the courts are actually acting on conceptions of their education clauses as sources of legislative powers, not duties.

The Kentucky Supreme Court case of *Rose v. Council for Better Education, Inc.* illustrates this approach. The *Rose* court held that education was a "fundamental right" under the Kentucky Constitution and that the legislature possessed an "absolute duty" to "advance" the right.²¹³ Ultimately, the court held that the current system, as a whole, was unconstitutional due to serious deficiencies in educational resources statewide.²¹⁴

However, the court then considered whether the trial court's remedial order was issued in violation of the separation of powers clauses of the state constitution.²¹⁵ The court ultimately urged the legislature to reform the system into one that would comply with the constitution, but it rejected calls for any specific remedial order, including the trial judge's order, as an impermissible "incursion, by the judiciary, of the functions of the legislature."²¹⁶ The court declined to order that any specific expenditures be made to eliminate the constitutional harms in the plaintiff districts or to issue any injunctions or writs of mandamus.²¹⁷ In doing so, the court applied a power-based conception of the education clause.

If the court's conception were claim- and duty-based, then the proper remedial action would have been to order the performance of the duty. Though it took jurisdiction over the case, construed the constitutional language, and held the system unconstitutional, the court left both the content and the pace of remediation at the discretion of the legislature, merely declaring that the legislature must "bring the system . . . into compliance" with the state constitution.²¹⁸

²¹² See Bauries, *supra* note 15, at 743-45 (reviewing the courts that abstain from remediation of state constitutional harms based on separation of powers concerns).

²¹³ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 201, 212, 215 (Ky. 1989). The court also famously held that an "efficient" system" would provide students with seven "capacities," as set forth in the court's opinion and the trial court's order, and that it would have nine "essential, and minimal, characteristics" of efficiency, as identified by the court. *Id.* at 212-13. Many courts have adopted this list of essential characteristics.

²¹⁴ *Id.* at 213.

²¹⁵ *Id.* at 213-15.

²¹⁶ *Id.* at 214, 216 ("The General Assembly must provide adequate funding for the system. How they do this is their decision.").

²¹⁷ *Id.* at 215.

²¹⁸ *Id.* at 214.

The Ohio Supreme Court has heard the same adequacy-based challenge to the state's education system numerous times between 1997 and the present and has come to conclusions similar to those of the Kentucky court.²¹⁹ Like the Kentucky court, the Ohio court in *DeRolph v. State*²²⁰ appeared to articulate a Hohfeldian duty to legislate adequate funding for education, referring to the education clause as "an explicit directive to the General Assembly" and determining that the legislative history of the education clause firmly establishes "the state's obligation, through the General Assembly, to provide for the full education of all children within the state."²²¹

The *DeRolph* court went on to hold that the state system was not "thorough and efficient," as required by the education clause.²²² However, again like the Kentucky court, the Ohio court declined to order a particular set of remedial measures, justifying its reluctance to provide any guidelines to the General Assembly based on the principles of the separation of powers, refusing to "encroach upon the clearly legislative function of deciding what the new legislation will be."²²³ The legislature never brought the system into compliance, and the court reaffirmed both its judgment of unconstitutionality and its remedial abstention in several subsequent opinions.²²⁴ Ultimately, the court ended its involvement in the case without ever issuing a coercive remedial order.²²⁵

In *Abbeville County School District v. State*,²²⁶ an appeal presenting only the issue of justiciability, the Supreme Court of South Carolina identified an apparent Hohfeldian duty in the education clause.²²⁷ Based on this duty, the court held that the plaintiffs had stated a valid, justiciable claim under the education clause and remanded for further proceedings.²²⁸ However, the court also admonished the lower courts not to invade the legislative province by directing any particular remedial legislative action in the event of a constitutional violation.²²⁹ Therefore, despite its initial rhetoric, the court's perception of the "duty" was more akin to a power, the exercise of which could not be judicially compelled.²³⁰

²¹⁹ *DeRolph v. State (DeRolph I)*, 677 N.E.2d 733, 747 (Ohio 1997).

²²⁰ *(DeRolph I)*, 677 N.E.2d 733 (Ohio 1997).

²²¹ *Id.* at 740-41.

²²² *Id.* at 737.

²²³ *Id.* at 747 n.9.

²²⁴ *E.g.*, *DeRolph v. State (DeRolph IV)*, 780 N.E.2d 529, 530 (Ohio 2002); *DeRolph v. State (DeRolph II)*, 728 N.E.2d 993, 1020-21 (Ohio 2000), *and opinion issued by* 754 N.E.2d 1184 (Ohio 2001), *and opinion vacated on reconsideration by* 780 N.E.2d 529 (Ohio 2002).

²²⁵ *State ex rel. State v. Lewis*, 789 N.E.2d 195, 202-03 (Ohio 2003).

²²⁶ 515 S.E.2d 535 (S.C. 1999).

²²⁷ *Id.* at 539-40.

²²⁸ *Id.* at 541.

²²⁹ *Id.* (reinstating the familiar phrase that it would not allow the courts of the state to "become super-legislatures or super-school boards").

²³⁰ *See id.*

New Hampshire's Supreme Court has addressed one adequacy-based constitutional challenge—*Claremont School District v. Governor*²³¹—several times at differing stages beginning in 1993.²³² In several of these appeals, the court has stated a conception of the education clause as a source of Hohfeldian duties and rights.²³³ The court has repeatedly held the system unconstitutional.²³⁴ In each of these appeals, however, the court has left the determination of what sort of education meets the constitutional standard to the legislature.²³⁵ The court has never issued an order compelling the performance of the legislature's duty. Moreover, once the legislature acted to define the education clause's terms, the court dismissed the case as moot.²³⁶ Reading the litigation history as a whole, one must therefore conclude that the legislature appears to have a power, rather than a compulsory Hohfeldian duty.

Vermont's Supreme Court has expressed a similar conception in two cases,²³⁷ and Montana has in one.²³⁸ The Idaho Supreme Court has expressed the same conception in five cases.²³⁹ In the most recent Idaho appeal, after upholding the trial court's judgment as to the constitutional violation, the court rejected the proposal that it issue a coercive remedial order and instead, directed that the legislature be tasked with fashioning a remedy.²⁴⁰

²³¹ (*Claremont I*), 635 A.2d 1375 (N.H. 1993).

²³² *Londonderry Sch. Dist. SAU No. 12 v. State (Londonderry II)*, 958 A.2d 930, 931 (N.H. 2008); *Londonderry Sch. Dist. SAU No. 12 v. State (Londonderry I)*, 907 A.2d 988, 995 (N.H. 2006); *Claremont Sch. Dist. v. Governor (Claremont III)*, 725 A.2d 648, 650 (N.H. 1998), and *subsequent determination*, 744 A.2d 1007 (N.H. 1999); *Opinion of the Justices (Sch. Fin.)*, 712 A.2d 1080, 1087-88 (N.H. 1998); *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1360 (N.H. 1997); *Claremont I*, 635 A.2d at 1381.

²³³ *E.g.*, *Londonderry I*, 907 A.2d at 989; *Claremont III*, 725 A.2d at 650; *Claremont II*, 703 A.2d at 1357.

²³⁴ *E.g.*, *Londonderry I*, 907 A.2d at 989; *Claremont III*, 725 A.2d at 652; *Claremont II*, 703 A.2d at 1357.

²³⁵ *Londonderry II*, 958 A.2d at 932-33; *Londonderry I*, 907 A.2d at 995-96; *Claremont III*, 725 A.2d at 651; *Opinion of the Justices*, 712 A.2d at 1088; *Claremont II*, 703 A.2d at 1359-60; *Claremont I*, 635 A.2d at 1381.

²³⁶ *Londonderry II*, 958 A.2d at 932.

²³⁷ *See* *Brigham v. State (Brigham II)*, 889 A.2d 715, 721-22 (Vt. 2005) (remanding for a determination of constitutional violation, but limiting the remedy in the event of such violation to a declaration); *Brigham v. State (Brigham I)*, 692 A.2d 384, 398 (Vt. 1997) (per curiam) ("Although the Legislature should act under the Vermont Constitution to make educational opportunity available on substantially equal terms, the specific means of discharging this broadly defined duty is properly left to its discretion.").

