

STATE CONSTITUTIONS AND INDIVIDUAL RIGHTS:
“LOCKSTEPPING” AND THE LESSONS OF SCHOOL FINANCE

*Scott R. Bauries**

ABSTRACT

Beginning with Justice Brennan’s clarion call to state supreme courts, scholars and jurists have urged, sought, and suggested approaches to rights under state constitutions independent of (and more protective than) those found in the federal Constitution. Critics of state courts have identified the courts’ persistent tendency to follow federal doctrines in “lockstep,” especially when construing rights guarantees with federal analogues. However, the analyses in these accounts have focused mostly on adoption of federal adjudicatory doctrines, rather than on judicial conceptions of the nature of the rights themselves. What is needed to advance this line of inquiry further is a way of calibrating the approaches to rights employed by state courts, so these approaches can be analyzed, evaluated, and compared to the approaches followed by federal courts, to assess the “lockstep” phenomenon in light of Justice Brennan’s admonishment. Here, I offer the framework first set forth by Wesley Newcomb Hohfeld as one way of accomplishing this calibration.

I focus my inquiry here on state constitutional education provisions, as interpreted through school finance litigation. Focusing on these provisions and cases affords a chance to evaluate the possibility of a “lockstep” phenomenon in the context of state constitutional affirmative commands unique to state constitutions. I use Hohfeldian conceptions to show that, in subtle, but important ways, the “lockstep” phenomenon is still a pervasive influence on state constitutional adjudication, though it is rhetorically disguised in affirmative rights cases mostly due to concerns over the separation of powers. Properly employed, Hohfeldian conceptions of legal relationships, considered in light of the unique textual and structural features of state constitutions, can provide state highest courts with the ready means for avoiding institutional conflicts while still fulfilling their roles as interpreters and protectors of state constitutional rights. Based on these principles, I present a foundation for the development of a more protective and less intrusive rights-based jurisprudence in state courts.

* Assistant Professor, University of Kentucky College of Law; J.D. 2005, University of Florida; Ph.D. 2009, University of Florida.

STATE CONSTITUTIONS AND INDIVIDUAL RIGHTS:
THE LESSONS OF SCHOOL FINANCE

TABLE OF CONTENTS

- I. INTRODUCTION: INDIVIDUAL RIGHTS AND THE “LOCKSTEP” PHENOMENON
- II. HOHFELD’S FUNDAMENTAL CONCEPTIONS
 - A. *Jural Correlatives and Jural Opposites*
 - B. *“Positive” and “Negative” Hohfeldian Relationships*
- III. SOURCES OF EDUCATION RIGHTS AND DUTIES
 - A. *State Constitutional Text*
 - i. Hortatory Provisions.
 - ii. Mandatory Provisions.
 - iii. Hybrid Provisions.
 - B. *School Finance Litigation*
- IV. JUDICIAL CONCEPTIONS OF EDUCATION
 - A. *Liberties and No-Rights*
 - B. *Immunities and Disabilities*
 - C. *Claim-Rights and Duties*
 - D. *Powers and Liabilities*
 - E. *Duties and No-Rights?*
- V. HOHFELD AND BRENNAN
 - A. *The “Lockstep” Phenomenon in State Courts*
 - B. *Litigating Affirmative Constitutional Commands*

I. INTRODUCTION: INDIVIDUAL RIGHTS AND THE “LOCKSTEP” PHENOMENON

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.

-Justice William J. Brennan, Jr.¹

State constitutional law and individual rights have had a rocky relationship. Through much of pre-Warren Court history, states followed a path of rights jurisprudence distinguished from the path followed in the federal courts. During this period, state courts, construing their own state constitutions, often offered the only protection for individual rights, as the Fourteenth

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

Amendment at first did not exist, and subsequently was not held to incorporate provisions from the federal Bill of Rights until the Warren Court era.² During the Warren Court era, the path changed, and the federal courts became the primary venue for the adjudication of constitutional rights claims.³

Critics of state courts have identified their tendency to follow federal doctrines in “lockstep” when construing rights guarantees stemming from constitutional language similar to that found in the federal document.⁴ Professor Williams, for example, has engaged in a long-running project to define and understand the “lockstep phenomenon,” as I will refer to it here.⁵ 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 clauses.⁶ In a recent case study, Professor Williams identified four principal forms of lockstepping, as well as several emerging forms, some of which are legitimate and others of which are illegitimate.⁷ Each of these focused, as most studies of state adoption of federal constitutional law have, on state interpretation or application of state constitutional provisions with analogues in the federal document.

Beginning in earnest with the publication of Justice Brennan’s clarion call to state courts,⁸ scholars and jurists have urged, sought, and suggested approaches to rights under state constitutions independent of (and more protective than) those found in the federal Constitution, even where such rights have obvious federal analogues.⁹ As Professor Williams has demonstrated, this project has met with mixed success. As to the provisions Professor Williams studies, most decisions end up adopting in some form the federal approach, though several decisions display a more nuanced form of adoption than the “unreflective adoptionism” form of

² See 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) (quoting Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 3 (2007) (“In a series of cases that are largely forgotten or brushed aside today, early state courts regularly did apply the Federal Bill of Rights to invalidate state laws and otherwise constrain state government.”)); see also Peter Linzer, *Why Bother with State Bills of Rights?*, 68 TEX. L. REV. 1573, 1575 (1989-1990) (“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.”).

³ Linzer, *supra* note __; see also James A. Gardner & Jim Rossi, Foreword: *The New Frontier of State Constitutional Law*, 46 WM. & MARY L. REV. 1231, 1232-34 (2004-2005) (outlining the history of state judicial approaches to enforcement of constitutional norms).

⁴ WILLIAMS, *supra* note __, at 209-24 (analyzing the “lockstepping” of federal equal protection doctrine where equal protection questions are considered in state courts).

⁵ See generally, WILLIAMS, *supra* note __, at __; Robert F. Williams, *State Courts Adopting Federal Doctrine”: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005).

⁶ See, e.g., WILLIAMS, *supra* note __, at 209-24 (criticizing lockstepping in equal protection cases).

⁷ Williams, *supra* note __, at 1504-18 (defining the forms of lockstepping).

⁸ Brennan, *supra* note 1.

⁹ Gardner & Rossi, *supra* note __.

lockstepping that makes up the familiar negative picture of state constitutionalism.¹⁰ Of the several forms of lockstepping that appear in Professor Williams’s paper, the one that comes closest to the phenomenon that is the subject of this Article is the form of lockstepping in which the state court “borrows” a test or form of reasoning from the federal courts and expresses an intention to apply it prospectively.¹¹

Two features of the lockstep phenomenon described in this final of Williams’s primary categories make it an appropriate frame of inquiry for school finance decisions. First, under Williams’s formulation of this form of lockstepping, a state court may adopt the federal approach, yet reach a different result on similar facts, as it is the test or form of reasoning that is adopted, rather than the substantive decision as to the value of the right in question.¹² As I will show, this is in fact what often happens in school finance decisions. Second, as Williams points out, because the court indicates that the adopted test is to apply to similar questions prospectively, one might infer that changes in federal law would not effect the state’s application of the test as adopted—thus, “It does seem to constitute state constitutional law.”¹³

In this Article, I add two dimensions to the work that Professor Williams began in this area. First, I examine the “prospective borrowing” form of lockstepping in decision based on state constitutional provisions both with and without federal analogues. The bulk of my analysis focuses on the latter, unlike much of the literature on lockstepping. Second, I examine a form of lockstepping that examines the influence of federal paradigms of rights. That is, I examine federal conceptions of the nature of constitutional rights in general and investigate the influence that such conceptions have had on the development of rights conceptions in state supreme courts. This analysis does not fit precisely into the “borrowing of tests and forms of reasoning” form of lockstepping that Professor Williams described, mostly because in many cases, any “adopting” occurs implicitly, but I hope to advance the project that Professor Williams has pursued for several years by adding a new dimension to it. I also hope to clarify the nature of rights to education under state constitutions.

Several scholars of state constitutions have begun to identify what appears to be an independent, states-specific approach to some individual rights, particularly rights to education.¹⁴ A good deal of scholarship exists examining school finance litigation—the primary vehicle

¹⁰ See Williams, *supra* note ____, at 1506-18 (distinguishing reflective adoptionism; prospective lockstepping; and prospective test borrowing from unreflective adoptionism).

¹¹ Williams, *supra* note ____, at 1514-18 (explaining prospective lockstepping of tests and forms of reasoning, and providing examples).

¹² Williams, *supra* note ____, at 1514-15.

¹³ Williams, *supra* note ____, at 1515.

¹⁴ E.g., Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 *RUTGERS L.J.* 799 (2002); Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 *HARV. L. REV.* 1833 (2001); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 *HARV. L. REV.* 1131 (1999); Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 *FORDHAM L. REV.* 1403 (1999); Johnathan 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); Burt Neuborne, *Foreword: 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).

through which these state education rights are interpreted.¹⁵ Much of this scholarship discusses education “rights” and “duties,” but little work attempts to discern the nature of any such rights or duties.¹⁶ A large portion of the scholarly work in existence focuses on the justiciability and remediability of education rights, assuming that such rights exist and passing over any consideration of what it means to have an education “right.”¹⁷

An equally large portion of the literature focuses on the quantitative and qualitative entitlements that school children have pursuant to the state constitution’s education clause.¹⁸ However, this work most often assumes the existence of an education “right,” typically as a predicate for making the case that some set of policy outcomes are part of the right.¹⁹ To date, scholars have not made systematic or theoretical inquiries as to the nature of the legal relationship between the individual and the state set up by an education clause.

This overlooked inquiry is the subject of this Article. My goals here are threefold. First, I seek to make a descriptive case for the constitutional status of education in the states, based on state constitutional text and state judicial decisions. Second, I seek to evaluate the “lockstep” phenomenon, as I have framed it above, in state constitutional adjudication presenting claims of affirmative entitlement to state resources (what scholars have loosely referred to as “positive rights”).²⁰

I pursue these tasks by employing Wesley Newcomb Hohfeld’s framework as the analytical methodology for the paper. Thus, as a third goal, I offer the first academic application

¹⁵ At this writing, the highest courts of forty-three states have adjudicated direct challenges to state education finance plans. Of the seven state highest courts that have not yet adjudicated a school finance case, four of these courts (those in Delaware, Hawaii, Mississippi, and Utah) have seen no judicial activity. 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*, 76 P.3d 22 (Nev. 2003); *Guinn v. Legislature* 71 P.3d 1269 (Nev. 2003). Also, South Dakota’s highest court has issued a preliminary decision holding that school districts have standing to sue to enforce the education clause. *Olson v. Guindon*, 2009 S.D. 63 (S.D. 2009). On remand, the state prevailed in the trial court, and the plaintiffs will likely appeal. *See* “South Dakota: Litigation,” National Access Network, Teachers College, Columbia University, *available at* http://www.schoolfunding.info/states/sd/lit_sd.php3. Finally, in New Mexico, a suit challenging the adequacy of capital funding was brought and initially settled, with enforcement actions working their way through both New Mexico’s trial courts and the United States Supreme Court, which held that the state could deduct federal equalization dollars granted to the state from its own required equalization efforts. *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 (2007) (reviewing the history of the various actions).

¹⁶ *See* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. ____ (forthcoming 2010) (reviewing the literature on educational adequacy litigation).

¹⁷ Articles cited in Bauries, *supra* note ____.

¹⁸ Articles cited in Bauries, *supra* note ____.

¹⁹ An early example is Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307 (1991) (arguing for the designation of state content standards as a constitutional entitlement).

²⁰ I consider this focus to be uniquely appropriate to a rights inquiry focused on state constitutions. 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: Fifth Annual Issue on State Constitutional Law*, 24 RUTGERS L.J. 907, 909 (1993).

of Hohfeld’s framework to state constitutional law. I show that Hohfeld’s framework is useful in understanding state constitutional rights. In particular, the application of Hohfeld’s methodology reveals the misleading character of “rights talk” in state supreme courts and shows that a subtle kind of “lockstep” phenomenon is alive and well in state constitutional contexts with no federal analogues. I then make the normative case that the “discourse of state constitutionalism”²¹ on individual rights, as well as the inter-branch interactions in state government resulting from school finance litigation, could be greatly improved with a more deliberate Hohfeldian perspective. This Article therefore advances the scholarly and judicial understanding of both the legal relationships attendant to education under state constitutions and the role of individual rights in state constitutions in general.

I begin by reviewing Hohfeld’s “fundamental conceptions” and expanding Hohfeld’s theory to the arena of constitutional rights, building on recent work by other scholars.²² Although I am not the first to attempt this expansion, I am the first to do so in the realm of *state* constitutional rights, and the first to include within the Hohfeldian analysis the category of affirmative or positive constitutional “rights.”²³ From this foundation, I move to a discussion of the sources of rights to education, I examine 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. Next, I systematically analyze the population of reported cases from state highest courts to identify Hohfeldian conceptions of education rights held or applied by the courts through definition, adjudication, and remediation.

I use Hohfeldian conceptions to show that, in subtle, but important ways, the lockstep phenomenon asserts a pervasive influence on state constitutional in affirmative rights cases, though it is often rhetorically disguised as a separation of powers concern. Nevertheless, I show

²¹ I borrow this phrase from James A. Gardner’s seminal article. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992). In part, my article seeks to provide a grounding for the discourse of state supreme courts on rights. I do not offer a broad theory of the nature of state constitutions in general, as Gardner does. Rather, I offer a way for state courts to conceptualize the legal relationships that exist in state documents—particularly in provisions that have no federal analogues, thus providing one possible response to the need for interpretive guidance voiced by, among others, Hans Linde. See Hans A. Linde, *State Constitutions are Not Common Law: Comments on Gardner’s Failed Discourse*, 24 RUTGERS L.J. 927, 956 (1993) (calling upon academics and lawyers to assist state court judges in applying the “actual guarantees that a state charter provides”).

²² E.g., O’Rourke, *infra* note ____; Why Hohfeld? I choose Hohfeld’s theory 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; 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, e.g., STEPHEN E. GOTTLIEB, BRIAN H. BIX, TIMOTHY D. LYTTON, & ROBYN L. WEST, JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS 301-19 (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 (2002) (“But in law schools today Hohfeld is relatively unknown and, I suspect, seldom mentioned in the classroom.”).

²³ As will be apparent from the analysis to follow, and as Hohfeld himself proved, when one takes a Hohfeldian view, the word “rights” is shown to have many possible meanings. In this paper I therefore use the “rights” in the general sense that encompasses all Hohfeldian relationships, reserving Hohfeld’s more specific terms for their particular applications.

that, properly employed, Hohfeldian conceptions of legal relationships, considered in light of the unique textual and structural features of state constitutions, can provide state highest courts with a ready means for avoiding institutional conflicts while still fulfilling their roles as interpreters and protectors of state constitutional rights. Based on these principles, I present a foundation for the development of a more protective, yet generally less intrusive, rights-based jurisprudence in state courts. I conclude by commenting on the future of litigation over affirmative individual rights in the states.

II. 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, Professor Wesley Newcomb Hohfeld developed a pioneering analytical framework for explaining legal rights.²⁴ He set this framework forth in two seminal law review articles published in the *Yale Law Journal*.²⁵ 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 may have, and each of which is related to two of the others, either as a “jural correlative” or as a “jural opposite.”

Numerous articles and books have employed Professor 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. 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 the focus of Hohfeld himself on state common law rights and relationships. It is also unfortunate, in that state constitutions offer unique conceptions of rights not found in the federal Constitution, and their study can therefore illuminate our understanding of rights-based relationships in general.

Hohfeld’s typology²⁶ 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”).

²⁴ Walter Wheeler Cook, *Hohfeld's Contribution to the Science of Law*, 28 *YALE L.J.* 721 (1919).

²⁵ See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 30-37 (1913) (developing and explaining the analytical framework); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710, 717 (1917); see also Arthur L. Corbin, *Jural Relations and Their Classification*, 30 *YALE L.J.* 226 (1921); Walter Wheeler Cook, *Hohfeld's Contribution to the Science of Law*, 28 *YALE L.J.* 721 (1919); 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).

²⁶ The framework for analysis begins with typological definitions of the terms that are encompassed by the word “right” in American jurisprudence. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 28-58 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710, 717 (1917).

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 you choose to create. Its opposite is a disability.
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.²⁷

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 or entity to act or prevent him or her or it 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 an invited guest, I have the right to certain guarantees of safety, and this right allows me to compel the other person to exercise reasonable care to ensure that the home is free of dangerous conditions, but if I am an unknown trespasser (and not some child chasing an attractive nuisance), 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.

Looking at Table 2, the following relations are evident: If I have a power to change a legal relationship (e.g., as 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, or no power (to terminate without establishing “cause”).

The important aspect of Hohfeld’s framework is the way in which it proposes to alter our statements of rights *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 to X,” for example.²⁸ If courts were to follow this rule,

²⁷ The tabular form of explicating Hohfeld’s conceptions is not new, but it is very useful at simplifying the relationships involved. For earlier uses of the tabular form, see **Hohfeld, etc.**

²⁸ STEPHEN E. GOTTLIEB, BRIAN H. BIX, TIMOTHY D. LYTTON, & ROBYN L. WEST, *JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS* 303-04 (2d ed. 2006)

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.²⁹ 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, and the Hohfeld system 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.³⁰ Such application poses difficult problems, as constitutional law often does not involve the relatively simple and individualized party structures common to private transactions and torts.³¹ 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.

In particular, Allen O’Rourke has recently made a significant contribution to this body of literature.³² In the first such systematic analysis, 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. A very 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.³³

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.³⁴ If one has

(explaining Hohfeld’s conceptions); see also O’Rourke, *supra* note ___, at ___ (p. 11 of my SSRN copy) (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* 200 (1982)); Hohfeld, *Fundamental Legal Conceptions*, *supra* note ___, at 742-66 (explaining the operation of the fundamental conceptions in hypothetical relationships);.

²⁹ GOTTLIEB *et al.*, *supra* note ___, at 304.

³⁰ See, e.g., Allen Thomas O’Rourke, *Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law*, 61 S.C. L. REV. 141 (2010); Maarten Henket, *Hohfeld, Public Reason and Comparative Constitutional Law*, 26 INT. J. FOR THE SEMIOTICS OF L. 202 (1996); H. Newcomb Morse, *Applying the Hohfeld System to Constitutional Analysis*, 9 WHITTIER L. REV. 639 (1988).

³¹ O’Rourke, *supra* note ___, at ___ (p. 14 of my copy).

³² Allen Thomas O’Rourke, *Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law*, 61 S.C. L. REV. 141 (2010).

³³ See O’Rourke, *supra* note ___, at 154-56 (citing H.L.A. HART, *THE CONCEPT OF LAW*). O’Rourke was not the first to make this connection, but was the first to do so as part of a systematic analysis of constitutional law. See, e.g., O’Rourke, *supra*, at 156 n. 98 and accompanying text (acknowledging Lon Fuller’s recognition of the same principle).

³⁴ 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 O’Rourke, *supra* note ___, at 147 (“physical actions or inactions”), 155

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.³⁵ One position, the “active position,” describes the person the law in question addresses directly. This position may be termed a “duty, liberty, power, [or] disability.”³⁶ The other position, the “passive position,” describes the person the law in question addresses indirectly. This position may be termed a “claim, no-claim, power, or liability.”³⁷ 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.³⁸

I find O’Rourke’s analysis very convincing, and I employ many of its elements in this Article. However, to these elements I add one point of clarification. As O’Rourke explains, Hohfeldian relationships can be usefully divided into primary and secondary rules. As H.L.A. Hart explained, and as O’Rourke applied, primary rules directly regulate conduct, while secondary rules regulate the effects of conduct. In the legislative context, the only 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 only of 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. In most state legislatures, there are 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

(“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. I elaborate more on this point in discussing what I consider 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 (in Hart’s terms, a “rule of recognition”) on the effects of legislative acts. *See infra* notes ___-___ and accompanying text.

³⁵ O’Rourke, *supra* note ___, at 150-51.

³⁶ O’Rourke, *supra* note ___, at 151.

³⁷ O’Rourke, *supra* note ___, at 151.

³⁸ *See* O’Rourke, *supra* note ___, at 154-55 (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).

that prohibits public office holders from engaging in duels.³⁹ 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.⁴⁰ The first provision—banning dueling—prohibits the 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 who has engaged in a duel. Thus, it 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 case, the members of the body, as well as the body itself, have engaged in identical primary 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 dueling is a primary rule, and the rule against expulsion with less than a two-thirds majority is a secondary rule.

I present the foregoing clarification because my inquiry is limited in this Article to the legal relationships that exist between the individual and the legislative bodies of the states and the federal government. I impose this limitation primarily to isolate 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. In litigation brought against non-legislative governmental actors, the conclusions that I draw here regarding legal relationships might apply differently, thus yielding different conclusions regarding legal relationships between individuals and executive or judicial branch actors. Future scholarship should address how these differences play out under state constitutional law. However, this piece, which only begins the Hohfeldian inquiry under state constitutions, will focus on the relationships that exist between individuals and legislative bodies.

In Hohfeldian terms, the vast majority of the legal relationships set up in the United States Constitution between individuals and legislative bodies are relationships of powers, liabilities, immunities, and disabilities; in other words, secondary rules.⁴¹ For example, Article I, Section 8 grants Congress the power to enact laws regulate interstate commerce.⁴² 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. Further,

³⁹ Ky. Const. § 239 (“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 . . .”).

⁴⁰ Ky. Const. § 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 . . .”).

⁴¹ See O’Rourke, *supra* note ____, at 158.

⁴² U.S. Const. art. I, § 8.

the Supremacy Clause disables any state law in irreconcilable conflict with such a law from operating past the effective date—say, a law requiring each of us to keep our garage doors open during the daylight hours.⁴³ However, if the subject of the enacted law (garage door positioning) falls outside the commerce power, then each of us has an immunity to the legal changes it intends, including the duties it purports to impose.⁴⁴

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 “Power”⁴⁵ over commerce that matches the Hohfeldian conception of “power”—the ability to alter legal relationships. For example, Congress may regulate interstate commerce by forbidding us to traffick in narcotics. The commerce power’s limitations do not prevent Congress from actually enacting any particular piece of legislation (i.e., they do not prohibit the *conduct* of enacting unconstitutional legislation), but these limitations do prevent legislation that transgresses them from being effective in causing the changes to legal relationships intended.

But what about the more familiar rights-based ideas expressed in the Bill of Rights? These are nearly uniformly stated as prohibitions⁴⁶ or general negative guarantees.⁴⁷ It is tempting, therefore, to view them as Hohfeldian duties “not to act.”⁴⁸ Despite their seeming duty-based language, 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, “Congress shall make no law . . . prohibiting the free exercise [of religion],” Congress has only a disability to “prohibit[] the free exercise [of religion].” This disability correlates with an immunity in the people to have to comply with laws that so abridge. We can see this in the enforcement of the amendment. For example, the Wisconsin compulsory attendance law in *Wisconsin v. Yoder*⁴⁹ was an otherwise-validly-enacted public policy promulgated by a state legislature with the power to promulgate such laws.

But in describing the claims put before it, the Supreme Court explained, “It 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.”⁵⁰ Thus, in *Yoder*, the Court set up the Yoders’ Free Exercise “rights” as an immunity, correlating with a disability, which limited the “power” of the

⁴³ See U.S. Const. art. VI.

⁴⁴ Note that Congress always has power to pass the relevant bill through both houses, and the president always has the power to sign it. The lack of an enumerated basis of legislative authority simply creates a disability in Congress and the president to make the law effect the changes in legal relationships intended by it.

⁴⁵ U.S. Const. art. I, § 8.

⁴⁶ *E.g.*, U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion”).

⁴⁷ *E.g.*, U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

⁴⁸ See, *e.g.*, Currie?

⁴⁹ 406 U.S. 205 (1972) (emphasis added).

⁵⁰ *Id.* at ____.

Wisconsin legislature to accomplish a definition or change to the Yoders' legal status. The statute was not ordered repealed, and the state legislature was not collectively held "liable" to the Yoders. Instead, the Yoders were allowed to assert an individual immunity to the statute's legal effects.

These principles apply equally to facially unconstitutional enactments. To understand this better, it is useful to imagine a statute ruled unconstitutional under the Equal Protection Clause, such as a segregation statute. Under our current jurisprudence, it would be unthinkable for the Supreme Court to order a state legislature to pass an act repealing a statute which denies equal protection, and it never has done so.⁵¹ Instead, the statute is simply declared unconstitutional, and the legislature is thereby disabled from making the change in legal relationships sought through the statute. That Congress or a state legislature in the future may 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 have numerous statutes and even constitutional provisions that are patently and facially unconstitutional.⁵² The continued existence of these laws in written form, especially in state constitutions, creates a moral hazard, but even this hazard does not create a Hohfeldian duty for the legislature to repeal such statutes and provisions. Similarly, it does not prevent the legislature from enacting similar ones—perhaps as part of a theory that the constitutional law jurisprudence is mistaken. This theory would of course be far-fetched in the segregation context, but for example, state legislatures enact abortion-related laws of dubious constitutional value all the time based on the theory that the law is actively changing in the area.⁵³ At most, legislatures collectively—and legislators individually—have the moral duty,

⁵¹ 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. Secretary of Com.*, 168 N.E.2d 480, 484 (Mass. 1960) (collecting federal and state cases) ("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 unconstitutional, 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 as a starting point that judgments declaring statutes unconstitutional generally leave such statutes in the enacted statutes and simply deny their enforcement, but arguing that subsequent overruling of such constitutional judgments should not be held to revive the enforceability of such previously unconstitutional 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 (1951) (reviewing numerous state supreme court decisions declaring statutes unconstitutional, but not directing repeal of such statutes, many of which explain that, though the statutes remain on the books, they have no legal effect).

⁵² *See, e.g.,* Ala. Const. art. XIV, § 256 (providing, in relevant part, "Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race."); Ky. Rev. Stat. § 158.175 (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). Each of these provisions has been specifically held to be unconstitutional, rendering them ineffective, but they may still exist as laws on the books.

⁵³ Cite recent enactment. This explanation also could include the many state provisions calling for or forbidding affirmative action programs. At some level, one or both of these approaches may violate the Constitution, but this possibility does not create a "duty" to avoid such legislation. Rather, it disables the legislation that goes too far.

based in their oaths, to approach legislation in fidelity to constitutional principles, but they do not have legal, Hohfeldian duties to avoid doing so.

Thus, it is incorrect to say that “No state shall deny” means that each state has a “duty” not to enact such a statute, or a “duty” to repeal 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, and it is challenged and 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 because no person has a claim-right to prevent a state legislature from enacting a particular piece of legislation—though we may have an immunity to its legal effects if it is contrary to the provisions of the Constitution.⁵⁴ Nearly all of the rules we cling to as “rights” under the U.S. Constitution are really immunities, and many of the “negative duties” we recognize are actually disabilities, because, as O’Rourke explains convincingly, the legal relationships set up in the Constitution are overwhelmingly secondary rules.⁵⁵

The United States Constitution does contain a few primary rules, though, as O’Rourke points out. For example, the Thirteenth Amendment states that slavery shall not exist in the United States. This arguably creates both a duty in each person (and the government) not to enslave a person, and a claim-right in each person to prevent others from enslaving him or her. Thus, the Constitution contains a primary rule that people shall not be enslaved, and this primary rule allows each person in the country to say “I have a right against X (the government, another person, whoever proposes enslavement) not to be enslaved.” Similarly, “X (the person or entity proposing enslavement) has a duty not to enslave me.” Each of these statements contains the required three Hohfeldian elements: two actors, each with a legal position, and a conduct statement.⁵⁶

O’Rourke’s major contribution to this field of study has therefore been to establish that the federal Constitution as applied to legislative actions is, overwhelmingly, a system of secondary rules enabling or disabling legislative conduct. The question remains 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. Moreover, the analogous provisions are often judicially construed identically—in “lockstep”—with their federal analogues.⁵⁷ Thus, no distinction in Hohfeldian terms need be drawn between

⁵⁴ 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.

⁵⁵ See O’Rourke, *supra* note ____, at ____.

⁵⁶ O’Rourke, *supra* note ____, at ____ (p. 20 of my SSRN copy).

⁵⁷ WILLIAMS, *supra* note ____.

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.

Within the Hohfeld system, rights may be further conceptualized as “positive,” or “negative.”⁵⁸ As outlined above, in Hohfeldian terms, a constitutional negative “right” is really an immunity to certain government action, which creates a disability on the part of the government to change your 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 be a claim-right to compel the government to act in a certain way toward the holder of the right. To date, virtually all of the individual rights that have been identified under the United States Constitution fall clearly into the category of negative rights, and most are explicitly stated in negative terms of limitation or prohibition on government action.⁵⁹

For example, equal protection violations consist of government action that affirmatively mistreats individuals based on suspect classifications, such as those based on race and national origin. However, no individual has a right to compel the government to guarantee him equal treatment by others. Instead, we each have some right to prevent the government from treating us unequally from those who similarly situated, but who are distinguished from us based on race or national origin. 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.⁶⁰ Rather, it must refrain from engaging on invidious classifications.

The fact that each of us 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 one that allows us to compel such performance.⁶¹ Instead, relational to the primary immunity to unequal treatment by non-legislative actors is sometimes a remedial interest to see past unequal treatment prospectively remedied to remove its vestiges.⁶² Nothing about the right itself compels such vestigial

⁵⁸ Currie, *Positive and Negative Constitutional Rights*.

⁵⁹ Frank B. Cross, *The Error of Positive Rights*, 48 *UCLA L. REV.* 857 (2000-2001); Currie, *supra* note ____, at ____.

⁶⁰ Cross, *supra* note ____, at ____.