²³⁸ *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 263 (Mont. 2005) (holding the system unconstitutional and ordering the legislature to define "quality," the operative term in the education clause (internal quotation marks omitted)).

²³⁹ *Idaho Schs. for Equal Educ. Opportunity v. State*, 129 P.3d 1199, 1202-03 (Idaho 2005) (reviewing the prior cases).

²⁴⁰ *Id.* at 1208 ("We affirm the conclusion of the district court that the current funding system is simply not sufficient to carry out the Legislature's duty under the constitution. . . . The appropriate

The Supreme Court of Arizona has followed a similar approach, allowing the legislature of the state to define the scope of its duties under the education clause.²⁴¹

3. Merits Review and Legislative Power

A final set of cases presents evidence of deference to legislative power in the form of the articulation of standards of review on the merits. In each of these cases, courts set about defining the constitutional standard by adopting a legislative definition. The courts then evaluated funding decisions based on this legislatively developed standard. Focusing on legislative discretion as part of the merits determination is functionally similar to focusing on legislative discretion as part of a justiciability determination, as it makes the plaintiff's injury and remedy depend on a power-based conception of the education clause. The introduction of legislative determinations of the requirements under which the legislature must operate illustrates in all of these cases that the courts, though they may use the word "duty," are really talking about Hohfeldian powers.

For example, the Kansas Supreme Court expressed this conception in a case presenting an adequacy-based constitutional challenge in *Unified School District No. 229 v. State* ("*USD 229*").²⁴² In *USD 229*, the court declined to invalidate the state's school finance system on adequacy grounds.²⁴³ The court based its refusal in part on the longstanding principle that the judiciary was to give legislative actions the strongest presumptions of constitutionality and only invalidate legislation clearly in conflict with the limitations imposed by the document.²⁴⁴

remedy, however, must be fashioned by the Legislature and not this Court."). Interestingly, unlike the plaintiffs in any other remedial abstention state, the plaintiffs in Idaho recognized that the court's unwillingness to order a remedy effectively neutered any right they held. As a result, they filed suit in federal court against the individual justices of the Idaho Supreme Court, alleging violations of their federal due process rights. *Kress v. Copple-Trout*, No. CV-07-261-S-BLW, 2008 WL 352620, at *2 (D. Idaho Feb. 7, 2008), and *dismissed on reconsideration*, 2008 WL 2095602 (D. Idaho May 16, 2008). Though this suit was ultimately dismissed, the plaintiffs' apparent need to file and prosecute it illustrates, from a plaintiff's perspective, the problems inherent in conceptualizing a constitutional provision that states an affirmative duty as a power. *Id.* at *3.

²⁴¹ *Hull v. Albrecht*, 960 P.2d 634, 636, 640 (Ariz. 1998) (en banc) (per curiam).

²⁴² (*USD 229*), 885 P.2d 1170, 1185-86 (Kan. 1994). In another line of cases, the court, after a lengthy involvement in supervising the remediation of an adequacy suit, declined to further supervise legislative policy development and ordered the lower court to dismiss the underlying case. *See Montoy v. State* (*Montoy III*), 138 P.3d 755, 765-66 (Kan. 2006).

²⁴³ *USD 229*, 885 P.2d at 1197.

²⁴⁴ *Id.* at 1173 ("When a statute is attacked as unconstitutional a presumption of constitutionality exists and the statute must be allowed to stand unless it is shown to violate a clear constitutional inhibition." (quoting *Unified Sch. Dist. No. 380 v. McMillen*, 845 P.2d 676, 681 (Kan. 1993)) (internal quotation marks omitted)).

By way of illustration, the court stated that “[i]t is generally agreed that the Kansas Constitution limits rather than confers power and any power and authority not limited by the constitution remains with the people and their legislators.”²⁴⁵ Applying the term “suitable” in the education clause as such a limitation, the *USD 229* court deferred to the recent legislative enactment of standards and goals for the education system as a working definition of “suitable.”²⁴⁶ Measuring the current system under these legislatively defined goals, the court declined to find that the current system failed to meet the suitability requirement.²⁴⁷ Similar decisions have been handed down in Georgia²⁴⁸ and Missouri,²⁴⁹ along with Oregon²⁵⁰ and Indiana,²⁵¹ as discussed below.

The Oregon Supreme Court, in *Pendleton School District 16R v. State*,²⁵² provided a unique, textually compelled power conception. In *Pen-*

²⁴⁵ *Id.* at 1174 (quoting *McMillen*, 845 P.2d at 681) (internal quotation marks omitted).

²⁴⁶ *Id.* at 1186 (internal quotation marks omitted).

²⁴⁷ *Id.* at 1186-87. The Kansas Supreme Court later held that the issue of “suitability” contained enough substantive content to allow a complaint based on a lack of suitability to survive a motion to dismiss. *Montoy v. State (Montoy I)*, 62 P.3d 228, 234 (Kan. 2003). The *Montoy* case subsequently yielded several Kansas Supreme Court opinions, ultimately resulting in an order to the state legislature to temporarily raise school funding levels by \$285 million in accordance with a previous cost study and pending further legislative study and action. *Montoy v. State (Montoy II)*, 112 P.3d 923, 940-41 (Kan. 2005). Thus, as of today, it may be more proper to place the Kansas court into the “claim-right” category. Nevertheless, even the most recent opinion of the Kansas Supreme Court purported to establish the required funding increase based on the contents of a cost study commissioned by the legislature, and it still left the legislature with significant discretion as to the contents of future funding packages. Recently, a group of plaintiffs has sought to reopen the case, claiming that the legislature’s more recent efforts fall short of the constitutional standard. Karen Pierog, *Kansas Sued Again over School Funding*, REUTERS (Nov. 2, 2010, 5:11 PM), <http://www.reuters.com/article/idUSTRE6A15XT20101102>. In response to this latest action, the court’s approach may change again, but *USD 229* remains the court’s clearest articulation of a conception of legislative powers over education, and the recent decisions have consistently avoided overruling it. *See, e.g., Montoy II*, 112 P.3d at 929 (“We also reject the State’s related argument that the doctrine of separation of powers limits our review to the issue of whether the legislature had the authority to pass such legislation. Any language in [*USD 229*] to this effect is inapplicable here because of this case’s remedial posture.” (citation omitted)).

²⁴⁸ *McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981) (“[W]hile an ‘adequate’ education must be designed to produce individuals who can function in society, it is primarily the legislative branch of government which must give content to the term ‘adequate.’”).

²⁴⁹ *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 488-89 (Mo. 2009) (en banc) (“The aspiration for a ‘general diffusion of knowledge and intelligence’ concerns policy decisions, and these political choices are left to the discretion of the other branches of government.”). The court clarified its holding by comparing the basic text of the education clause with one specific portion of the education article, which was not the subject of the challenge before the court. *Id.* That provision requires the state to spend no less than 25 percent of general revenue on education. *Id.* at 488 (citing MO. CONST. art. IX, § 3(b)). It was this provision, according to the court, that provided for a legislative duty. *Id.* at 489. All other provisions merely described legislative powers. *See id.*

²⁵⁰ *Pendleton Sch. Dist. 16R v. State*, 200 P.3d 133, 141-42 (Or. 2009) (en banc).

²⁵¹ *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 522 (Ind. 2009).

²⁵² 200 P.3d 133 (Or. 2009) (en banc).

dleton, the court reviewed a unique education clause provision that the voters had added by constitutional amendment:

(1) The Legislative Assembly shall appropriate in each biennium a sum of money sufficient to ensure that the state's system of public education meets quality goals established by law, and publish a report that either demonstrates the appropriation is sufficient, or identifies the reasons for the insufficiency, its extent, and its impact on the ability of the state's system of public education to meet those goals.²⁵³

The court interpreted this clause and agreed with the trial court that the legislature had not met the stated funding requirement, which the legislature itself had established through positive law creating content standards.²⁵⁴ However, the court focused its ultimate decision on the remaining language of the clause, which clearly contemplates that the Oregon Legislative Assembly has the discretion to fund at levels not meeting the funding goals, as long as it publicly explains the apparent shortfall.²⁵⁵ Thus, the court approached the education clause as a source of legislative power, limited only by process.