⁶¹ See Frank B. Cross, *The Error of Positive Rights*, 48 *UCLA L. REV.* 857 (2000-2001) (distinguishing between positive and negative rights).

⁶² In drawing this distinction, I do not mean to say that the primary right is “substantive” and 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. Tracy A. Thomas, *Congress’ Section 5 Power and Remedial Rights*, 34 *U.C. DAVIS L. REV.* 673, 687-95 (2001) (explaining a “unified” theory of rights and remedies, where each has the substantive character of a right); Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *COLUM. L. REV.* 857, 861 (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)); see also JOHN NORTON POMEROY, *REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION, ACCORDING TO THE REFORMED AMERICAN PROCEDURE: A TREATISE* 129-30 (1876) (distinguishing between the “primary right of ownership” and the “remedial right of possession,” which might include a remedial right of forcible ejectment); **Stanford Encyclopedica entry**. 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 ____, at ____ (describing

remediation, and at a certain level, a judge’s power to order a vestigial remedy is indeed limited by the right itself.⁶³

Even the more debatable categories of federal constitutional rights, such as the right to have counsel provided at the expense of the government in a substantial criminal prosecution,⁶⁴ all can be traced back to a negative rights-based conception.⁶⁵ 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 and until the government subjects the defendant to prosecution.⁶⁶ Thus, the “positive right” to counsel at the expense of the government is really a negative right allowing a defendant to prevent the government from convicting him, and thus depriving him of life, liberty, or property, without first providing him counsel. The fact that courts have chosen as a means of remediating the violation of this right the political expedient of requiring states to fund public defender’s offices does not change the character of the right itself—for an equally effective remedial measure (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.⁶⁷

To identify a positive constitutional right, one must identify a situation where, even in the *complete* absence of governmental action (including action to institutionalize a person, action to imprison a person, action to prosecute a person, or action to classify a person), an individual would have a claim against the government.⁶⁸ 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-

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). I adhere to the view that, at some level, rights as remedies can 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* Sable, *Destabilization Rights*, HARV. L. REV. __ (200_) (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 ___ at ___ (discussing judicial use of “remedial abstention” to avoid ordering remedial legislative action where state constitutional rights have been violated); *see also* *Brown v. Bd. of Educ.* (1954) holding segregated schooling unconstitutional, but failing to order desegregation of any schools).

⁶³ *See* *Missouri v. Jenkins*.

⁶⁴ *Gideon v. Wainright*.

⁶⁵ *See* Cross; Currie, *supra* note ____.

⁶⁶ Cross, *supra* note ____.

⁶⁷ I do 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.

⁶⁸ Cross, *supra* note ____.

relational rights in individuals.⁶⁹ As Professor Hershkoff has explained, language grounding potential affirmative rights to welfare and housing appear in most state constitutions, and education-based language appears in all fifty, though the right-based character within each of these policy areas must be inferred from duty-based language in each relevant state document. Nevertheless, textually, state constitutions contain positive-duty provisions almost completely alien to federal constitutional doctrine.⁷⁰

For example, New York's constitution contains a provision requiring that aid to the poor "shall be provided by the state."⁷¹ Alabama's document declares, "It 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.⁷² 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."⁷³ 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."⁷⁴ Several other state constitutions contain similar provisions, some relying on unambiguous, duty-based language,⁷⁵ others stating hortatory goals and placing explicit discretion on the legislature,⁷⁶ and still others placing mandates on local governmental bodies, rather than on the state legislative branch.⁷⁷

The important question for interpretive purposes is whether these duty- and goal-based provisions provide enough of a foundation to say that individuals possess affirmative Hohfeldian 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 "yes," either by way

⁶⁹ Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1138-39 (1999) (outlining New York's provision); others (Feldman, etc.).

⁷⁰ See Burt J. Neuborne, Foreword, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893-95 (1988-1989) (collecting state welfare provisions, some of which are phrased in positive duty terms). But see Guarantee Clause; Census Clause, neither of which admits of any individual interests that can be violated through the failure to perform the stated duties.

⁷¹ N.Y. Const. art. XVII, § 1.

⁷² Ala. Const. art. IV, § 88.

⁷³ Mont. Const. art. XII, § 3(3).

⁷⁴ Wyo. Const. art. VII, § 18 (Wyo. Stat. § 97-7-18).

⁷⁵ See, e.g., Miss. Const. art. IV, § 86 ("It shall be the duty of the legislature to provide by law for the treatment and care of the insane . . .").

⁷⁶ See, e.g., N.C. Const. art. VI, § 3 ("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.").

⁷⁷ See, e.g., Okla. Const. art. XVII, § 3 ("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.").

of assumption or by way of little more than conclusory normative analysis, and has moved on to the questions of enforceability, justiciability, and remediability.⁷⁸

In my view, these papers put the cart before the horse. It is, in fact, a serious and debatable question whether duty- and goal-based language in a state constitution creates individual claim-rights, where such language is typically directed at legislative actors and often is coupled with the language of near-absolute legislative discretion. Thus, I examine the text of state education provisions, along with state court jurisprudence in school finance litigation—the most prominent form of litigation implicating these sorts of affirmative provisions—and determine whether state education clauses confer individual claim-rights and if so, the nature of the rights conferred. In the next two Parts, I define the main sources of evidence from which one can determine the nature of education’s constitutional status in the states, and I examine what that status appears to be in each state.

III. SOURCES OF EDUCATION RIGHTS AND DUTIES

A. *State Constitutional Text*

As introduced above, state constitutions are distinct from the federal document in part because they contain provisions mandating the making of public policy in certain areas, including education. Much of this policy-directive language is drafted in the style of a statute 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.⁷⁹ Based on this provision, it would certainly be proper to say that the Louisiana legislature has a “legal duty” to negotiate, but this duty is not Hohfeldian because it does not run to any identified person or entity.⁸⁰ No one possesses a claim-right to force the negotiation to occur.

⁷⁸ Helen Hershkoff, Foreword: Positive Rights and the Evolution of State Constitutions, 33 *RUTGERS L.J.* 799 (2002); Helen Hershkoff, State Courts and the “Passive Virtues”: Rethinking the Judicial Function, 114 *HARV. L. REV.* 1833 (2001); Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 *HARV. L. REV.* 1131 (1999); Helen Hershkoff, Welfare Devolution and State Constitutions, 67 *FORDHAM L. REV.* 1403 (1999); Johnathan 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); Burt Neuborne, Foreword: 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).

⁷⁹ La. Const. art. VIII, § 13(B); compare with Va. Const. art. VIII, § 2 (providing for an allocation of authority in determining standards of quality and allocations of funding favoring legislative discretion far more than Louisiana’s provision: “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.”).

⁸⁰ Although individual rights give rise to correlative duties, duties do not necessarily give rise to correlative individual rights. Joel Feinberg, *Duties, Rights and Claims*, 3 *AM. PHILOSOPHICAL Q.*, 137, 137-142 (1966); David

Rather, based on this text, the Louisiana legislature possesses a Hohfeldian power to establish a level of funding for education each year, subject to the proviso that the level of funding established must result from a negotiation with the state board of education.

The Louisiana legislature cannot simply choose ignore the state board's proposed expenditure levels and distribution formula in a given year and enact its own education budget formula independently, because it has a Hohfeldian disability to effect the legal changes intended by such action. Admittedly, it is possible that the Louisiana legislature could attempt this action anyway, and this could lead to legislative paralysis, so the state constitution further provides that, should the legislature and state board come to impasse in any particular year, the most recent properly enacted formula would remain the operable one. In such a case, the people of the state would possess an immunity to the changes sought to be achieved in the expenditure levels and funding formula through the challenged legislation.

Most state education provisions read more generally, and Louisiana's constitution itself contains a more general mandate. These provisions have generally been categorized into four forms, each of which represents an increasing level of strength of textual commitment.⁸¹ Nevertheless, from a Hohfeldian standpoint, there are really only two forms. The first form, which I will call the "Hortatory Form," includes the minority of state constitutions that merely express a fondness for education and an hortatory desire to see it promoted.⁸² The second, which I will call the "Directive Form," includes the vast majority of state education clauses, which express an affirmative state duty to establish and maintain some sort of education system. As I will show, unlike the "duty" expressed in the Louisiana Constitution for the legislature to negotiate with the state board, the "duty" expressed in the vast majority of general state education clauses is potentially a Hohfeldian duty.

Hohfeldian duties in state constitutions may also correlate logically with individual claim-rights. Under this interpretation, if the state legislature has a duty to establish and maintain an education system, then it fulfills that duty for the benefit of the users of the system, and those users logically have claim-rights to see that duty performed as to themselves.⁸³ If an individual living in a particular state is not provided access to educational services at all, then logically, that individual should be able to compel that such access be provided by the state.⁸⁴

Lyons, Rights, Claimants and Beneficiaries, 6 AM. PHILOSOPHICAL Q., 173, 173-185 (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. 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. This is true whether one holds a "will" view of rights (because no person has the power to coerce the legislature to negotiate) or whether one holds an "interest" view of rights (because the negotiation process was adopted to improve policy development, not to serve the interests of a specifically identifiable class of individuals)—**check this and evaluate**.

⁸¹ Thro and Wood's recent WELR article.

⁸² Connecticut, Massachusetts, others?

⁸³ This example illustrates the compatibility of interest theory with my reading.

⁸⁴ This example illustrates the compatibility of will theory with my reading.

Thus, in Hohfeldian terms, the individual 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 contains the required three Hohfeldian elements of two legal positions (the individual’s claim-right and the legislature’s duty), and one conduct statement (provision of educational services).

This conclusion is not inevitable, though. Scholars of Hohfeld have recognized that, although individual rights always give rise to correlative duties, duties do not necessarily always give rise to correlative individual rights.⁸⁵ One example of this is the “duty” for the legislature to negotiate funding levels with the state board in Louisiana. As outlined above, though the legislature of the state may have a moral or political duty to negotiate, it cannot be compelled to do so. Rather, the negotiation provision operates as a secondary rule disabling legislation from accomplishing desired changes if the legislature fails to negotiate.⁸⁶

To begin examining these issues, it is necessary to analyze the education provisions of the fifty state constitutions to determine whether their text suggests a Hohfeldian set of relationships. The clearest Hohfeldian relationships would seem to arise from the overwhelming majority of state constitutions providing explicitly for a legislative duty to establish and maintain an educational system.⁸⁷ In providing for explicit duties to establish and maintain support for

⁸⁵ Joel Feinberg, *Duties, Rights and Claims*, 3 AM. PHIL. Q., 137, 137-142 (1966); David Lyons, *Rights, Claimants and Beneficiaries*, 6 AM. PHIL. Q., 173, 173-185 (1969).

⁸⁶ See O’Rourke, *supra* note ___, at ___ (distinguishing between Hohfeldian jural correlatives that present primary rules, which compel or forbid conduct, and those that present secondary rules, which merely enable or disable conduct).

⁸⁷ Ala. Const. art. XIV, § 256 (“The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years.”); Alaska Const. art. VII, § 1 (“The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions.”); Ark. Const. art. XIV, § 1 (“Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.”); Ark. Const. art. XIX, § 19 (“It shall be the duty of the General Assembly to provide by law for the support of institutions for the education of the deaf and dumb, and of the blind; and also for the treatment of the insane.”); Ariz. Const. art. XI, § 1 (“A. The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include: 1. Kindergarten schools. 2. Common schools. 3. High schools. 4. Normal schools. 5. Industrial schools. 6. Universities, which shall include an agricultural college, a school of mines, and such other technical schools as may be essential, until such time as it may be deemed advisable to establish separate state institutions of such character. B. The legislature shall also enact such laws as shall provide for the education and care of pupils who are hearing and vision impaired.”); Ariz. Const. art. XI, § 6 (“The legislature shall provide for a system of common schools by which a free school shall be established and maintained in every school district for at least six months in each year, which school shall be open to all pupils between the ages of six and twenty-one years.”); Colo. Const. art. IX, § 2 (“The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.”); Conn. Const. art. VIII, § 1 (“There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.”); Del. Const. art. X, § 1 (“The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means.”); Ga. Const. art. VIII, § 1 (“The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation. The expense of other public education shall be provided for in such manner and in such amount as may be provided by law.”); Haw. Const. art. X, § 1 (“The State shall provide for the establishment, support and control of a statewide system of public schools free from

sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefor.”); Ida. Const. art. IX, § 1 (“The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.”); Ill. Const. art. X, § 1 (“A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has the primary responsibility for financing the system of public education.”); Ind. Const. art. IX, § 1 (“It shall be the duty of the General Assembly to provide, by law, for the support of institutions for the education of the deaf, the mute, and the blind; and for the treatment of the insane.”); Kan. Const. art. VI, § 1 (“The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law.”); Ky. Const. § 183 (“The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.”); La. Const. art. VIII, § 1 (“The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system.”); Maine Const. art. VIII, Pt. 1st, § 1 (“A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools”); Md. Const. art. VIII, § 1 (“The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.”); Mass. Const. ch. V, § 2 (“Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.”); Mich. Const. art. VIII, §§ 1 (“Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”); Mich. Const. § 2 (“The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law.”); Minn. Const. art. XIII, § 1 (“The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.”); Miss. Const. art. VIII, § 201 (“The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe.”); Missouri Const. art. IX, § 1(a) (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.”); Missouri Const. art. IX, § 3(b) (“In event the public school fund provided and set apart by law for the support of free public schools, shall be insufficient to sustain free schools at least eight months in every year in each school district of the state, the general assembly may provide for such deficiency; but in no case shall there be set apart less than twenty-five percent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools.”); Mont. Const. art. X, § 1(1) (“It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.”); Mont. Const. art. X, § 1(3) (“The legislature shall provide a basic system of free quality public elementary and secondary schools.”); Neb. Const. art. VII, § 1 (“The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years.”); Nev. Const. art. XI, § 2 (“The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year”); N.J. Const. art. VIII, § 4(1) (“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the

children in the State between the ages of five and eighteen years.”); N.M. Const. art. XII, § 1 (“A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.” This provision should be read in conjunction with the provision set forth in note ____, infra); N.Y. Const. art. XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”); N.C. Const. art. IX, § 2 (“The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.”); N.D. Const. art. VIII, § 1 (“A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control.”); N.D. Const. art. VIII, § 2 (“The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.”); N.D. Const. art. VIII, § 4 (“The legislative assembly shall take such other steps as may be necessary to prevent illiteracy, secure a reasonable degree of uniformity in course of study, and to promote industrial, scientific, and agricultural improvements.”); Ohio Const. art. VI, § 2 (“The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state”); Okla. Const. art. XIII, § 1 (“The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated.”); Okla. Const. art. XIII, § 2 (“The Legislature shall provide for the establishment and support of institutions for the care and education of persons within the state who are deaf, deaf and mute or blind.”); Ore. Const. art. VIII, § 3 (“The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.”); Ore. Const. art. VIII, § 8(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.”); Pa. Const. art. III, § 14 (“The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.”); R.I. Const. art. VII, § 1 (“The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services.”); S.D. Const. art. VIII, § 1 (“The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education.”); Tenn. Const. art. XI, § 12 (“The state of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools.”); Tex. Const. art. VII, § 1 (“A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, 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.”); Utah Const. art. X, § 1 (“The Legislature shall provide for the establishment and maintenance of the state’s education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control.”); Va. Const. art. VIII, § 1 (“The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.”); Wash. Const. art. IX, § 1 (“It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.”); Wash. Const. art. IX, § 2 (“The legislature shall provide for a general and uniform system of public schools.”); W.V. Const. art. XII, § 1 (“The Legislature shall provide, by general law, for a thorough and efficient system of free schools.”); W.V. Const. art. XII, § 12 (“The Legislature shall foster and encourage, moral, intellectual, scientific and agricultural improvement; it shall, whenever it may be practicable, make suitable provision for the blind, mute and insane, and for the organization of such institutions of learning as the best interests of general education in the state may demand.”); Wis. Const. art. X, § 3 (“The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform

educational systems, it would seem that such provisions set up Hohfeldian duties, which potentially correlate with individual claim-rights of the children in the 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 “encourag[ing]” education.⁸⁸ In some others, the commitment to education is presented in *purely* hortatory terms.⁸⁹ In stark contrast, in Florida, Texas, and Virginia, in addition to placing an explicit duty on the state to provide for education, the constitutions specify detailed requirements for the provision of educational services, such as required class sizes and required access to free preschool.⁹⁰

as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years . . .”).