Perhaps the clearest statement of the power/liability approach came from the Indiana Supreme Court in the recent case of *Bonner ex rel. Bonner v. Daniels*.²⁵⁶ In dismissing the plaintiffs' challenge to the adequacy of education spending, the court pointedly held that (1) the state constitution imposes no duty of adequate funding on the legislature, and (2) it does not confer any individual rights:

Although recognizing the Indiana Constitution directs the General Assembly to establish a general and uniform system of public schools, we hold that it does not mandate any judicially enforceable standard of quality, and to the extent that an individual student has a right, entitlement, or privilege to pursue public education, this derives from the enactments of the General Assembly, not from the Indiana Constitution.²⁵⁷

Thus, the Indiana court expressed what is apparent from the cases reviewed above: in many states, despite the constitutional text's compulsory language, the legislature's role in education is almost entirely discretionary.²⁵⁸ If this is the case, then the legislature's position is that of the holder

²⁵³ *Id.* at 139 (quoting OR. CONST. art. VIII, § 8) (internal quotation marks omitted).

²⁵⁴ *Id.* at 141.

²⁵⁵ *Id.* at 140, 142.

²⁵⁶ 907 N.E.2d 516 (Ind. 2009).

²⁵⁷ *Id.* at 518.

²⁵⁸ The court held as follows:

Guided as we are by the text of the constitutional provision in the context of its history, we conclude that the Education Clause of the Indiana Constitution does not impose upon government an affirmative duty to achieve any particular standard of resulting educational quality. This determination is delegated to the sound legislative discretion of the General Assembly. And in the absence of such a constitutional duty, there is no basis for the judiciary to evaluate whether it has been breached.

of a nearly absolute Hohfeldian power, and the individual's position is that of the holder of a liability. Important to note is the Indiana court's specific pronouncement that *no individual right* attaches to the legislature's power under the state constitution (thus only a liability). This idea underlies several of the cases discussed in this Section, but courts often disguise it by proclaiming that individual rights exist.

The cases reviewed above all purport to construe the duty-based terms in their education clauses by focusing heavily on legislative discretion and power. In reality, though, if education is a system of discretionary powers and liabilities, then it admits of no individual claim-rights at all. This is quite surprising, given that nearly every state education clause uses a duty-based term, such as "shall" or even the term "duty" itself, to describe the legal relationships constitutionally desired in education; and one would ordinarily assume that a right would append to each such duty. It is also surprising, considering the mountain of literature by reputable scholars in which the analysis begins from the proposition that there is a positive right to education under state constitutions.²⁵⁹

Does this mean that the Hohfeldian conception of claim-rights is inaccurate to describe education's constitutional status? This seems so in most states. The full idea is more nuanced, though. In reality, in nearly three-fourths of the states that have addressed education clause litigation, the legislature has *some* duty. This "duty" just appears to be a basic one: a duty to legislate. In reviewing claims based on this ostensible duty, courts do not focus on legislative action that might be compelled (i.e., the "duty cell" of the Hohfeldian chart). Rather, the courts focus on the use of legislative discretion (i.e., the "power cell" of the Hohfeldian chart).²⁶⁰

Prior scholarship applying Hohfeld to public law has recognized that if the government possesses a duty to make legal changes, then it must also possess a Hohfeldian power to make such legal changes and that this power carries with it the discretion to determine how to make those changes, subject to the proviso that, at some point, the exercise of such discretion (e.g., deciding not to make the legal change at all) may run afoul of the duty.²⁶¹

Id. at 522.

²⁵⁹ See, e.g., Feldman, *supra* note 14, at 1077; Hershkoff, *Positive Rights and State Constitutions*, *supra* note 14, at 1168; Hershkoff, *State Courts and the "Passive Virtues"*, *supra* note 14, at 1839; Neuborne, *supra* note 14, at 897-98.

²⁶⁰ For a visual depiction of the Hohfeldian chart, see *supra* Part I.A.

²⁶¹ See J. H. Grey, *Discretion in Administrative Law*, 17 OSGOODE HALL L.J. 107, 108-09 (1979). Professor Grey states:

We can therefore summarize the debate by saying that discretion is a power that is almost always or always is attached to some level of duty. Review of discretion means determining how far the power extends and at what point the "duty" is ignored and the correlative "right" violated. As soon as this point is reached, the courts can interfere; before that they will abstain from doing so.

Such “discretion” could also run afoul of the implied power itself, or of an express or implied disability that is placed on the power. For example, the President of the United States has the express duty under Article II of the U.S. Constitution to “preserve, protect and defend the Constitution of the United States.”²⁶² In discharging this duty, the President has an implied power to perform acts that normal citizens cannot legally perform—for example, to set wiretaps of suspected enemies of the people.²⁶³ However, this power has limits. For example, the Fourth Amendment’s prohibition against unreasonable searches and seizures²⁶⁴ places an independent disability on the President’s exercise of his implied surveillance power.²⁶⁵

A simpler example will illustrate the point. Suppose I have a contractual duty, as your Human Resources Director, to recruit a “top-notch” CFO for your business. You have left me with complete responsibility for the task, but my duty runs to you, and you possess a claim-right to see it performed. Unless you mean to dictate to me the exact person to hire, I must possess an implied power, in the form of my professional discretion, to: (1) market the position; (2) select the pool of interviewees; (3) conduct the review; and (4) select the ultimately successful candidate. But this discretion has limits. I may not select a professional circus clown with no financial training for the position simply because he makes me laugh. My discretion must always be exercised rationally, in your best interest, and in good faith. These requirements can be thought of as implied disabilities on my power. Positive law might also place express disabilities on my power. For example, I cannot exercise my power by discriminating racially among the applicants.²⁶⁶ In this scenario, if I fail to hire a person for the position, I have violated my duty, but if I hire a clown or if I hire a person due to racial animus against other candidates, then I have exceeded my power by transgressing a disability.

In most school finance cases, it appears that this sort of relationship is what the courts have in mind. The state legislature has the constitutional duty to set up and maintain an education system for the benefit of the people. Implied in this duty, however, is a Hohfeldian power to decide how to set up and structure that system and at what level to fund it. Sometimes

Id. This principle has been applied in constitutional case law regarding the President’s executive duty to protect and defend the Constitution. *See* *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 310 (1972). There, the court noted:

We begin the inquiry by noting that the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to “preserve, protect and defend the Constitution of the United States.” Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means.

Id. (quoting U.S. CONST. art II, § 1).

²⁶² U.S. CONST. art. II, § 1 (internal quotation marks omitted).

²⁶³ *Keith*, 407 U.S. at 310.

²⁶⁴ U.S. CONST. amend. IV.

²⁶⁵ *Keith*, 407 U.S. at 310, 320.

²⁶⁶ 42 U.S.C. § 2000e-2(a)(1) (2006).

this power even includes the discretion to determine what the education clause itself means. The trick is in determining where the legislature has exceeded the discretion inherent in its implied power and thereby transgressed an implied disability. The only “duty” to which one can reduce the constitutional text—the only non-negotiable, compulsory term, that is—is the duty to set up and maintain some sort of education system. However, in no case is any legislature accused of failing to provide for an education system. Rather, each case presents a challenge to the legislature’s decision as to how much funding to provide and how to allocate it.

The arguments asserted in school finance cases do not really go to legislative inaction, then, even though this talismanic word (like the words “right” and “duty”) is bandied about frequently in the cases and the literature. All state legislatures have acted. The legislatures subject to constitutional challenges have simply acted in ways that the plaintiffs claim exceed the legislative discretion expressed or implied in the education clause. In the Hohfeldian sense, these claims are not truly about claim-rights and duties because they are not truly about action or inaction. Rather, they are centered upon the subjective and discretion-laden terms of the education clause—the duty statement—and these terms imply limitations on the power to execute the duty, not definitions of the duty itself. If this is the majority approach, as it appears to be based on the cases, then the judicial and scholarly rhetoric regarding school finance—which is laden with the terms “rights” and “duties”—is largely mistaken.

IV. HOHFELD AND BRENNAN

Justice Brennan’s call to state judiciaries to go beyond the rights judicially recognized in the Federal Constitution and to develop more rights-protective local regimes would seem to suggest that the doctrinal convergence²⁶⁷ that other scholars have identified among state courts as “unreflective adoptionism”²⁶⁸ or “lockstepping”²⁶⁹ is undesirable. But what does the analysis above add to this conclusion? First, is the convergence phenomenon present in state constitutional adjudication of claims based on rights with no federal analogues, such as education rights? If so, is this a bad thing? Moreover, would recognizing individual Hohfeldian claim-rights to education actually serve the interests that Justice Brennan sought to serve? This Part addresses these questions.

²⁶⁷ Brennan, *supra* note 1, at 503; Gardner, *supra* note 8, at 109.

²⁶⁸ See Williams, *supra* note 2, at 1505 (internal quotation marks omitted).

²⁶⁹ See *id.* at 1502.

A. *Conceptual Convergence in State Courts*

Based on the cases reviewed in this Article, it does not appear that the kind of doctrinal convergence identified in much of the state constitutional law scholarship is present in school finance litigation grounded on state education clauses. If convergence in this context means declining to adjudicate claims based on legislative duties and individual rights that the federal courts would decline to entertain, such as a basic idea of a legislature's duty to provide for education, then it appears in this general sense that, with limited exceptions, such convergence does not occur. Nearly every state court has at least conceded that the legislature has some responsibility to legislate on education,²⁷⁰ contrary to Congress, which has complete discretion in deciding whether or not to address education policy and in fact largely stayed out of the field until the 1960s.²⁷¹

However, the Hohfeldian perspective employed here illustrates that a more subtle form of convergence is prevalent—even dominant—in state supreme courts. This form involves the convergence of *conceptions* of the nature of constitutional rights in general, as distinguished from the convergence of state and federal adjudicatory *doctrines*. As outlined in Part I, federal courts generally approach legal relationships set up under the U.S. Constitution between individuals and legislative bodies as secondary rules of power, disability, liability, and immunity.²⁷² Despite the duty-based language in most state constitutions, and despite the ubiquitous mention of the words “rights” and “duties” in the cases, the overwhelming majority of state supreme courts articulate a basic duty or responsibility to legislate, but focus their adjudication, remediation, and abstention decisions on legislative power, rather than duty. The remainder of this Section offers some thoughts as to reasons for this conceptual convergence.

To begin with, claim-rights call for enforcement. Where a claim-right is violated, the remedy is naturally to compel the performance of the correlative duty. Where a duty is negative—a duty to forebear from action (e.g., the duty of a police officer not to racially profile drivers)—the court can at least prohibitively enjoin the state actor from taking the prohibited action.²⁷³

²⁷⁰ See *supra* Part III.D.3.

²⁷¹ See Harvey Kantor, *Education, Social Reform, and the State: ESEA and Federal Education Policy in the 1960s*, 100 AM. J. EDUC. 47, 47-48 (1991). Professor Goodwin Liu has recently written an interesting piece contending that the Citizenship Clause of the Fourteenth Amendment imposes a “duty” on Congress to legislate in the field of education. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334-35 (2006). Though well-argued, it is extremely doubtful that the Supreme Court will accept this reading any time in the near future.

²⁷² See *supra* Part I.A.

²⁷³ *Brasfield v. Burnwell Coal Co.*, 60 So. 382, 384-85 (Ala. 1912).

Where a duty is positive, in contrast, the court naturally must compel action (as it does in a specific performance contractual case).²⁷⁴

But how would this work with a positive claim-right to educational services? Ostensibly, if an individual has a claim-right to educational services, then he should be able to compel the provision of such services to him. This is, in fact, what happens frequently under the Individuals with Disabilities Education Act (“IDEA”).²⁷⁵ The IDEA creates a duty that correlates with a claim-right in each individual disabled student for a free education appropriate to his disability.²⁷⁶ The performance of this duty is (partially) subsidized by Congress, but it runs from the school district to the student.²⁷⁷ Where the duty is breached, a hearing officer is empowered to issue a mandatory injunction compelling the district to provide the required services or compensatory services.²⁷⁸ If the required services cannot be performed in the public district, a new set of claim-rights and duties may be created. The student may acquire a liberty to attend a private school of his choosing (as long as the services can be provided there),²⁷⁹ as well as a claim-right against the school district for reimbursement of the costs of attending, which would correlate with the district’s duty to pay those costs.²⁸⁰ In terms of claim-rights and duties, then, the IDEA system is reliably Hohfeldian because two identifiable entities each possess correlative legal positions as to designated conduct—the provision of educational services.

A similar set of relationships could conceivably exist in general school finance under state constitutions. Ostensibly, the school-age children in a state could be held to possess a claim-right to educational services at a certain level (e.g., basic, adequate, high-quality, etc.). This claim-right could be described as correlative to the (often explicit and textual) legislative duty to provide for such services, at least monetarily. If this were so, then a lack of legislative action sufficient to ensure that a particular student receives access to the required services could be considered a breach of the duty,

²⁷⁴ See *Munchak Corp. v. Caldwell*, 273 S.E.2d 281, 285 (N.C. 1981).

²⁷⁵ See Sharon C. Streett, *The Individuals with Disabilities Education Act*, 19 U. ARK. LITTLE ROCK L. J. 35, 51 (1996) (explaining the remedy of compensatory services for the denial of a free appropriate public education under the Individuals with Disabilities Education Act).

²⁷⁶ 20 U.S.C. §§ 1400-82 (2006).

²⁷⁷ See *id.* § 1400(d) (outlining the purposes of the IDEA); *id.* § 1412 (outlining the requirements for states to receive federal IDEA funding, which requirements involve the formulation of a statewide plan to provide each disabled student a free appropriate public education in the least restrictive environment practicable); *id.* § 1413 (outlining the requirements for local educational agencies (school districts and/or schools) to receive IDEA-based state and federal funding, which requires, inter alia, compliance with the statewide plan required by § 1412).

²⁷⁸ See Streett, *supra* note 275, at 51.

²⁷⁹ Alternatively, this may be considered a Hohfeldian power in the student to change the student’s (legal) enrollment status, to which the school district is liable.

²⁸⁰ Streett, *supra* note 275, at 50.

which could then be remedied judicially through an order to provide the services.

Several practical inter-branch problems would be created by such a relationship, though. To begin with, all school finance litigation is brought against state legislatures, and all school finance litigation founded on the quality terms in an education clause depends for its success on the theory that legislative inaction in providing sufficient funds has violated rights or breached duties.²⁸¹ Thus, where a court finds that such rights or duties have been violated or breached, its proper and most logical remedial action must be to order the performance of the breached duties—that is, to order increases in funding. But most state courts are prohibited from ordering or proscribing *conduct* where the violating party is the legislature,²⁸² and those not so prohibited nevertheless overwhelmingly choose not to order legislative appropriations based on general concerns over the separation of powers.²⁸³

Surmounting this obstacle to the enforcement of claim-rights to education would be difficult enough, but even assuming that a court can do so, as courts in six states have attempted,²⁸⁴ this decision would not end the matter. Rather, another practical problem is what a court is to do if its order is not followed. A state supreme court cannot conceivably put the entire legislature in jail for contempt, and it certainly cannot jail only the members who vote against, or even work against, compliance with the order.²⁸⁵ Any such action would be a serious affront to bedrock principles of representative government and would not be accepted by the public as legitimate. Considering that judges in the highest state courts of nearly forty states must stand for popular election either as an initial matter or for retention in

²⁸¹ See WOOD, *supra* note 96, at 70-71 (explaining the nature of an adequacy-based challenge).