⁸⁸ Cal. Const. art. IX, § 1 (“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.”); Iowa Const. art. IX, § 3 (“The general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement.”); Nev. Const. art. XI, § 1 (“The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements,” but this provision must be read in conjunction with the provision set forth in note ___, supra); N.H. Const. art. 83 (“Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people . . .”); N.C. Const. art. IX, § 1 (“Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.” This provision must be read in conjunction with the provision set forth in note ___, *infra*.); Wyo. Const. art. I, § 23 (“The legislature shall suitably encourage means and agencies calculated to advance the sciences and liberal arts.” This provision must be read together with the individual rights-based provision set forth *infra* in note ____).

⁸⁹ Vt. Const. ch. II, § 68 (“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.”);

⁹⁰ Fla. Const. art. IX, § 1(a) (“The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.”). This provision, similar to the provisions outlined in note ___, supra, expresses a legislative duty to set up and maintain a system of education. However, it is followed by several more specific provisions requiring that there “are a sufficient number of classrooms so that” class sizes meet several age-related limits, Fla. Const. art. IX, § 1(a)(1)-(3); and access to a “high quality pre-kindergarten learning opportunity in the form of an early childhood development and education program” for each child in the state who wants one, Fla. Const. art. IX, § 1(b); *see also* Tex. Const. art. VII, § 3(b) (containing, in addition to the provision set forth supra in note ___, the following more specific duty: “It shall be the duty of the State Board of Education to set aside a sufficient amount of available funds to provide free text books for the use of children attending the public free schools of this State.”); Va. Const. art. VIII, § 3 (following its more general mandate for a high quality system of public schools with more specific mandates: “The General Assembly shall provide for the compulsory elementary

Importantly, only in New Mexico, North Carolina, Oklahoma, and Wyoming are the education clauses drafted—at least in part—to grant individual entitlements, and only Wyoming’s constitution explicitly states that its citizens have a “right” to education.⁹¹ In all other states, the education provisions are solely directed at the state government, usually the legislative branch. Only one of the fifty state constitutions contains a directive regarding curriculum content.⁹²

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. Yet the state supreme courts have taken varied approaches to adjudicating claims based on these roughly similar constitutional provisions.⁹³ Several courts have held such claims to be non-justiciable. Others have held them to be justiciable, but have abstained from remediation once a constitutional violation was identified. Still others have engaged in both adjudication and directive remediation. 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. Thus, it is necessary to analyze the cases decided in the state supreme courts construing the education provisions discussed above in order to gain a full and more accurate understanding of education’s constitutional status in each state. I engage this task in the following Part.

and secondary education of every eligible child of appropriate age, such eligibility and age to be determined by law. It shall ensure that textbooks are provided at no cost to each child attending public school whose parent or guardian is financially unable to furnish them.”).

⁹¹ N.M. Const. art. XII, § 5 (“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 (“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 (“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, between the ages of eight and sixteen years, for at least three months in each year.”); Wyo. Const. art. I, § 23 (“The right of the citizens to opportunities for education should have practical recognition.”). Wyoming is also the only state to include its education provision within its declaration of rights.

⁹² N.D. Const. art. VIII, § 3 (“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.”). This provision is one of three directives in the North Dakota Constitution relevant to the maintenance of a public school system. The others are stated as legislative duties. *See supra* note ____.

⁹³ *See generally* 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. ____ (forthcoming 2010) (outlining the different state supreme court approaches and empirically analyzing these approaches in light of separation of powers provisions in state constitutions).

IV. JUDICIAL CONCEPTIONS OF EDUCATION'S CONSTITUTIONAL STATUS

In the following sections, I review 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. I conduct this analysis focusing on two important data points in each set of cases: (1) what the courts say; and (2) what the courts do. The first data point examines the statements that courts make in their opinions when they purport to discuss what they perceive education's constitutional status to be. The second data point examines the courts' actual actions in the cases (i.e., engaging in review, abstaining, employing standards of review, making directive remedial orders, abstaining from remediation, etc.). I find that, more often than one would expect intuitively, courts' actions and the language of their opinions do not appear to precisely match up, but that the combination of rhetoric and result in nearly all of the cases allows for a reasonably clear conclusion.

My analytical goal is to fit each state's apparent conception of education's constitutional status into one of the four familiar Hohfeldian correlative pairs—claim-right/duty; liberty/no-right; power/liability; and immunity/disability. Thus, this Part contains a section discussing the evidence for each Hohfeldian pair. I find that the cases overwhelmingly focus on the language of “duties” and “rights,” but that the actions of the courts deriving these conceptions do not match intuitive expectations.

A. Liberties and No-Rights

Although this paper 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,” 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 not take that action, as he sees fit, free from the legitimate interference of any other actor. If we set this legal relationship up hypothetically between the individual and the state as to education, we might phrase it as, “John has a liberty to seek education.” Correlatively, “No person has the 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. Rather, it would seem more appropriate for claims to preserve the liberty to choose homeschooling or private schooling as alternatives to public schooling. 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 contrast, in school finance litigation, claimants seek resources to enable their action—measured either relatively or in the absolute. It simply fits poorly to say that John has a “liberty” to a certain amount of educational resources, as opposed to the liberty to seek such resources, because only the latter statement governs John's conduct.

Similarly, it makes little sense to say that the state has “no right” to act to deny John his “liberty” to educational resources. It is simply not correct to state that a person has a “liberty” to a thing—a person has a liberty to engage in conduct, or to refrain from engaging in conduct, but what is incorrectly referred to as a “liberty” to a thing is properly referred to as an entitlement, or in Hohfeldian terms, a claim-right. If so, then the proper relational statement is, “John has a claim-right that the Legislature provide him with educational resources.”

For the same reason, it would be incorrect to refer to the state’s position in its educational relationship with John as a “no-right” to interfere with his “liberty.” The concept of the “no-right,” in fact, does not fit state legislative action well at all, as discussed above, because legislatures can always engage in the *act* of legislating—they simply may not be able to make legislation effect the legal alterations they intend. Borrowing again from O’Rourke, this means that the actual *conduct* of legislating is not prohibited where the state constitution imposes limits on legislative action or protects individual prerogatives. Instead, the *effects* of legislation are disabled. This latter effect describes a Hohfeldian disability, rather than a no-right.

This conclusion does not require that the concept of the no-right be absent from school finance litigation. On the contrary, the no-right appears to play a significant role in the recent cases—just in a way that does not require the presence of any correlative liberty. I discuss this strange phenomenon below, but first, I outline the three Hohfeldian ways of describing legal relationships in education under state constitutions.

First, I discuss the conception of education in terms of immunities and disabilities. I then proceed to the conception of education in terms of powers and liabilities. Third, I discuss the more limited conception of education in terms of claim-rights and duties. Finally, I discuss the unique role of the Hohfeldian conception of the no-right in much of school finance litigation, and how this conception has become untethered from its usual correlative (the liberty), has become tethered to a conception ordinarily unconnected to it in Hohfeldian analysis (the duty), and has become conflated with the secondary-rule conception of the liability.

B. *Immunities and Disabilities*

Until recently, most state highest courts faced with school finance litigation conceived of education clause relationships as immunities and disabilities, similar to those set up in the First and Fourteenth Amendments. Mostly, these conceptions resulted from two phenomena. First, school finance cases were overwhelmingly brought as challenges to the equality of funding. Second, and relatedly, state supreme courts, where claims of right are analogous to those found in the federal courts, have tended to adopt federal adjudicatory doctrines in “lockstep,” and this has been no less true in school finance litigation. However, in school finance litigation, it has nevertheless been possible to achieve different results on the same facts where courts have adopted federal adjudicatory doctrines.

For example, in California, the state supreme court, applying the rational basis-strict scrutiny dichotomy familiar to Fourteenth Amendment jurisprudence, held in *Serrano v. Priest* in 1977 that the state’s system of financing education was not necessary to achieve a compelling government interest, and was thus unconstitutional.⁹⁴ 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*, which held the education is not a fundamental right and wealth is not a suspect classification for Fourteenth Amendment

⁹⁴ *Serrano v. Priest*, 557 P.2d 929, Cal. 763 (Cal. 1977) (“Serrano II”) (construing article I, sections 11 and 21 [California’s “uniformity” and “equal privileges” provisions, now reflected in article IV, section 16 and article I, section 7(b)] of the California Constitution as “‘substantially the equivalent’ of the equal protection clause of the Fourteenth Amendment to the federal Constitution.”) (quoting *Dept. of Mental Hygiene v. Kirchner* 400 P.2d 321 (Cal. 1965)). This case was decided several years after “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*, 487 P.2d 1241 (Cal. 1971) (“Serrano I”).

purposes. The Supreme Court in *Rodriguez* had therefore applied rational basis review to the school financing system in Texas, upholding its unequal classifications based on local property wealth as justified by the legitimate governmental objective of local control.

When the California Supreme Court reviewed *Serrano* again following *Rodriguez*, it recognized that the Supreme Court's decision had effectively overruled its own decision in *Serrano I* as to the Fourteenth Amendment. The court also held that the state constitution's two equality provisions were properly construed as coextensive with the Equal Protection Clause.⁹⁵ 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.⁹⁶ Based on these preliminary holdings, the court held that the legislature's school financing system, which was heavily weighted toward local property wealth, exceeded the legislature's authority over education and appropriations.

The means by which the California Supreme Court reached this conclusion are reflected in the following important passage from the court's opinion in *Serrano II*:

Article IX, section 14 of the state Constitution clearly establishes that it is the Legislature which bears the ultimate responsibility for establishing school districts and their boundaries. By its exercise of this power, and by the concurrent exercise of its powers under article XIII, section 21 to provide for a school financing mechanism based upon county levies of school district taxes, it has created a system whereby disparities in assessed valuation per ADA among the various school districts result in disparities in the educational opportunity available to the students within such districts. Thus, as we said in *Serrano I*, "[g]overnmental action drew the school district boundary lines, thus determining how much local wealth each district would contain [citations]." It is that action, which we reiterate is the product of legislative determinations, that we today hold to be in violation of our state provisions guaranteeing equal protection of the laws.⁹⁷

Thus, in exercising its "power" to draw district lines and establish local taxing authorities for school funding, the California Legislature exceeded the limitations placed on its legislative acts by drawing district lines such that immense wealth disparities were created or maintained. These

⁹⁵ 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. *Serrano II*, 557 P.2d at Cal. 764. ("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 (Cal. 1975)).

⁹⁶ *Id.* at 755-56 ("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.").

⁹⁷ *Id.* at Cal. 772-73 (quoting *Serrano I*, 5 Cal.3d at 603) (other footnotes and citations omitted).

wealth disparities resulted in revenue disparities, which resulted in unequal funding, thus subjecting local school children in property-poor districts to unequal legislative treatment.

In Hohfeldian terms, the legislature acted in contravention of a disability placed on its action by sections of the California Constitution guaranteeing equal protection of the laws.⁹⁸ The legislature's actions thus transgressed the individual immunities against unequal treatment held by children in property-poor districts. Accordingly, the legislation establishing districts with unequal property wealth was held to be invalid.⁹⁹

Several other state courts have followed similar approaches when presented with primarily equality-based arguments. Some have applied the federal adjudicatory approach in complete "lockstep," both applying the rational basis-strict scrutiny dichotomy and mirroring the holdings of *Rodriguez* as to the non-fundamental nature of education and the non-suspect nature of wealth.¹⁰⁰ As discussed above, California adopted the adjudicatory approach to judicial scrutiny, but nevertheless held that, under the state constitution, education is a fundamental interest, and wealth is a suspect classification.¹⁰¹ A few courts have diverged in counter-intuitive ways, holding education to be a fundamental right, but upholding their state system under rational basis review¹⁰² or even strict scrutiny.¹⁰³ One court adopted the federal approach of

⁹⁸ See *Serrano II*, 557 P.2d at Cal. 773 ("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 Cal. 774 ("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.").

⁹⁹ *Id.* at Cal. 776.

¹⁰⁰ See *Committee for Educational Equality v. State*, ___ S.W.3d ___ (Mo. 2009) (in rejecting an equality-based challenge, "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." **this case is discussed again infra**) (citations omitted); *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 **this case discussed again infra**); *Sch. Adm. Dist. No. 1 v. Com'r of Educ.*, 659 A.2d 854, 857 (Maine 1995) ("We apply the rational basis test and affirm the court's finding that the funding reductions in the Act are rationally related to a legitimate governmental interest."); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995) (upholding the system based on local control **this case discussed again infra**); *Exira Community School Dist. v. State*, 512 N.W.2d 787 (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 not available to them because of where they live"); *Skeen v. State*, 505 N.W.2d 299, 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); *Hornbeck v. Somerset Co. Bd. of Educ.*, 458 A. 2d 758, Md. 656-57 (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); *Lujan v. Colorado State Bd. of Educ.*, 649 P. 2d 1005, 1022-25 (Colo. 1982) (plurality opinion) (applying rational basis review to uphold the state system); *McDaniel v. Thomas*, 285 S.E.2d 156, Ga. 647-48 (Ga. 1981) (explicitly applying *Rodriguez*'s holdings as persuasive in upholding the system under rational basis review).

¹⁰¹ *Serrano II*, 557 P.2d 929, Cal. 763 (Cal. 1977).