²⁸² See, e.g., *LIMITS v. President of the Senate*, 604 N.E.2d 1307, 1309-10 (Mass. 1992) (“Mandamus is not available against the Legislature. . . . [A] judicial remedy is not available whenever a joint session fails to perform a duty that the Constitution assigns to it.”).

²⁸³ See *supra* Part III.D. As discussed elsewhere, most state constitutions contain explicit and formalistically stated separation of powers clauses. See Bauries, *supra* note 15, at 734. Aside from the structural arguments made in this Article, emerging econometric work is revealing that such interventions have yielded disappointing results. See ERIK A. HANUSHEK & ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES* 145-70 (2009) (presenting research showing few achievement gains from judicially directed expenditures in New Jersey, Kentucky, and Wyoming).

²⁸⁴ See *supra* Part III.C.

²⁸⁵ See generally Karla Grossenbacher, Note, *Implementing Structural Injunctions: Getting a Remedy When Local Officials Resist*, 80 GEO. L.J. 2227, 2235-36 (1992) (discussing the many reasons, both legal and practical, why a judge cannot hold legislators in contempt for refusing to enact certain legislation). Although several scholars have defended the use of “structural injunctions” or “legislative injunctions,” see, e.g., Robert A. Schapiro, Note, *The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction*, 99 YALE L.J. 231, 233-34 (1989), no paper has presented a convincing defense of even a hypothetical injunction issued against the highest legislative body of a state or against Congress that requires the enactment of legislation.

office, this path would seem a risky one even from a completely cynical perspective.²⁸⁶

Ultimately, as a coordinate branch of government, the legislature would, as a practical matter, have the choice of whether to comply with such an order, and the legislature would likely win any resulting constitutional confrontation. This reality undoubtedly explains why no state court has gone so far as to issue an injunctive order in a school finance suit and to follow through by using its traditional contempt power when the order has been flouted by the state legislature.²⁸⁷ In fact, most courts reaching a judgment against the state in school finance litigation have not even gone so far as to issue any kind of directive remedial order and have instead left remediation to the discretion of the legislature, an approach that inherently cuts against any kind of claim-right-based conception of education's constitutional status.²⁸⁸

It seems, then, that based on these challenges, Hohfeldian claim-rights to educational resources and services are unworkable, at least where such claim-rights run against the state legislature to compel adequate funding or resources. Accordingly, it is likely that the state courts have gravitated toward conceptualizing education "rights" as a set of powers, liabilities, immunities, and disabilities in school finance litigation as a matter of necessity and preservation of their institutional legitimacy. As explained above, this is the same conceptual approach taken toward rights and legislative powers under the Federal Constitution.²⁸⁹ Thus, it presents a subtle conceptual convergence of state and federal approaches to enumerated rights and powers.

Based on the recent trends in the cases, it appears that state courts are unlikely to change this orientation.²⁹⁰ However, it may be that the orientation toward secondary rules of power and liability in education can be used effectively to protect the individual interests that they are intended to benefit. In the next Section, this Article outlines some preliminary thoughts as to this possibility.

²⁸⁶ *Methods of Judicial Selection*, AMERICAN JUDICATURE SOCIETY, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm (last visited Nov. 18, 2010).

²⁸⁷ See, e.g., *supra* notes 219-25 and accompanying text (discussing the long-running Ohio litigation, which resulted in numerous decisions of unconstitutionality and much legislative recalcitrance to judicial declarations, ultimately resulting in the dismissal of the action, though the system remained out of compliance with the constitution).

²⁸⁸ See *supra* Part III.D.2.

²⁸⁹ See *supra* Part I.A.

²⁹⁰ See *Lobato v. State*, 218 P.3d 358, 373-74 (Colo. 2009) (en banc) (applying a power-disability-based conception of the education clause); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 777, 784-85, 789-90 (Tex. 2005) (same).

B. *Enforcing Affirmative Constitutional Commands as Secondary Rules*

Although it may seem a counter-intuitive conclusion, the application of the secondary-rules paradigm in state courts could be the foundation of a unique, states-specific approach, which is at the same time less intrusive than competing state approaches and more protective of individual interests than the federal approach to rights. A few unique features of state constitutionalism suggest why this may be so.

First, in the default sense, state legislative power is *plenary*.²⁹¹ In the Federal Constitution, legislative power's default state is "no power," and this default state becomes altered only through enumeration.²⁹² The structure of enumerations of power in state constitutions is to name a policy area and then to articulate standards for what should be legislatively pursued in that policy area.²⁹³ Where the U.S. Constitution speaks to legislating in an area of public policy, the proper reading of such a clause is as a grant of power and, therefore, discretion to exercise such power. In contrast, no state constitutional grant of power is ever necessary to confer legislative power on a state legislature.²⁹⁴ Accordingly, the enumeration of a power in a state constitution must be read as something other than a grant of power. State constitutional enumerations of power—especially those that state affirmative commands—are properly read as limitations on power and, therefore, as limitations on legislative discretion.²⁹⁵

The federal courts understandably review exercises of congressional discretion under grants of legislative power rather generously. This broad view is appropriate because it is reasonable to conclude that, in enumerating

²⁹¹ *City of Pawtucket v. Sundlun*, 662 A.2d 40, 44 (R.I. 1995) ("Because the General Assembly does not look to the State Constitution for grants of power, we have invariably adhered to the view that the General Assembly possesses all the powers inherent to the sovereign other than those that the constitution textually commits to the other branches of state government."); see also TARR, *supra* note 108, at 6-9 (explaining that state governments have historically possessed plenary powers); Michael J. Besso, *Connecticut Legislative Power in the First Century of State Constitutional Government*, 15 QUINNIPIAC L. REV. 1, 1 (1995) ("In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country." (quoting THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 126 (7th ed. 1903)) (internal quotation marks omitted)).

²⁹² Besso, *supra* note 291, at 8-9.

²⁹³ See *supra* Part II.A (discussing and citing the education clauses in the fifty state constitutions, each of which follows this structure).

²⁹⁴ See TARR, *supra* note 108, at 6-9; Besso, *supra* note 291, at 1.

²⁹⁵ Michael E. Libonati, *The Legislative Branch*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 37, 37 (G. Alan Tarr & Robert F. Williams eds., 2006) (referring to this proposition as "not uncontroversial"); see also TARR, *supra* note 108, at 7-9; WILLIAMS, *supra* note 3, at 28. For example, in its most basic sense, an affirmative command to exercise an inherent legislative power is a limitation on the inherent legislative discretion not to exercise the power; cf. Grey, *supra* note 261, at 108 (explaining that an affirmative command to exercise an inherent legislative power is a limitation on the inherent legislative discretion not to exercise the power).

legislative powers, the Framers saw these legislative ends as important enough to nationalize and place in the hands of Congress.²⁹⁶ In most cases presenting challenges to Congress's exercise of its enumerated legislative powers, the federal courts have placed great weight on the judgments of congressional actors as to both defining the scope of the enumerated policy area and determining the wisdom of the challenged legislative act.²⁹⁷ This deference waned slightly for a period in the late 1990s and early 2000s,²⁹⁸ but recent rulings affirm that the courts continue to view Congress's authority under its enumerated powers quite broadly.²⁹⁹

Consistent with the conceptual convergence phenomenon, state courts have, by and large, mimicked this federal practice of substantially deferring to legislative definitions and exercises of enumerated powers. Common

²⁹⁶ See, e.g., ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 171 (2010) ("The Supremacy Clause identified and created a body of supreme law of the land that was, according to Article I, circumscribed along subject-specific lines such that there was no concurrence with the substantive areas of state law."); see also *New York v. United States*, 505 U.S. 144, 180 (1992) (stating the belief that the Framers included the commerce power in Article I to prevent local trade disputes under local laws from disrupting the national economy); Besso, *supra* note 291, at 9 (explaining the purpose of federal enumerated powers as one of serving "[n]ational interests"). For a critique of this perspective, as to the Commerce Clause, see Calvin H. Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL RTS. J. 1 (2004).

²⁹⁷ See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 230 (2d ed. 2002) (explaining the broad deference generally afforded to Congress); Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163, 163-66 (1998) (reviewing the broad, deferential approach to congressional authority in the two primary areas of its exercise—the commerce power and the spending power).

²⁹⁸ See *Morrison v. United States*, 529 U.S. 598, 613-19 (2000) (striking down portions of the Violence Against Women Act as outside the scope of the commerce power); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (striking down the Religious Freedom Restoration Act as outside the scope of the Section 5 power in the Fourteenth Amendment); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the Tenth Amendment prevents Congress from using the commerce power to compel state officials to enforce a federal regulatory scheme); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (striking down the Gun Free School Zones Act as outside the scope of the commerce power); *New York*, 505 U.S. at 188 (holding that the Tenth Amendment imposes an independent limitation on the commerce power that forbids Congress from compelling states to enact regulatory schemes).

²⁹⁹ See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432 (2006) (applying the Religious Freedom Restoration Act against the federal government, ostensibly as a valid exercise of the commerce power); *Gonzales v. Raich*, 545 U.S. 1, 17-18 (2005) (reaffirming the very broad Depression-era reading of the Commerce Clause exemplified by *Wickard v. Filburn*, 317 U.S. 111 (1942)); see also Nicole Huberfeld, Note, *The Commerce Clause Post-Lopez: It's Not Dead Yet*, 28 SETON HALL L. REV. 182, 208, 211 (1997) (arguing that the increased scrutiny evident in *Lopez* was not so strict as to change the nature of Commerce Clause jurisprudence). The federal courts have also imported this deferential stance into cases reviewing state action against the Equal Protection Clause. See Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 669-90 (2000) (outlining a theory of declining deference to congressional definitions of "commerce" and other enumerated powers, but explaining that the theory does not apply to rational basis review of state actions implicating the Equal Protection Clause or the Due Process Clause).

among state supreme courts, in fact, is a doctrine that prohibits the striking down of legislation unless such legislation can be shown to be repugnant to constitutional limitations “beyond a reasonable doubt.”³⁰⁰ As Justice Brennan and many commentators have since pointed out, however, nothing compels state courts to follow the deferential federal model.³⁰¹ If, properly conceived, the purported grants in state constitutions of legislative authority over public policy areas are to be read as purposeful limitations on the otherwise plenary power of state legislatures, then the basis for deference is actually weaker, not stronger, in state courts than it is in federal courts.³⁰² The question is whether such grants are properly read in such a way.

The answer is apparent from the basic structure of the two forms of power enumeration. In the Federal Constitution, powers are granted broadly over policy areas. Few grants of power contain any standards within the grant language.³⁰³ Accordingly, the courts properly approach the enumerations of policy topics in Article I, Section 8 with an orientation toward the “power cell” in the Hohfeldian chart of secondary rules.³⁰⁴ In contrast, state enumerations of power are unnecessary, as state legislatures already have

³⁰⁰ See, e.g., *Retired Pub. Emps. Council of Wash. v. Charles*, 62 P.3d 470, 482 (Wash. 2003); *State v. Joseph E.G.*, 623 N.W.2d 137, 139 (Wis. Ct. App. 2000); Besso, *supra* note 291, at 47-49 (discussing the “beyond a reasonable doubt” rule in Connecticut). This rule has a very long pedigree in state courts. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 146 (1893) (illustrating the ubiquity of the rule, as well as its resilience in the face of challenges, in early state constitutional adjudication).

³⁰¹ See Brennan, *supra* note 1, at 503.

³⁰² See Schapiro, *supra* note 299, at 709 (arguing that the affirmative commands in state constitutions manifest a “distrust of unbridled legislative discretion”). Schapiro criticizes the “false dichotomy” of the foundational distinctions between plenary and enumerated powers and calls for a more contextual approach for determining the extent of judicial deference. *Id.* at 710. While there is much to like in Schapiro’s approach, downplaying the clear distinctions between drafting strategies inherent in beginning with a baseline of “no power” and adding powers through enumeration, as compared to beginning with a baseline of “plenary power” and enumerating limitations to it, seems to undermine even a contextual approach, which must depend on the “constitutional judgments” reflected in the documents. If the contextual approach minimizes distinctions between the baselines, then it jettisons from the relevant context a salient difference in baseline constitutional legislative authority evident in the text of the documents. It seems logical that a contextualist should begin with a defining feature of a constitution that sets up a baseline context.

³⁰³ The clearest example of a provision with a limiting standard stated within the power grant is that of the taxing and spending power, which must be exercised to “pay the debts, and provide for the common defence and general welfare of the United States” and which may not be used to impose taxes that are not “uniform throughout the United States.” U.S. CONST. art. I, § 8, cl. 1. As to the “general welfare” language of Clause 1, Supreme Court case law has essentially given it unbounded meaning through its refusal to interpret the language, so it may not impose any Hohfeldian disability at all. See, e.g., John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 CHAP. L. REV. 63, 67-71 (2001) (outlining the Supreme Court’s refusal to see the “general welfare” language as a limitation and calling for renewed scrutiny based on historical evidence of the original meaning of the words (internal quotation marks omitted)).

³⁰⁴ For the Hohfeldian charts in which these “cells” appear, see *supra* Part I.

all powers not ceded to the federal government or reserved to the people.³⁰⁵ Thus, the assumptions underlying deference toward the exercise of enumerated powers in the two systems, properly conceived, should each be reversed from the other. That is, if state legislative authority is plenary in the default sense, yet the framers of a state constitution chose to specifically enumerate a power anyway, then the correct inference is that the state framers feared the misuse of the power in that policy context and wished to circumscribe it—to disable it, in Hohfeldian terms.³⁰⁶

Importantly, this sort of limitation is properly read as a limitation on legislative discretion and as a particular kind of discretion in the area of affirmatively stated provisions—the discretion not to pursue the enumerated goal.³⁰⁷ If such a limitation is to be meaningful, then unlike federal courts, which appear to focus on the “power” cell of the Hohfeldian matrix in interpreting basic grants of power—that is, determining whether power exists at all based on the enumeration and only inquiring as to misuse where an external provision disables the power—state courts must focus on the “disability” cell—that is, determining whether discretionary power has been misused based on disabilities stated or implied in the enumeration itself.

For example, a court, in reviewing an enumeration-based challenge to Commerce Clause legislation, reviews such legislation for whether it qualifies as regulation of “commerce”—whether congressional power over the subject of the legislation exists at all. If legislation enacted through the commerce power is, in contrast, challenged as a violation of due process, then the court evaluates whether Congress has misused its discretion under the commerce power in violation of an external disability.³⁰⁸ In contrast, litigation over legislative powers in education never contemplates whether the subject of the legislation actually qualifies as “education”—the “power cell” of the Hohfeldian matrix. Rather, such litigation assumes that the subject of the enumerated power includes the challenged legislation, and the court instead focuses on whether the challenged legislation transgresses the quality terms in the grant of power—the “disability cell” of the Hohfeldian matrix.

The inference that a purported enumeration of power in a state constitution is actually a limitation on power thus justifies a more searching form of review over enumerated legislative powers than that found in the federal courts. Indeed, this inference even justifies more searching judicial review

³⁰⁵ See TARR, *supra* note 108, at 6-9.

³⁰⁶ See Schapiro, *supra* note 299, at 710 (observing that provisions in state constitutions that require legislative action both “grant powers to the legislature and cabin the exercise of legislative discretion”).

³⁰⁷ Cf. Grey, *supra* note 261, at 108 (describing discretion as “attached to some level of duty” and explaining that, where discretion is exceeded (positively or negatively), a legal position is altered from power to duty).

³⁰⁸ See O’Rourke, *supra* note 32, at 161.

over *enumerated* state powers than it would over *unenumerated* (and thus plenary and non-disabled) state powers. Under this formulation, most state legislatures should possess far more discretion in enacting, say, commercial codes than they should in enacting school finance plans.