¹⁰² *Vincent v. Voight*, 614 N.W.2d 388, Wisc. 639-40 (Wis. 2000) (explicitly relying on *Rodriguez* in upholding the state system under rational basis review, despite holding that Wisconsin children possess a "fundamental right to a sound, basic education"); *Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973) (same).

differing levels of scrutiny, but crafted its own “intermediate” level of scrutiny for the “important substantive right” to education.¹⁰⁴ Another rejected the approach to equal protection scrutiny under the federal school desegregation cases, exchanging for it the burden-shifting approach followed in voting rights cases,¹⁰⁵ and in still another, 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.¹⁰⁶ Finally, some state courts have declined to find education rights to be fundamental, or wealth to be suspect, but have nevertheless overturned their state systems due to spending disparities that were held to be irrational.¹⁰⁷

¹⁰³ *Scott v. Com.*, 443 SE 2d 138, 142 (Va. 1994) (“In sum, we 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.”).

¹⁰⁴ *Bismarck Public School Dist. 1 v. State*, 511 N.W.2d 247, 257 (N.D. 1994) (holding that education is an individual fundamental right, but crafting an “intermediate” level of scrutiny applicable to “important substantive rights,” such as education, for which strict scrutiny involves the courts in micro-management of details; and invalidating the system based on this intermediate level of scrutiny); *see also id.* at 259 (“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.”); *Idaho Sch. for Equal Educ. Oppor. v. Evans*, 850 P.2d 724, 732-33 (Idaho 1993) (“*ISEEO*”) (holding that education is not a fundamental right, but that intermediate scrutiny nonetheless applied to classifications that blatantly discriminated, stating, “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.”) (**this case also discussed infra**).

¹⁰⁵ *Horton v. Meskill*, 486 A.2d 1099 (Conn. 1985) (“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.”) (citing *Reynolds v. Sims*, 377 U.S. 533, 577 (1964); *Mohan v. Howell*, 410 U.S. 315, 324-25, modified, 411 U.S. 922, (1973); *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *see also Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) (initially holding the state system unconstitutional after applying a version of strict scrutiny). Connecticut has also derived an independent claim-right to compel the legislature to remedy *de facto* segregation by race or ethnicity, *Sheff v. O'Neill*, 638 A.2d 589 (Conn. 1994), but this sort of right is different enough from the others studied here to make inappropriate the inclusion of any deep comparative analysis of *Sheff*. I leave that 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 V.

¹⁰⁶ *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973) (overruling *Milliken v. Green*, 203 N.W.2d 457 (Mich. 1972), which had held the state system unconstitutional).

¹⁰⁷ *Tennessee Small School Sys. v. McWherter*, 851 S.W.2d 139, Tn. 152 (Tenn. 1993) (stating, “This 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); *Dupree v. Alma School*

In each of these cases, the courts focused on whether legislative action was taken in excess of the limitations placed on it by the state constitutions, most often through equal protection provisions, but at times through a “uniformity” term in the state education clause. 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 have in the cases correlated with individual immunities against unequal treatment that rose to a determined level of invidiousness. The level of invidiousness required to invalidate legislative action differed among the states, but the conception of legal relationships was the same in each from a Hohfeldian perspective. As all of these cases presented claims of equal protection violations, this approach is understandable. As discussed above, the federal Equal Protection Clause is also a source of legislative disabilities and individual immunities.¹⁰⁸

Beginning in 1989 with *Rose v. Council for Better Education, Inc.* in Kentucky, state courts began to focus more on education clauses than on equal protection provisions, and they began to focus more on educational adequacy than equality.¹⁰⁹ Accordingly, their analytical approaches began to move away from evaluating legislative transgressions upon disabilities and immunities, as I will discuss.¹¹⁰ Recently, however, some state courts have returned to an immunity/disability-based conception of the education clause, holding that it can be violated only if the legislature exceeds a legislative disability either expressed or implied in the text.

A recent example of this approach is found in the Texas Supreme Court’s opinion in *Neely v. West Orange Cove CISD*.¹¹¹ In *Neely*, the Texas court upheld the state legislature’s most recent actions in crafting a school finance system, but only after literally decades of litigation and responsive action.¹¹² 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*,”¹¹³ tracking the language of the state constitution, which provides, in relevant part, that “it shall be the *duty* of the Legislature of the State to establish and

Dist. No. 30, 651 S.W.2d 90, 93 (1983) (overturning the state system and rejecting “local control” as a governmental objective sufficient to satisfy rational basis review).

¹⁰⁸ See *supra* notes ___ - ___ and accompanying text (discussing Hohfeldian secondary rules in the context of the Fourteenth Amendment).

¹⁰⁹ Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 109 (1995); Thro; Heise. *But see* Ryan; Koski.

¹¹⁰ See *infra* Part IV.E. for a discussion of the unique approach to legal relationships in education engendered by the Kentucky decision, which remains the dominant approach today. A few of the cases discussed above contain some analysis of adequacy-based rights, but none of the decisions were ultimately based on any such rights. See *Vincent v. Voight*, 614 N.W.2d 388, Wisc. 624-25 (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); *Scott v. Com.*, 443 SE 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).

¹¹¹ 176 S.W.3d 746 (Tex. 2005).

¹¹² *Id.* at 752; see also 107 S.W.3d 558 (Tex. 2003); 917 S.W.2d 717 (Tex. 1995); 868 S.W.2d 306 (Tex. 1993); 826 S.W.2d 489 (Tex. 1992); 777 S.W.2d 391 (Tex. 1989).

¹¹³ *Id.* at 778 (emphasis added).

make suitable provision for the support and maintenance of an efficient system of public free schools.”¹¹⁴

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.”¹¹⁵

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 to the education clause. 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.¹¹⁶

Thus, the court interpreted the “duty” set forth in the state constitution as a limitation on legislative power, which in Hohfeldian terms would be regarded as a disability. That is, the court held that the legislature is required to legislate in education, that it has broad discretionary power as to how to craft such legislation, but that this power is limited by a disability to make arbitrary changes to legal relationships in education.

Extending this idea of the “duty as disability,” the court expressed its standard of review more directly and clearly than it had in any previous case, asking, “Whether the statutory provisions creating the public school system are arbitrary and therefore unconstitutional”¹¹⁷ Consistent with this conception, the court ultimately held that the state system was not in violation of constitutional standards.¹¹⁸ Although the state constitution speaks in terms of

¹¹⁴ Tex. Const. art. VII § 1 (emphasis added).

¹¹⁵ *Id.* at 777 (quoting *Edgewood v. Kirby*, 777 S.W.2d 391, 394 (Tex.1989) (“Edgewood I”).)

¹¹⁶ *Id.* at 784 (quoting *Mumme v. Marrs*, 40 S.W.2d 31, 35-36 (1931)).

¹¹⁷ *Id.* at 785; *see also id.* (“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.”).

¹¹⁸ *Id.* at 789-90 (“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.”).

“duty,” the formulation of the standard in this way corresponds more closely with the Hohfeldian conceptions of disability and its correlative, immunity.

To show that this is the correct interpretation, we must analyze what the court found for the legislature in the state constitution. It is true that the court identified a clear “duty” to legislate on the topic of education. However, this “duty,” if it is Hohfeldian, was never defined by the *Neely* court. If it had been defined, the definition would have taken the form of a statement of what the legislature is required to do. The furthest toward any such definition that the opinion progressed was to quote its own earlier response to the legislature’s objection, on political question grounds, to justiciability:

This is not an area in which the Constitution vests exclusive discretion in the legislature; rather the language of article VII, section 1 imposes on the legislature an affirmative duty to establish and provide for the public free schools. 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."

....

If the system is not "efficient" or not "suitable," the legislature has not discharged its constitutional duty and it is our duty to say so.¹¹⁹

Based on this language, the court rejected anew the state’s political question-based objection to review. However, as outline in the discussion above, and as expressed in the quote from *Edgewood I*, the court also found that this duty was accompanied by extensive “discretion,” which was limited only by the legislature’s disability to make its discretionary decision arbitrarily.¹²⁰

Reading the opinion as a whole, then, one is left with the following rules of law. The Texas legislature is obligated to exercise legislative power in education. However, the legislature maintains nearly complete discretion as to what legislation to enact. The only limitation on this discretion is that the legislation may not be “arbitrary,” meaning that it must be “informed by guiding rules and principles properly related to public education.”¹²¹

Converted to the Hohfeldian terms of legal relationship, the legislature 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). One may

¹¹⁹ *Id.* at 776-77 (quoting *Edgewood I*, 777 S.W.2d at 394).

¹²⁰ *Id.* at 785.

¹²¹ *Id.* at 784-85 (adopting the definition of “arbitrary” from a case defining the “abuse of discretion” standard of review on appeal) (citing *General Tire, Inc. v. Kepple*, 970 S.W.2d 520, 526 (Tex. 1998)).

infer from the quotation above that individuals and school districts in Texas also possess correlative immunities to such arbitrary legislation.¹²²

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 and immunities. After issuing a ruling that the state system was unconstitutional as applied to low-wealth districts in 1993,¹²³ the court again addressed the case as part of an enforcement proceeding in 2005, indicating a view of the education clause based on secondary rules.¹²⁴

The court's majority issued a very short opinion rejecting the Report and Recommendation of a single justice, who had recommended that the court order the legislature to commission and fund an adequacy study.¹²⁵ The court's short opinion also fully and finally disposed of the case, which had been subject to the continuing jurisdiction of the Massachusetts courts based on the earlier *McDuffy* mandate.¹²⁶ This brief opinion of the court's judgment, issued by five of the seven justices, was followed by a three-justice "plurality" concurrence, a two-justice "minority" concurrence, and two individual dissenting opinions.¹²⁷

The plurality explained its rejection of the Report and Recommendation on the basis that, although the Massachusetts Constitution established a judicially enforceable duty to provide an adequate education, the current system of education, despite documented deficiencies and disparities relating to individual districts, met this standard.¹²⁸ 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,¹²⁹ had abdicated its duty to "cherish" the public schools by acting in an "arbitrary, nonresponsive, or irrational way to meet the constitutional mandate."¹³⁰ The plurality advocated this position in spite of the fact that wide disparities in absolute funding continued to exist between districts within the state.¹³¹ The language of the plurality's concurrence suggests that, rather than reaching the merits of the alleged inadequacy of the state's education system, the court should confine its review to process, inquiring whether the Legislature has acted arbitrarily or has acted in good faith in executing its constitutional duties.

¹²² See *id.* at 784 (quoting *Mumme v. Marrs*, 40 S.W.2d 31, 35-36 (1931), stating the disability as one against enacting legislation "so arbitrary as to be violative of the rights of the citizen").

¹²³ *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993) (hereinafter, "*McDuffy*")

¹²⁴ *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (hereinafter, "*Hancock*").

¹²⁵ *Id.* at 1136-37.

¹²⁶ See *McDuffy v. Sec. of the Exec. Off. of Educ.*, 615 N.E.2d 516 (Mass. 1993).

¹²⁷ *Hancock*, 822 N.E.2d at 1136-37.

¹²⁸ *Id.* at 1140.

¹²⁹ See *McDuffy*, 615 N.E.2d at 516.

¹³⁰ *Hancock*, 822 N.E.2d at 1140 (Marshall, C.J., concurring) (plurality opinion).

¹³¹ *Id.*

The “minority” concurrence argued instead that *McDuffy* should be overruled in pertinent part on separation of powers grounds.¹³² According to the minority concurring justices, the education clause could not be subjected to substantive review by the judiciary because any remedy that the court could impose on the legislature would require it to order taxation and spending, clearly legislative functions.¹³³ The minority concurrence relied explicitly on the Massachusetts Constitution’s separation of powers clause¹³⁴ as a justification for judicial abstention, concluding, “Where, as here, the remedy for an alleged deprivation would require a court to order the Commonwealth to spend money that the Legislature has not appropriated, judicial intervention is not permitted.”¹³⁵ The minority concurrence further explained that judicial intervention is not available where the basis for a complaint is merely that the Legislature has failed to carry out a responsibility assigned to it.¹³⁶

The two opinions comprising the court’s “majority,” then, illustrated a tendency to view the language of the education clause in terms of secondary rules of power and disability, rather than in terms of primary rules of conduct. Although it used the language of “duty,” the “plurality concurrence” seemed to favor the recent approach followed in Texas to evaluate legislative action for arbitrariness, implying that a Hohfeldian disability to legislate arbitrarily is the element of the education clause subject to judicial review.¹³⁷ The “minority concurrence” used the language of “discretionary functions” to describe the Legislature’s constitutional power in education and cautioned against judicial usurpation of it, evoking the Hohfeldian power of the legislature to act where the constitution does not impose a disability.¹³⁸ The future direction of the Massachusetts court is far from clear, but this recent set of opinions does not show the court favoring a conception of the education clause grounded in duties and claim-rights.

Very recently, the Colorado Supreme Court, in remanding a case for trial after rejecting a state challenge to justiciability, instructed the lower court as to the standard of review to apply.¹³⁹ Adopting the standard from a prior case presenting an equality-based challenge,¹⁴⁰ the

¹³² *Id.* at 1160 (Cowan, J., concurring).

¹³³ *Id.* at 1161 (Cowan, J., concurring).

¹³⁴ Mass. Const. Pt. I, art. 30 provides, “In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”

¹³⁵ *Hancock*, 822 N.E.2d at 1161 (Cowan, J., concurring).

¹³⁶ *Id.* (Cowan, J., concurring) (quoting *LIMITS v. President of the Senate*, 604 N.E.2d 1307, 1310 (1992) (“a judicial remedy is not available whenever a joint session fails to perform a duty that the Constitution assigns to it”). The minority concurring justices also drew the Court’s attention to a familiar principle in separation of powers doctrine that has been completely overlooked in most states addressing adequacy challenges—the principle that “Mandamus is not available against the Legislature.” *See id.* (quoting *LIMITS*, 604 N.E.2d at 1310). This principle has also been completely overlooked in the literature on judicial review in education finance litigation, and it presents a fertile subject for future research.

¹³⁷ *Id.* at 1158 (Marshall, C.J., concurring) (plurality opinion).

¹³⁸ *Id.* at 1160-61 (Cowan, J., concurring).

¹³⁹ *Lobato v. State*, 218 P. 3d 358 (Colo. 2009).

court instructed the lower court to evaluate the legislature exercise of its power based on whether it was “rationally related to the constitutional mandate that the General Assembly provide a ‘thorough and uniform’ public school system.”¹⁴¹ The Colorado court thus imposed a standard of legislative disability—a limitation on irrational legislation—to the education clause, similar to the “arbitrariness” standard followed by the Texas Supreme Court and the plurality of the Massachusetts Supreme Court. The Colorado court crafted this standard for the explicit purpose of avoiding “unduly infringing on the legislature’s policymaking authority.”¹⁴² Because state supreme courts often find themselves confronted with inter-branch conflicts in school finance litigation,¹⁴³ this evolving approach may soon gain more adherents.¹⁴⁴ For now, though, outside the context of purely equality-based litigation, it remains a minority approach.