A second salient feature of state constitutions—the greater *specificity* in defining the powers enumerated—supports this idea. The U.S. Constitution defines its enumerated powers broadly and generally—one might even say vaguely.³⁰⁹ In contrast, state constitutions often specify the powers they grant in great detail.³¹⁰ State education clauses are most often stated more vaguely, but they all contain significantly more content and textual guidance than the Commerce Clause,³¹¹ the Spending Clause,³¹² or the Courts Clause,³¹³ for example. This greater specificity is a further indication of a limitation on legislative authority, even if we agree to read the duty-based language in state education clauses as grants of legislative power.

A third feature of state constitutions—often invoked, but never in Hohfeldian terms—is the presence of *affirmatively stated provisions*. As discussed above, commentators and courts often invoke the affirmative character of state education clauses as a justification for more searching judicial review, and courts that use the language of “legislative duty” or “obligation” always ground this language in the text of the education clause. However, these courts overwhelmingly go on to enforce the stated duties as legislative powers, not duties, by allowing the legislature the discretion to define its own obligations or by denying claimants any correlative claim-rights to compel performance and holding legislative discretion to be the paramount concern in remediation.³¹⁴

Despite this textual and adjudicatory disconnect, the affirmative character of the constitutional provisions in question adds a relevant contextual element to assist with the court’s determination of the proper amount of deference to afford—the element of *importance*. If most other state functions are stated in the permissive and education is stated in the affirmative-mandatory, then a logical conclusion is that the drafters attached increased importance to the education provisions, as compared to other state functions, such as the general appropriations power or the power over corporations, which are more often stated in the negative or permissive.³¹⁵ Indeed,

³⁰⁹ See Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 631-37 (2009) (drawing a distinction between vagueness, which is a constitutional feature not particularly susceptible to construction using baseline assumptions, and ambiguity, which is a contractual feature subject to interpretation through baseline assumptions).

³¹⁰ WILLIAMS, *supra* note 3, at 20.

³¹¹ U.S. CONST. art. I, § 8, cl. 3.

³¹² *Id.* art. I, § 8, cl. 1.

³¹³ *Id.* art. I, § 8, cl. 9.

³¹⁴ See *supra* Part III.D (discussing remedial abstention in many state courts).

³¹⁵ See, e.g., FLA. CONST. art. III, § 12 (West, Westlaw through Nov. 4, 2008) (“Laws making appropriations for salaries of public officers and other current expenses of the state shall contain

in some state constitutions, the “paramount” importance of education is even made explicit in the text.³¹⁶

If the dominant conception applied to affirmative education provisions in state constitutions is to be a Hohfeldian conception of disabilities, then where the legislature exceeds the limits that state constitutional enumeration places upon it, the proper judicial remedy should be to invalidate the challenged legislative act—that is, to disable its effects. However, as to education, the articulated limits are, as one scholar put it, “inherently nebulous.”³¹⁷ The important question, then, is when to invalidate legislative action—at what point is an education clause-related disability transgressed?

To answer this question, it is necessary to recognize that state education clauses, for all their semantic variation, state remarkably similar goals. Each education clause calls for the legislature to support a system of schools that provides education to the people of the state. Many education clauses augment this basic duty with one or more quality-based adjectives, but these adjectives, being “inherently nebulous,” are not readily subject to principled interpretation. But a disability, being a limitation, needs a demarcation—a definition. Recently, a few state courts have conceptualized state education clauses so as to suggest a definition or a demarcation of legislative disability that might be broadly applicable among the states.

The Texas Supreme Court, in *Neeley v. West Orange-Cove Consolidated Independent School District*,³¹⁸ upheld the state legislature’s most recent actions in crafting a school finance system.³¹⁹ In determining whether the case was justiciable, the court explained that the legislature could not be considered “the final authority on whether it has discharged its constitutional obligation,”³²⁰ tracking the language of the state constitution, which pro-

provisions on no other subject.”); IND. CONST. art. X, § 3 (West, Westlaw through 2010) (“No money shall be drawn from the Treasury, but in pursuance of appropriations made by law.”). The Washington Constitution reads:

Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited or restrained by law.

WASH. CONST. art. XII, § 1 (West, Westlaw through Nov. 3, 2009 amendments).

³¹⁶ Florida’s constitution and Washington’s constitution both refer to the duty as “paramount.” See FLA. CONST. art. IX, § 1(a) (West, Westlaw through Nov. 4, 2008); WASH. CONST. art. IX, § 1 (West, Westlaw through Nov. 3, 2009 amendments).

³¹⁷ Clayton P. Gillette, *Reconstructing Local Control of School Finance: A Cautionary Note*, 25 CAP. U. L. REV. 37, 37 (1996).

³¹⁸ 176 S.W.3d 746 (Tex. 2005). This recent decision came only after decades of litigation and inconsistently responsive action. *Id.* at 752-53; see also *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558 (Tex. 2003); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995); *Richards v. League of United Latin Am. Citizens*, 868 S.W.2d 306 (Tex. 1993); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

³¹⁹ *Neeley*, 176 S.W.3d at 789-90, 792.

³²⁰ *Id.* at 778 (emphasis added).

vides, in relevant part, that “it shall be the *duty* of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”³²¹

The court, however, construed the “duty” expressed in the state constitution as an imposition of limiting “standards” on legislative action, which must be reviewable in the courts, quoting its first ruling on the question: “This duty is not committed unconditionally to the legislature’s discretion, but instead is accompanied by standards. By express constitutional mandate, the legislature must make ‘suitable’ provision for an ‘efficient’ system for the ‘essential’ purpose of a ‘general diffusion of knowledge.’”³²² Working from this language, the court attempted, for the first time in the long history of litigation in the state, to define a standard of review appropriate for the education clause. The court, however, recognized the nebulous nature of the adjectives in the education clause and read them to impose a more legally familiar standard. Again quoting from a previous case (this one much older), the court settled on “arbitrariness” as the appropriate standard: “The Legislature alone is to judge what means are necessary and appropriate for a purpose which the Constitution makes legitimate. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen.”³²³ Thus, the court interpreted the “duty” set forth in the state constitution as a Hohfeldian disability on legislative power. That is, the court held that the legislature is required to legislate on education and that it has broad discretionary power regarding how to craft such legislation, but that this power is also limited by a disability to make arbitrary changes to legal relationships in education.

Extending this idea of the “duty as disability,” the court operationalized the term “arbitrary”: “If the Legislature’s choices are informed by *guiding rules and principles properly related to public education*—that is, if the choices are not arbitrary—then the system does not violate the constitutional provision.”³²⁴ Consistent with this conception, the court ultimately held that the state system was not in violation of constitutional standards.³²⁵ Although the state constitution speaks in terms of “duty,” the formulation of

³²¹ TEX. CONST. art. VII, § 1 (West, Westlaw through 2009) (emphasis added).

³²² *Neeley*, 176 S.W.3d at 776 (quoting *Kirby*, 777 S.W.2d at 394) (internal quotation marks omitted).

³²³ *Id.* at 784 (quoting *Mumme v. Marrs*, 40 S.W.2d 31, 35-36 (1931)) (internal quotation marks omitted).

³²⁴ *Id.* at 785 (emphasis added).

³²⁵ *Id.* at 789-90. In determining that this standard was not violated, the court held:

Having carefully reviewed the evidence and the district court’s findings, we cannot conclude that the Legislature has acted arbitrarily in structuring and funding the public education system so that school districts are not reasonably able to afford all students the access to education and the educational opportunity to accomplish a general diffusion of knowledge.

Id.

the standard in this way corresponds more closely with the Hohfeldian conception of “disability.”