C. *Claim-Rights and Duties*

As one can see from the discussion above, the disability/immunity approach, while seemingly focused on the interests of the individual, has not borne much fruit for plaintiffs. Rather, plaintiffs have been far more successful where courts have been willing to construe the education clause as a set of claim-rights and duties. For example, the courts of New Jersey—the only state with a more extensive history of school finance litigation than Texas—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 requiring legislative action. The operative opinions are numerous, so deriving a single conception of legal relationships presents challenges, but 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.¹⁴⁵

¹⁴⁰ *Id.* at 374 (citing *Lujan v. Colorado State Bd. of Educ.*, 649 P. 2d 1005 (Colo. 1982) (discussed *supra*, Part IV.B.)).

¹⁴¹ *Id.* at 374 (“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.”).

¹⁴² *Id.* at 374.

¹⁴³ See Bauries, *supra* note ___, at ___ (explaining the ubiquity of separation of powers concerns in school finance cases).

¹⁴⁴ *Cf.*, *Campaign for Fiscal Equity, Inc. v. State*, 861 NE 2d 50 (N.Y. 2006) (rejecting the lower courts’ modifications and approving a funding plan proposed by the legislative and executive branches in response to earlier rulings, based on a determination that the plan was “reasonable” and not “irrational.”).

¹⁴⁵ See, e.g., *Abbott v. Burke*, 693 A. 2d 417, 190 (N.J. 1997) (“Abbott IV”) (“This continued deprivation of the constitutional right to a thorough and efficient education necessitates a remedy.”); *id.* at 189 (“Plaintiffs seek affirmation of their constitutional right to an opportunity that will enable them to achieve a thorough and efficient education, that is, a level of education that will allow them to assume a place in society as competitive and effective workers and contributors—an educational opportunity that is now to be defined and measured by the content standards of the new act. Accordingly, the interim remedy that we mandate to effectuate that right is the improvement of regular education through increased funding.”); *id.* at 190 (“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.”); *Abbott v. Burke*, 960 A. 2d 360, 362 (N.J. 2008) (“Abbott XIX”) (“Since the early 1970s, pupils

The history of litigation over school finance in New Jersey is truly breathtaking. The most recent opinion of the New Jersey Supreme Court was that court's *twentieth opinion* over as many years in the state's *second line of cases* dealing with school finance.¹⁴⁶ The prior line of cases, referred to as *Robinson v. Cahill*,¹⁴⁷ also yielded several opinions over the course of twenty years, but it is the second line of cases, referred to as *Abbott v. Burke* that established the court's conceptions of the legal relationships attendant to the constitutional status of education. After so many opinions, the court has long since dispensed with any pretense to stating a standard of legislative conduct or articulating the proper standards for judicial review. The most recent opinion (Abbott XX) merely reviews each stated ground for challenge of the most recent legislative response to the previous orders of the court and declares each as "not constitutionally infirm," or some variant of that phrase.¹⁴⁸

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 constitution."¹⁴⁹ In its initial review for facial constitutionality, the court was not presented with a claim that the legislation violated the rights, privileges, or immunities of any identified class of individuals, so the 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.¹⁵⁰

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. N.J. Const. art. VIII, § 4.").

¹⁴⁶ *Abbott v. Burke*, 971 A.2d 989, 991 (2009) ("Abbott XX") (speaking only of New Jersey Supreme Court decisions, "Today's decision marks the twentieth opinion or order issued in the course of the *Abbott* litigation.").

¹⁴⁷ See, e.g., *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), *cert. denied sub. nom.* *Dickey v. Robinson*, 414 U.S. 976 (1973) (generally referred to as "Robinson") (finding the state system unconstitutional under the state education clause, due to large disparities in funding); *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975) (generally referred to as "Robinson IV") (ordering, for the first time, legislative action to remedy the constitutional violation).

¹⁴⁸ See *Abbott XX*, 971 A.2d at 1001 ("Based on that record, we conclude that although the New Jersey PJP process may have differed from the process as implemented in other states, any differences do not equate to constitutional shortcomings."); *Id.* at 1002 ("In sum, we 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.");

¹⁴⁹ *Robinson v. Cahill*, 355 A. 2d 129, 460-61 (N.J. 1976) (generally referred to as "Robinson V").

¹⁵⁰ *Robinson v. Cahill*, 355 A. 2d 129, 460-61 (N.J. 1976) (generally referred to as "Robinson V"); see also *id.* at 465 ("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.'") (quoting *Robinson I*, 303 A.2d at 62 N.J. at 513).

Thus, the New Jersey found in the education clause both a “duty” and a “power,” but any duty to take affirmative action obviously must be accompanied by the power to take the required action, or they are 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 the court has accordingly refined its approach to focus on the enforcement of individual claim-rights correlative to this legislative duty identified in *Robinson V*.¹⁵¹ 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.¹⁵² 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.¹⁵³

Unlike every other state supreme court that has found what appears to be a Hohfeldian duty in the education clause, the New Jersey court has focused on the claim-rights correlative to the identified duty and attempted to discern exactly what each holder of a claim-right is entitled to receive from legislation. 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. Thus, the New Jersey Supreme Court has been the most active court in enforcing the education clause as a set of Hohfeldian claim-rights with a correlative affirmative duty to be performed by the state. However, the New Jersey court is not the only court to have taken this interpretive road.

The New York Court of Appeals has reached the merits of one adequacy-based challenge.¹⁵⁴ In *Campaign for Fiscal Equity v. State*, the court adopted its earlier *dicta* in an equity-based appeal in *Board of Education v. Nyquist* to hold that the state constitution’s education clause established a constitutional duty for the Legislature to provide a “sound basic

¹⁵¹ See, e.g., *Abbott IV*, 693 A. 2d at N.J. 152 (N.J. 1997) (“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.”).

¹⁵² *Abbott IV*, 693 A.2d at 188; *id.* at 198 (“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.”); *Abbott XX*, 971 A.2d at 1009 (in dissolving the orders rendered during the past twenty years of judicial opinions, “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.”).

¹⁵³ E.g., *Abbott IV*, 693 A.2d at N.J. 224 (ordering the legislature to appropriate additional funds to what the court then referred to as “the Abbott districts”).

¹⁵⁴ *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995) (hereinafter “*Campaign*”). 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.

education.”¹⁵⁵ *Nyquist* presented an equity-based challenge, and the court’s ultimate resolution of this early challenge presented yet another “lockstep” application of the *Rodriguez* approach.¹⁵⁶

However, prior to reaching the merits, the court had to address a separation of powers objection to review. In rejecting this challenge, the court explained:

With full recognition and respect, however, for the distribution of powers in educational matters among the legislative, executive and judicial branches, it is nevertheless the responsibility of the courts to adjudicate contentions that actions taken by the Legislature and the executive fail to conform to the mandates of the Constitution, which constrain the activities of all three branches.”¹⁵⁷

The court went on to state that the state constitution guaranteed only a “sound basic education,” which the court interpreted as “an education.”¹⁵⁸ Thus, like many in the equity era, the *Nyquist* claim failed, 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.”¹⁵⁹

The first such challenge was heard the first time in the Court of Appeals in 1995 in *Campaign for Fiscal Equity v. State*.¹⁶⁰ In a very brief discussion of separation of powers principles, the *Campaign I* court adopted as precedent the *dicta* of the *Nyquist* court that the education clause imposed a duty upon the Legislature to provide a “sound basic education,” and that this duty was subject to adjudication in court.¹⁶¹ Unlike the court in *Nyquist*, though, the *Campaign I* court took the opportunity to set forth a demanding explication of the meaning of “sound basic education.”¹⁶² The court specified that a “sound basic education” includes minimally adequate physical facilities, instrumentalities of learning, instruction, and teacher quality, but the court noted that a cause of action under the education clause could not be established solely through proof that state standards could not be achieved under current funding.¹⁶³ The court held that such a cause of action could be established on remand only if the plaintiffs could show a causal link between state funding levels and the inability of students to obtain a “sound basic education.”¹⁶⁴

¹⁵⁵ *Id.* at 665 (citing *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 369 (N.Y. 1982)).

¹⁵⁶ *See supra*, Part II.B. (reviewing the immunity-based decisions handed down during the reform wave dominated by equity-based theories of relief).

¹⁵⁷ *Id.* at 363 (emphasis added).

¹⁵⁸ *Nyquist*, 439 N.E.2d at 368-69.

¹⁵⁹ *Nyquist*, 439 N.E.2d at 369.

¹⁶⁰ *Campaign I*, 655 N.E.2d at 661.

¹⁶¹ *Id.*

¹⁶² *Id.* at 666.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 667.

After making its threshold determination of the propriety of judicial review, the court went beyond the minimal-duty-based language used by the *Nyquist* court and held that New York’s school-age children were possessed of 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.¹⁶⁵

This language was carried through the remainder of the litigation, and it is clear that the New York court has relied on this conception of an individual claim-right to education as the foundation of judicial review of the legislature’s correlative duty to provide a “sound basic education.”¹⁶⁶

In more recent years, the court considered the merits of the case again, held that the plaintiffs had established that the state was not providing a sound basic education to school-age children of New York City, and ordered the General Assembly to determine the cost of remedying the situation.¹⁶⁷ The court then proceeded to defend its remedial order:

Finally, the remedy is hardly extraordinary or unprecedented. It is, rather, an effort to learn from our national experience and fashion an outcome that will address the constitutional violation instead of inviting decades of litigation.

. . . .

We trust that fixing a few signposts in the road yet to be traveled by the parties will shorten the already arduous journey and help to achieve the hoped-for remedy.¹⁶⁸

The court also contrasted the problems encountered by the New Jersey Supreme court, which was initially reticent and later became the most active court in the nation as to remediation, with the fairly resistance-free experience in Kentucky, which the New York court assumed was due to greater specification of remedy by the Kentucky court.¹⁶⁹

¹⁶⁵ *Id.* at 666.

¹⁶⁶ See discussion of *Campaign II*, *infra*.

¹⁶⁷ *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003) (hereinafter “*Campaign II*”).

¹⁶⁸ *Id.* (internal citations omitted).

¹⁶⁹ *Id.* at 349-50. As it turns out, this assumption contradicted the Kentucky court’s actual remedial approach, which was to abstain. See *infra*, Part IV.E. The case was appealed once more to the Court of Appeals as *Campaign III*,

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. Accordingly, the court has not resisted ordering specific remedial action on the part of the political branches where it determines that the constitutional duty has not been performed.

The Supreme Court of North Carolina has heard an adequacy-based challenge both on appeal from the trial court's denial of a motion to dismiss in *Leandro v. State*¹⁷⁰ and on appeal from a merits decision in favor of the plaintiffs in *Hoke County Board of Education v. State*.¹⁷¹ The court first addressed judicial review in *Leandro*.¹⁷² The *Leandro* court quickly disposed of the State's contention that educational adequacy was a nonjusticiable political question, holding that the court has a duty to interpret the state constitution and "to reject any act in conflict therewith."¹⁷³ The court went on to hold that the education clause of the North Carolina Constitution guaranteed a substantive, positive, individual right to compel the General Assembly to provide a "sound basic education."¹⁷⁴

When it later addressed the merits-based decision of the trial court in favor of the plaintiffs in *Hoke*, the court 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,"¹⁷⁵ basing its decision on evidence of low standardized test scores, graduation rates, course offerings, and other factors in the plaintiff district, in comparison with statewide averages.¹⁷⁶ However, the court reversed a portion of the trial court's remedial order based on separation of powers principles.¹⁷⁷ The trial court had ordered the General Assembly to enact legislation to ensure that "at-risk" students would be entitled to schooling at public expense as of the age of four, in conflict with the existing legislative system, which merely allowed school attendance as of the age of five and required it as of the age of seven.¹⁷⁸ The court explained that, although the trial court was

which presented only challenges to the adequacy of remedial measures taken and proposed by the governor and the legislature in response to the court's order in *Campaign II*. *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50, 55 (N.Y. 2006) (hereinafter "*Campaign III*"). 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.

¹⁷⁰ *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997).

¹⁷¹ *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004).

¹⁷² *Leandro*, 488 S.E.2d at 253-54.

¹⁷³ *Id.* at 254 (quoting *Maready v. City of Winston-Salem*, 467 S.E.2d 615, 620 (N.C. 1996)).

¹⁷⁴ *Id.*

¹⁷⁵ *Hoke*, 599 S.E.2d at 381.

¹⁷⁶ *Id.* at 381-84; 389-90.

¹⁷⁷ *Id.* at 391.

¹⁷⁸ *Id.*

correct in finding that the students in the plaintiff district were entitled to some school readiness assistance, and that the General Assembly was obligated to provide this assistance, it was premature, on the evidence presented, to direct the General Assembly to provide this assistance in such a specific way.¹⁷⁹

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, and that separation of powers concerns would not prevent such judicial action.¹⁸⁰ In so holding, the North Carolina court defined both a positive right and a correlative legislative duty.

The Supreme Court of Arkansas has addressed the same adequacy-based constitutional challenge to the state's education finance system several times. In 2002, the court held the system unconstitutional in part due to inadequate total spending.¹⁸¹ Throughout its discussion, the court referred to the education clause provisions as establishing a "duty,"¹⁸² a "responsib[ility],"¹⁸³ and even an "absolute duty."¹⁸⁴ In construing the duty of the state to provide adequate education, the court held that this "absolute duty" runs "to each school child."¹⁸⁵ Thus, the court set up a Hohfeldian relationship of legislative duty and numerous individual claim-rights. Applying this relationship to the case before it, the court held that the system was unconstitutional. The court, upon motion, recalled its mandate and reissued its decision in 2004,¹⁸⁶ and again in 2005,¹⁸⁷ in this latter case ordering the state legislature to conduct an adequacy study, as provided for in prior legislation enacted in response to *Huckabee I*.¹⁸⁸

The Wyoming Supreme Court has heard the same adequacy-based constitutional challenge several times, and has generally ruled in favor of the plaintiffs in these cases, initially styled *Campbell County School District v. State*.¹⁸⁹ In the final case, *Campbell III*, the court

¹⁷⁹ *Id.* at 393.

¹⁸⁰ *Id.* at 393.

¹⁸¹ *Lake View Sch. Dist. v. Huckabee*, 91 S.W.3d 472, 484-485, 495 (Ark. 2002) (hereinafter "*Huckabee I*").

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 492 ("There is no question in this court's mind that the requirement of a general, suitable, and efficient system of free public schools places on the State an absolute duty to provide the school children of Arkansas with an adequate education.").

¹⁸⁵ *Id.* at 495.

¹⁸⁶ *Lake View Sch. Dist. v. Huckabee*, 189 S.W.3d 1, 16-17 (Ark. 2004) ("*Huckabee II*").

¹⁸⁷ *Lake View Sch. Dist. v. Huckabee*, 220 S.W.3d 645, 655-57 (Ark. 2005) ("*Huckabee III*").

¹⁸⁸ *Id.* at 657.