The legislature in Texas thus has a duty to enact legislation relating to education, but the duty is not enforced as such. Rather, the imposition of the duty sets up a legislative power burdened only by a disability to enact legislation that is “arbitrary,” which is the only portion of the relationship that may be enforced in court (unless, it seems, the Texas legislature stops legislating at all in education). If individuals possess “rights” to education, then, these “rights” are immunities correlative to the legislative disability to enact arbitrary legislation. Thus, although the Texas Constitution sets forth textually a primary rule of legislative conduct—the duty to legislate in education—the enforceable aspect of the educational relationship in Texas is the disability to enact arbitrary legislation—a secondary rule.

Other state supreme courts have begun to move in this direction. For example, the Supreme Judicial Court of Massachusetts has recently shown a willingness to treat the legal relationships created by the state constitution’s education clause as Hohfeldian disabilities, though it has made this indication only through a concurring plurality of a divided court.³²⁶ Also, very recently, the Colorado Supreme Court, in remanding a case for trial after rejecting a state challenge to justiciability, instructed the lower court to apply “rational basis review” to a challenge based on the quality terms of the education clause.³²⁷ Even more recently, the Connecticut Supreme Court issued a strongly worded opinion holding adequacy of education to be justiciable, but it indicated in a footnote that the state system should be upheld as long as the legislature has set up “a program of instruction *rationaly calculated* to enforce the constitutional right to a minimally adequate education.”³²⁸

³²⁶ *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1137-39 (Mass. 2005) (Marshall, J., concurring) (plurality opinion) (reviewing legislative compliance with court declarations issued in *McDuffy v. Secretary of the Executive Office of Education*, 615 N.E.2d 516 (Mass. 1993)). The plurality stated that the plaintiffs had failed to show that the legislature, in enacting the current system following the adverse *McDuffy* decision years earlier, had abdicated its duty to cherish the public schools by acting in an “arbitrary, nonresponsive, or irrational way to meet the constitutional mandate.” *Id.* at 1139-40.

³²⁷ *Lobato v. State*, 218 P.3d 358, 374 (Colo. 2009). The *Lobato* court concluded:

Hence, we hold that the judiciary must similarly evaluate whether the current state’s public school financing system is funded and allocated in a manner rationally related to the constitutional mandate that the General Assembly provide a “thorough and uniform” public school system. This rational basis review satisfies the judiciary’s obligation to evaluate the constitutionality of the public school system without unduly infringing on the legislature’s policymaking authority.

Id.; *cf.* *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50, 57, 59 (N.Y. 2006) (rejecting the lower court’s modifications and approving a funding plan proposed by the legislative and executive branches in response to earlier rulings, which was based on a determination that the plan was not “unreasonable” and not “irrational”).

³²⁸ *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 255 n.59 (2010) (emphasis added).

State supreme courts often find themselves confronted with inter-branch conflicts in school finance litigation.³²⁹ Much of this conflict can be traced to the “nebulous” nature of the legislative disabilities imposed by the language of the education clause. Simply put, reasonable people will always disagree as to what quantum and quality of education satisfies the subjective adjectives that litter state education clauses, all of which seem directed at requiring a system adequate to the needs of the people. Thus, in deriving from these nebulous terms the more familiar adjudicatory conception of a prohibition on “arbitrariness,” defined as a failure to rationally pursue the goal of establishing an adequate education system, these recent courts have provided a way to ensure that education “rights” are justiciable but that legislative policy judgments will not simply be second-guessed judicially. Considering its potential to minimize inter-branch conflicts, this evolving approach may soon gain more adherents.

With these points in mind, a state education clause, if it is to be enforced as a legislative disability, should be read to disable only legislative action that is arbitrary in its pursuit of the broadly universal goal of a system that adequately educates the people. The framework outlined in this Article certainly calls for a very limited form of judicial enforcement of individual “rights” to education. Even such limited enforcement, however, would greatly exceed that available under the Federal Constitution, which has only been read to limit certain failures of equal protection in the provision of education, but which has never inquired as to the adequacy of state legislative enactments.

Admittedly, the conception of the “adequacy right” set forth here falls short of the many duty-based conceptions that state courts and especially commentators have *articulated*, but it tightly fits the conception that the overwhelming majority of state courts have actually *applied*. Moreover, this approach has the virtue of avoiding judicial hyper-specification of policy goals, and it thus minimizes the chances of institutional conflict.³³⁰ With such a tool in their arsenal, it may be that the state courts that have preferred to abstain at the justiciability stage as a means of institutional protection due to a lack of “judicially manageable standards” will now choose to participate in defining constitutional norms, particularly because, in these cases, the primary concern that causes courts to abstain is a concern over remediation of “positive rights” claims. Under this approach, a court find-

³²⁹ See Bauries, *supra* note 15, at 738 (explaining the ubiquity of separation of powers concerns in school finance cases).

³³⁰ See Thro, *supra* note 150, at 548 (speaking of the Kentucky Supreme Court’s articulation of a multi-factor standard in *Rose*, the author notes that “[i]f this standard is taken literally, there is not a public school system in America that meets it”).

ing a violation of a disability on a legislative power can fulfill its judicial duty by striking down the legislation.³³¹

Though Justice Brennan's call to state courts has been interpreted as an invitation to embrace "positive rights" and to reject "rationality review,"³³² these two concepts need not be incompatible. A Hohfeldian analysis has revealed substantial conceptual convergence in state and federal courts in viewing the making of public policy as the realm of legislative powers, rather than individual claim-rights. But this analysis also reveals a possibility that state constitutional education "rights" are more properly conceptualized as disabilities placed on legislative power, which limit arbitrary legislative exercises of discretion in designing an education system and allow for judicial review of the rational pursuit of educational adequacy.

CONCLUSION

As a descriptive matter, it appears that Professor Hohfeld would have little to say of school finance that would give hope to Justice Brennan. To the extent that Justice Brennan had negative state constitutional rights in mind, it appears that, by and large, these rights have been approached similarly to their federal court analogues—as very weak immunities correlative to very insignificant disabilities on broad legislative powers. To the extent that Justice Brennan had positive state constitutional rights in mind when he called upon state courts to exercise their federalist role in providing greater protection to individual rights than that available in federal courts, he undoubtedly expected these rights to carry with them individual claims of enforcement. Instead, the cases have produced many reaffirmations of functionally absolute legislative powers. As this Article has argued, this illustrates a conceptual convergence of state and federal approaches to enumerated powers. In both cases, it appears that Justice Brennan's expectations have been frustrated.

As a normative matter, however, Justice Brennan's goals remain worthy of realization, and a proper Hohfeldian conception of state legislative powers and disabilities actually supports these goals. If properly focused on the disabilities presented by state constitutional text—where such disabilities, due to their "nebulous" character, can only be fairly

³³¹ As Professors Rosenkranz and Bybee have correctly pointed out, invalidation of legislation is the natural remedy where a legislative body has transgressed a legislative disability. *See* Bybee, *Common Ground*, *supra* note 32, at 332 (concluding that under his theory of the First Amendment, a decision in favor of the Yoders should have required invalidation of the challenged statute, rather than a judicially created exemption from its application); Rosenkranz, *supra* note 35, at 1248-49 ("If Congress violated the Constitution by making a law, basic remedial principles suggest that the Court should accord the violation no legal effect and should instead restore the law to the pre-violation status quo.").

³³² *See* Hershkoff, *Positive Rights and State Constitutions*, *supra* note 14, at 1136-37.

interpreted as limiting the legislature's discretion to enactments that further the accomplishment of the goal—state courts can defensibly review exercises of power based on a substantive appraisal of the rational pursuit of adequacy. Also, by focusing on the “disability cell” of the Hohfeldian matrix, state courts can forge a state constitutional doctrine of enforcing enumerations of powers in a way that is distinct from the “power cell” focus of the federal courts.

Ultimately, then, conceptual convergence may actually operate to enable the fulfillment of Justice Brennan's hopes. Thinking about state constitutional “rights” in terms of Hohfeldian correlatives and focusing adjudication on an approach to ostensible “affirmative rights” as secondary rules of power, disability, and individual immunity illustrates both the possibility and the promise of a more refined role for state supreme courts in enforcing state constitutional norms.