¹⁸⁹ *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995) (hereinafter "*Campbell I*").

invalidated the system for a third time.¹⁹⁰ In this latter case, the court ordered increased funding for capital facilities and retained jurisdiction to monitor legislative compliance with the ruling.¹⁹¹

In *Campbell I*, the court had preceded its disposal of a justiciability challenge stating, “Constitutional provisions imposing an affirmative mandatory duty upon the legislature are judicially enforceable *in protecting individual rights*, such as educational rights.”¹⁹² Thus, the individual nature of the education rights at issue influenced the justiciability determination. The court also explicitly juxtaposed the individual rights with a correlative, and affirmative, legislative duty. This holding was left unquestioned in the later appeals.¹⁹³

The Washington case of *Seattle School District No. 1 v. State*¹⁹⁴ was the first state high court appeal in which educational adequacy in the absolute—not relative—sense was addressed. The Washington court engaged in an explicit and lengthy 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. As a 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 in violation of them.¹⁹⁵ 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.¹⁹⁶

The court first dismissed the State’s contention that, because it was labeled “Preamble” and because of its placement at the head of a collection of more specific provisions within the constitution, the education clause was merely hortatory, and that it did not establish any rights or duties.¹⁹⁷ Next, 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.¹⁹⁸ This portion of the opinion was the easiest for the court, as the Washington Constitution contains a provision specifically stating, “The provisions of this Constitution are Mandatory, unless by express words they are Declared to be otherwise.”¹⁹⁹ Finding no language in the education clause declaring it non-mandatory, the court held that it was mandatory and as such, that it imposed “affirmative duties of the State.”²⁰⁰

¹⁹⁰ *Campbell III*, 32 P.3d at 330-31.

¹⁹¹ *Id.* at 331.

¹⁹² *Id.* (emphasis added).

¹⁹³ *See Campbell III*, 32 P.3d at 331-37 (defending both judicial review and active, policy directive remediation on the basis that courts must act when legislative bodies fail to recognize constitutional rights).

¹⁹⁴ 585 P.2d 71 (Wash. 1978) (hereinafter “*Seattle*”).

¹⁹⁵ *Id.* at 83.

¹⁹⁶ *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).

¹⁹⁷ *Id.* at 84-85.

¹⁹⁸ *Id.* at 85.

¹⁹⁹ *See id.* (quoting Wash. Const. art. I, § 29).

²⁰⁰ *Id.* at 86-87.

The Court later explained how it arrived at the conclusion that education was 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.”²⁰¹ Explicitly discussing Hohfeldian jural correlatives, the Court held that the existence of an affirmative duty of the State gave rise to an affirmative correlative right to compel the State's actions, which right ran equally to each individual state resident.²⁰²

The court went on to hold, in broad terms, that the state constitution mandated 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.²⁰³

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.²⁰⁴ 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.

The West Virginia case of *Pauley v. Kelly*²⁰⁵ is one of the earliest instances in which a state supreme court addressed a challenge grounded explicitly in total adequacy of funding. The case was styled as both an equity challenge and an adequacy challenge in the trial court, and the trial court entered an initial finding that the plaintiff school district's funding was “inadequate,” in comparison with that of other districts.²⁰⁶ However, despite this finding, the court dismissed the action on the pleadings for the failure to establish a violation of the state constitution's due process clause, which had been interpreted to guarantee equal protection, as well.²⁰⁷ The plaintiffs appealed, arguing that the court's findings that the plaintiff district was not provided a “thorough and efficient” education, as set forth in the state constitution's education clause,

²⁰¹ *Id.* at 91 (citing Wash. Const. art. 9, § 1).

²⁰² *See id.*; *id.* at 91 n.10 (citing Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-37 (1913); Arthur L. Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226 (1921); Walter Wheeler Cook, *Hohfeld's Contribution to the Science of Law*, 28 YALE L.J. 721 (1919); 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)).

²⁰³ *Id.* at 94 (citing *Robinson I*, 303 A.2d 273 (N.J. 1973); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

²⁰⁴ *Id.* at 96-97.

²⁰⁵ 255 S.E.2d 859 (W.V. 1979) (hereinafter, “*Pauley I*”).

²⁰⁶ *Id.* at 861-62.

²⁰⁷ *Id.* at 862-63.

should have been sufficient to entitle the plaintiffs to a declaratory judgment of unconstitutionality.²⁰⁸

In reviewing the trial court's decision, the court quoted with approval a very early pronouncement from the West Virginia Supreme court concerning the nature of the education clause:

From this clause it is plain, the people intended that the 'thoroughness' and 'efficiency' of the system of free schools, adopted by the legislature, should in no wise be prejudiced by the want of ample means. They make it obligatory upon the legislature to provide for the support of such schools . . . thus placing in the hands of the legislature, for that purpose, plenary, if not absolute, power.²⁰⁹

In that early case, the court had employed the education clause as a means of shielding the Legislature from a challenge to its establishment of local school boards with taxing authority.²¹⁰ The court held that the education clause, in addition to other constitutional provisions, imbued the Legislature to "judge . . . what was necessary and proper 'for the organization of such institutions of learning as the best interests of general education in the State may demand,' and have all powers, consistent with the principles of right and justice, as recognized and protected by the constitution, to provide the means for their support."²¹¹

Nevertheless, despite these strong early pronouncements regarding the nearly absolute legislative power and discretion over education, the court went on to declare, "Certainly, the mandatory requirement of 'a thorough and efficient system of free schools,' found in Article XII, Section 1 of our Constitution, demonstrates that education is a fundamental constitutional right in this State."²¹² Based on these formulations, the court then remanded the case to the trial court to (1) determine, using strict scrutiny, whether the state education system violated the equal protection provisions of the state constitution; and (2) develop standards by which the thoroughness and efficiency of the state system could be tested, based on the court's formulation, and determine whether the system should be invalidated based on the education clause.²¹³ The appeal has been followed by several legislative acts, and by several procedural appeals,²¹⁴ but the court's holding as to the correlative right and duty in the education clause has not been revisited.

²⁰⁸ *Id.* at 863.

²⁰⁹ *Id.* (quoting *Kuhn v. Board of Educ. of Wellsburg*, 4 W.Va. 499, 509 (W.Va. 1871), *overruled on unrelated grounds*, *Williams v. Grant County Court*, 26 W.Va. 488 (W.Va. 1885)).

²¹⁰ *Kuhn*, 4 W.Va. at 509-10.

²¹¹ *Id.* (quoting W.Va. Const., art. X, § 4.).

²¹² *Id.* at 878.

²¹³ *Id.*

²¹⁴ *See Pauley v. Gainer*, 177 W.Va. 464, 353 S.E.2d 318, 37 Ed. Law Rep. 953 (W.Va. 1986) (appealing based on the failure to join the governor, an indispensable party); *Pauley v. Bailey*, 174 W.Va. 167, 324 S.E.2d 128 (W.Va. 1984) (appealing a challenge to the state Board of Education's implementation of statutes enacted in response to

The seven lines of cases reviewed in this section provide the only 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. In addition, each of the courts ordering specific remedial action has retained jurisdiction to evaluate compliance with its order, a further indication that each court has seen itself as enforcing legislative duties to legislate.

D. Powers and Liabilities

The language of the state constitutions cited in Part III, even upon a cursory glance, overwhelmingly suggests a common approach to legal relationships in 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. Yet, in much of school finance litigation, courts grant strong deference to legislative decision making—often absolute deference. In fact, courts often completely abstain from reviewing the merits of state constitutional challenges grounded in the education clause, due to a stated conception of the terms therein as “power” or “unreviewable discretion.” These cases seem to fit of the Hohfeldian correlatives of “power” and “liability,” despite the text they construe.

For example, in Alaska, the state supreme court rejected an early education clause-based challenge to the legislature’s failure to provide a high school in a remote Inuit village.²¹⁵ In holding the issues non-justiciable absent a valid equal protection challenge, the court expressed its view of the education clause in terms of legislative power and discretion: “So long as they are not violative of equal protection, the nature and proper means of overcoming the disadvantages [of plaintiffs in the current education system] present questions for the legislature.”²¹⁶

Similarly, the Supreme Court of Louisiana rejected a duty-based conception of the state’s education clause.²¹⁷ The court reviewed the education clause in search of a duty for the legislature to fund whatever budget the state board of education might propose and found none, declaring, “under Article VIII, § 13(B) of the Louisiana Constitution of 1974, the 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’”²¹⁸

Pauley I); *Pauley v. Bailey*, 171 W.Va. 651, 301 S.E.2d 608 (W.Va. 1983) (appealing the denial of a motion to intervene as a party-plaintiff in the ongoing litigation).

²¹⁵ *Hootch v. Alaska State-Operated School System*, 536 P.2d 793, 804-05 (Alaska 1975).

²¹⁶ *Id.* at 805.

²¹⁷ *La. Ass'n of Educ. v. Edwards*, 521 So. 2d 390 (La 1988).

²¹⁸

The Supreme Court of Arizona has addressed the state's education clause three separate times.²¹⁹ In the first decision, *Roosevelt I*, the court disposed of the issue of legislative duty in a footnote, declaring that the case, which presented theories of equity based in the uniformity provisions of the education clause, "afford[ed] us no opportunity to define adequacy of education or minimum standards under the constitution."²²⁰ The court went on to hold that the education finance system was unconstitutionally inequitable.²²¹

The next two cases that reached the Arizona Supreme Court, both captioned *Hull v. Albrecht*, arrived after the trial court, which had retained jurisdiction over the previous remedial order, denied the Governor's motion for a declaration that the Legislature's newly-enacted school finance system now met constitutional requirements.²²² The court upheld the trial court's denial of relief to the state.²²³ In so doing, the court explicated the adequacy-based meaning of the education clause for the first time:

The general and uniform requirement applies only to the state's constitutional obligation to fund a public school system that is adequate. Defining adequacy, in the first instance, is a legislative task. But, in addition to providing a minimum quantity and quality standard for buildings, *a constitutionally adequate system will make available to all districts financing sufficient to provide facilities and equipment necessary and appropriate to enable students to master the educational goals set by the legislature or by the State Board of Education pursuant to the power delegated by the legislature.*²²⁴

The court adopted the stance that the adequacy of the facilities funding was to be measured based upon whether such funding was sufficient to provide the facilities necessary and proper for students to meet state goals, whether established by the Legislature or by the executive branch.²²⁵

The court reaffirmed its adequacy standard when the case came before it again in *Albrecht II* as a result of another legislative reform.²²⁶ In *Albrecht II*, the court again invalidated the capital funding portion of the system on equity grounds.²²⁷ However, as to adequacy and the

²¹⁹ *Hull v. Albrecht*, 960 P.2d 634 (Ariz. 1998) ("*Albrecht II*"); *Hull v. Albrecht*, 950 P.2d 1141 (Ariz. 1997) ("*Albrecht I*"); *Roosevelt Elem. Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994) ("*Roosevelt I*"). The Court also reviewed the same case once more, but that ruling was based only on equity concerns.

²²⁰ *Roosevelt I*, 877 P.2d at 814 n.7.

²²¹ *Id.* at 815-16.

²²² *Albrecht I*, 950 P.2d 1141, 1142 (Ariz. 1997).

²²³ *Id.* at 1146.

²²⁴ *Id.* at 1145 (emphasis added).

²²⁵ *See id.*

²²⁶ *Hull v. Albrecht*, 960 P.2d 634, 636-37 (Ariz. 1998) ("*Albrecht II*").

²²⁷ *Id.* at 639.

education clause's terms, the court unqualifiedly accepted the state's definition of the standard for adequacy of education and the level of funding for capital facilities necessary to meet that standard.²²⁸ Thus, though Arizona does not present the clearest typological case, it appears that the court there emphasizes legislative discretion (and thus Hohfeldian power), preferring to strike down legislation only where it transgresses an equality-based disability.

Kansas

In the most recent opinion in the ongoing *Montoy v. State* litigation in Kansas, the court evaluated legislative action taken after the court had stayed its mandate in the 2005 "*Montoy III*" appeal and concluded that the Legislature had substantially complied with the education clause mandate.²²⁹ The court held that significant action on the part of the Legislature had evidenced compliance with the court's prior orders, even though additional expenditures would continue to be necessary to remedy the system.²³⁰ The court also reviewed the state of affairs that had prevailed in several states where the highest courts had remanded education finance adequacy cases to the lower courts for ongoing supervision of legislative action.²³¹ Using that history as a rationale, the court declined to further supervise legislative policy development and ordered the lower court to dismiss the underlying case.²³² Over the course of the many *Montoy* decisions, the court did not attempt to evaluate the nature of the rights or duties at issue in the cases.

One clue to the court's reticence in the area lay in the court's earlier decisions, particularly a 1994 decision in a case in part presenting an adequacy-based constitutional challenge, *Unified School Dist. No. 229 v. State*.²³³ In *USD 229*, the court declined to invalidate the state's school finance system on adequacy grounds.²³⁴ 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.²³⁵ By way of illustration, the court stated, "It 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."²³⁶ Each of these statements focused on Hohfeldian powers, liabilities, and disabilities. Applying the term

²²⁸ *Id.* at 637.

²²⁹ *See Montoy v. State*, 138 P.3d 755, 757-61 (Kan. 2006) (hereinafter "*Montoy IV*").

²³⁰ *See id.* at 765-66.

²³¹ *Id.* at 765-66 (reviewing the legislative stalemates that have resulted from the decisions and remands in New Jersey, Arizona, Arkansas, California, New Hampshire, and Texas, discussed *supra*, this Chapter).

²³² *Id.* at 766.

²³³ 885 P.2d 1170 (Kan. 1994) (hereinafter, "*USD 229*").

²³⁴ *Id.* at 1197.

²³⁵ *Id.* at 1173-74 (quoting *Shawnee Hills Mobile Homes, Inc. v. Rural Water Dist.*, 537 P.2d 210 (1975) ("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.")).

²³⁶ *Id.* at 1174.

“suitable” in the education clause as such a limitation, the *USD 299* court deferred to the recent legislative enactment of standards and goals for the education system as a working definition of “suitable.”²³⁷ Measuring the current system under these legislatively defined goals, the court declined to find that the current system failed to meet the suitability requirement.²³⁸

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.²³⁹ 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.”²⁴⁰ 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,”²⁴¹ thus applying the political question doctrine without naming it as such. In making its determination, the court conceded that some “right” to education existed under the state constitution, but held that this right was unenforceable in the judiciary because it was committed to the legislature’s “virtually unreviewable discretion.”²⁴² This latter statement illustrates the strong preference in Rhode Island for a conception of education as a Hohfeldian power, correlative to individual liabilities.

In *Pendleton School District 16R v. State*,²⁴³ the Oregon Supreme Court was presented with two constitutional challenges. The Oregon Constitution contains an education clause of similar variety to the constitutions of the other states studied herein, providing, “The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.”²⁴⁴ In addition to its general education clause, however, the state constitution also contains a more specific provision added by popular constitutional amendment in 2000.²⁴⁵ This newer provision provides, in pertinent part:

(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

²³⁷ *Id.* at 1186.

²³⁸ *Id.*

²³⁹ *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995).

²⁴⁰ *Id.* at 56.

²⁴¹ *Id.* at 58.

²⁴² *Id.* at 57. *See also id.* at 60, where the Court reiterated this position, stating, “as discussed supra, education is not generally a judicially-enforceable right under article 12, section 1, of our State Constitution.”

²⁴³ ___ P.3d ___, 345 Or. 596, 2009 WL 152666 (Or. 2009) (slip opinion).

²⁴⁴ *Id.* at *10 (quoting Or. Const. art. VIII, § 3).

²⁴⁵ *See id.* at *1 (describing the adoption of the amendment).

impact on the ability of the state's system of public education to meet those goals.²⁴⁶

The plaintiffs presented the court with alternate theories of a constitutional violation. First, they contended that the Legislative Assembly was in violation of this latter education appropriations clause due to its failure to appropriate funds equal to those specified in a cost study that the Legislative Assembly had commissioned based on its own education standards.²⁴⁷ Next, the plaintiffs contended that, even absent a violation under the education appropriations clause, the Legislative Assembly had violated the general education clause in one of two ways. Either (1) the education clause incorporated the standards set forth in the education appropriations clause, which incorporated the standards of quality set by the Legislative Assembly and its delegates, and the failure to provide enough funding to meet these standards therefore amounted to a violation of the education clause; or alternatively, (2) the education clause imposed its own quality standard, and the Legislative Assembly had failed to adequately fund the state school system in accordance with this standard.²⁴⁸

The court held that the trial court should have entered a declaratory judgment that the Legislative Assembly had failed to provide sufficient funds to meet the standard adopted in the education appropriations clause.²⁴⁹ However, the court also sharply limited this holding, clarifying that, conversely, the trial court was not empowered to enter the other declaration the plaintiffs sought, or the injunction that they sought to enforce it, which would have declared that the Legislative Assembly “must abide by the Oregon Constitution and appropriate [adequate funds].”²⁵⁰ In rejecting these forms of relief, the court focused on the remaining language of the education appropriations clause, which clearly contemplated that the Legislative Assembly would have the discretion to fund at levels not meeting the funding goals, and that if it exercised this discretion, it could nevertheless make the people liable to the reduced spending levels if it were to publicly explain the apparent shortfall.²⁵¹

Finally, the court addressed the merits of the plaintiffs’ alternative claims and held that the state had not failed to meet the standard established by the education clause.²⁵² Adopting the conception of the education clause’s meaning from an early equity case decided in the state, the court held that the education clause merely “requires that the legislature provide a ‘minimum of educational opportunities.’”²⁵³ Applying this interpretation, the court held:

²⁴⁶ *Id.* (quoting Or. Const. art. VIII, § 8) (hereinafter, the “education appropriations clause”).

²⁴⁷ *Id.* at *6.

²⁴⁸ *Id.* at *9.

²⁴⁹ *Id.* at *8.

²⁵⁰ *Id.*

²⁵¹ *Id.* at *8-*9.

²⁵² *Id.* at *10-*12.

²⁵³ *Id.* at *11 (quoting *Olsen v. State ex rel. Johnson*, 554 P.2d 139, 148 (1976)).

However, the legislature's failure to fund the public schools sufficient to meet the quality goals established by law does not demonstrate that the legislature has ipso facto failed to provide a minimum of educational opportunities. Moreover, plaintiffs' allegations that insufficient funding has produced a number of negative conditions in the public schools that they describe as "inadequate" are insufficient to claim that the public education system is no longer uniform.²⁵⁴

The court in Oregon has therefore viewed both of the education clauses in its state constitution as repositories of legislative power, with certain procedural disabilities placed on its exercise, but with no requirement to meet a specific level of quality in the system or its funding.²⁵⁵

The Supreme Court of Georgia made a similar decision very early in the modern history of school finance litigation.²⁵⁶ Construing one of the more demanding education clauses in the nation, the court cited the lack of judicially manageable standards for deriving a meaning of the clause's mandatory term, "adequate."²⁵⁷ The court then held that this definition should be left in legislative hands, stating, "while 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.'"²⁵⁸

The Supreme Court of Oklahoma has addressed a constitutional challenge grounded in adequacy once, in *Oklahoma Education Association v. State*.²⁵⁹ The court in *OEA* upheld the dismissal of the action based on the political question doctrine.²⁶⁰ In doing so, the court exclusively relied on the state constitution's explicit mandate for separated powers.²⁶¹ The court held that it was powerless under the state constitution to interfere with legislative discretion in matters committed to such discretion by law, and that the Legislature was vested with "exclusive authority" for determining the fiscal policy of the state.²⁶²

²⁵⁴ *Id.*

²⁵⁵ *See id.* ("In light of [earlier case law that declined to find a quality-based duty in the education clause], we reject without further discussion plaintiffs' contention that Article VIII, section 3, should be read to mandate a particular level of funding for public education.").

²⁵⁶ *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981).

²⁵⁷ *Id.* at 644 (quoting *Deriso v. Cooper*, 246 Ga. 540, 543 (272 S.E.2d 274) (1980)).

²⁵⁸ *Id.*

²⁵⁹ 158 P.3d 1058 (Okla. 2007) ("*OEA*").

²⁶⁰ *Id.* at 1065-66. The Court held earlier in its opinion that the plaintiffs lacked standing, but addressed the political question doctrine nevertheless because the application of the doctrine to dismiss the case would render any mandate to dismiss the case without prejudice due to lack of standing futile. *See id.* at 1065.

²⁶¹ *See id.*

²⁶² *Id.* at 1066.

The Oklahoma court throughout the relevant portion of its opinion described the language of the education clause as establishing a legislative “duty.”²⁶³ However, more pointedly, the court reaffirmed its holding in a prior equity case that, “When the methods for carrying out this duty are challenged, ‘the only justiciable question is whether the Legislature acted within its powers.’”²⁶⁴ The Oklahoma court justified its reticence on the discretionary nature of the duties established by the education clause, solidifying a Hohfeldian power-based approach.

In Missouri, the state supreme court recently issued its long-awaited authoritative ruling on the right to education.²⁶⁵ The court, like the others in this section, approached the education clause as a source of legislative power, which could be exercised with total discretion unless limited by a constitutional disability.²⁶⁶ Finding none, the court dismissed the adequacy claims. 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.²⁶⁷ That provision requires the state to spend no less than 25 percent of general revenue on education. It was this provision, according to the court, which provided for a legislative duty. All other provisions merely described legislative powers.²⁶⁸ The court solidified its deferential approach, stating, “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.”²⁶⁹

Perhaps the clearest statement of the power/liability dichotomy that appears to be developing in the state courts came from the **Indiana** Supreme Court in the recent case of *Bonner v. Daniels*.²⁷⁰ 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:

²⁶³ *Id.* at 1065-66.

²⁶⁴ *Id.* at 1066 (quoting *Fair School Finance Council of Okla., Inc. v. State*, 746 P.2d 1135 (Okla. 1987)).

²⁶⁵ *Committee for Educational Equality v. State*, ___ S.W.3d ___ (Mo. 2009). The court also held that the state constitution’s equal protection clause was not violated. *See supra* note ___ (listing immunity-based decisions in state courts facing equal protection challenges).

²⁶⁶ *Id.* at ___ (“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.”).

²⁶⁷ *Id.* at ___ (“... section 3(b) provides the legislature a flexible framework for funding Missouri’s public schools. It indicates the minimum level of funding that the legislature “shall” set aside — at least 25 percent of the state revenue. But it also outlines that the legislature “may” provide additional funding to account for deficiencies. It is the language of section 3(b), not the aspirational introductory language of section 1(a), that provides the constitutional parameters for funding Missouri’s public schools.”); The court did hold that the legislature had an enforceable duty to allocate at least 25% of state revenue to education because this requirement explicitly appears in the education clause’s text. *Id.* at ___.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at ___.

²⁷⁰ *Bonner v. Daniels*, 907 N.E.2d 516 (Ind. 2009).

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.²⁷¹

Thus, the Indiana court expressed what is apparent from the cases reviewed above—that in many states, despite the constitutional text’s compulsory language, the legislature’s role in education is almost entirely discretionary.²⁷² If this is the case, then the legislature’s position is as the holder of a nearly absolute power, and the individual’s position is as 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, only a liability. This idea appears in several of the cases discussed in this Section and the next, but courts often disguise this effect 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 in legislative discretion and power. In reality, though, if education is a system of discretionary powers and liabilities, then it admits of no individual 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.²⁷³

Nevertheless, claim-rights to education appear more than rhetorically only in the small number of cases reviewed in Part IV.C. Does this mean that the Hohfeldian conception of claim-rights is inaccurate to describe education’s constitutional status? This seems so in most states, as claims tend to be rejected based either on the near-absolute discretionary power of the legislature, or as discussed below, held to be nonjusticiable either at the threshold stage of litigation or at the remedial stage.

²⁷¹ *Id.* at 518; *see also id.* at 522 (“By its own terms, Article 8, concerning education, does not speak in terms of a right or entitlement to education. Rather, the Article relates to the aspirational goals and objectives assigned to the General Assembly as the legislative branch of Indiana government.”).

²⁷² *Id.* at 522 (“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.”).

²⁷³ *See, e.g.*, Helen Hershkoff, *State Courts and the Passive Virtues: Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833 (2001); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131 (1999); Johnathan 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); Burt Neuborne, *Foreward: State Constitutions and the Evolution of Positive Rights*, 20 Rutgers L.J. 881 (1989).

As discussed in the next Section, there does appear to be a role for Hohfeldian conceptions of legislative duty in this latter group of cases, but they are not appropriate for grouping with the cases discussed in Part IV.C, even though several of them resulting in procedural dismissals at the threshold stage of litigation. This is because the pure Hohfeldian conception of duty is most often joined in these cases with a unique and unlikely jural correlative in school finance litigation—the Hohfeldian “no-right.”²⁷⁴

E. Duties and No-Rights

In several states, the education clause imposes a clear duty to legislate, and the courts have described this duty as a Hohfeldian compulsion to act, but the courts nevertheless have decided that the performance of such duty is a non-justiciable political question, or is otherwise judicially non-cognizable, due to separation of powers concerns.²⁷⁵ In such cases, it would appear that, because a suit to compel the duty’s performance is not cognizable in the state’s courts, no person or entity possesses a claim-right correlative to the duty. In fact, in Hohfeldian terms, individuals and school districts actually appear to be in possession of a “no-right.”

The courts that share this conception fall into two groups. One group of courts is willing to read the state education clause as a statement of legislative duties—obligations that must be fulfilled, but this group adheres to the view that the performance of such duties, for one reason or another, is not subject to judicial review. The other group of courts is willing not only to read the education clause as imposing a legislative duty, but is also willing to construe that duty and to say whether it has been performed. However, this latter group of courts, upon identifying a violation, holds itself to be without constitutional power to order specific remedial action to perform the duty. Each of these groups views the potential or actual remediation of school finance-based harms as an intolerable threat to the separation of powers, and in so doing, each group of courts attaches to the legislative duty a strange fellow—the no-right.

The first group includes the courts in Florida, Alabama, Illinois, Pennsylvania, and Nebraska. In each of these states, the court has acknowledged that the state legislature is burdened by a Hohfeldian duty, a compulsion to act to legislate in education, but each of these courts has also held that no individual has the right to seek the enforcement of the duty in the state’s courts.

For example, in *Coalition of Adequacy and Fairness v. Chiles*, a series of plaintiffs challenged statewide spending as constitutionally inadequate, in violation of the education clause’s command to make “Adequate provision” for a “uniform system of free public schools.”²⁷⁶ The state contended that any decision rendered in the case would violate the explicit

²⁷⁴ **power cases and the no-right cases.**

²⁷⁵ See, e.g., *Coalition for Adequacy and Fairness v. Chiles*, 680 So.2d 400 (Fla. 1996) (dismissing a constitutional challenge to expenditure levels as a nonjusticiable political question). Since 1970, eight state supreme courts have ultimately made this determination regarding school finance litigation. Bauries, *supra* note ___, at ___.

²⁷⁶ *Coalition for Adequacy & Fairness in Sch. Fund., Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996); *Id.* at 402. See Fla. Const., art. IX, § 1 (1968). This provision has since been amended twice in response to *Chiles*. See Scott R. Bauries, *Florida’s Past and Future Roles in Education Finance Reform Litigation*, 32 J. EDUC. FIN. 89, 97-98 (2006) (evaluating the effectiveness of subsequent amendments at addressing the problems identified by the Justices in *Chiles*).

mandate for separated powers in the Florida Constitution.²⁷⁷ The court agreed, holding that the plaintiffs had not shown that judicial intrusion into the legislative process was justified.²⁷⁸ The court based its determination completely on the “power” of the Legislature to determine priorities among competing state policies, including the policies at the heart of the education clause,²⁷⁹ adopting the lower court’s conception of state power:

To decide such an abstract question of “adequate” funding, the courts would necessarily be required to subjectively evaluate the Legislature’s value judgments as to the spending priorities to be assigned to the state’s many needs, education being one among them. In short, the Court would have to usurp and oversee the appropriations power, either directly or indirectly, in order to grant the relief sought by Plaintiffs. While Plaintiffs assert that they do not ask the Court to compel the Legislature to appropriate any specific sum, but merely to declare that the present funding level is constitutionally inadequate, what they seek would nevertheless require the Court to pass upon those legislative value judgments which translate into appropriations decisions. And, if the Court were to declare present funding levels “inadequate,” presumably the Plaintiffs would expect the Court to evaluate, and either affirm or set aside, future appropriations decisions, unless the Plaintiffs are seeking merely an advisory opinion from the Court.²⁸⁰

Based on this adopted language, the court dismissed the case.²⁸¹ The court spoke of the education clause language as imposing “enormous discretion” upon the Legislature.²⁸²

This formulation, considered in light of the court’s quoted portion of the trial court’s dismissal order, would suggest that the education clause language confers no rights at all upon individuals and only confers a non-enforceable duty upon the Legislature. However, even though the court ultimately declared that the subjective terms of the education clause were non-justiciable, the court’s ultimate pronouncements as to the case before it were that the initial plaintiffs had made “an insufficient showing . . . to justify judicial intrusion,”²⁸³ and that they

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 408 (“While we stop short of saying “never,” appellants have failed to demonstrate in their allegations, or in their arguments on appeal, an appropriate standard for determining “adequacy” that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature, both generally (in determining appropriations) and specifically (in providing by law for an adequate and uniform system of education).”).

²⁸⁰ *Id.* at 406-07.

²⁸¹ *Id.*

²⁸² *Id.* at 408 (“We hold that the 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.”).

²⁸³ *Id.* at 407.

“failed to demonstrate in their allegations a violation of the legislature's duties under the Florida Constitution.”²⁸⁴ These statements seem to admit of some form of enforceable duty under the education clause, as well as the possibility that some “showing” might justify merits review in the future, and that this “showing” might involve allegations of an abuse of the Legislature’s very broad discretion.

Similarly, in *Ex Parte James*,²⁸⁵ decided almost ten years after the court’s first opinion in an ongoing school finance case, the Alabama Supreme Court dismissed the ongoing litigation. The litigation was based on the state constitution’s education clause, which provides, in pertinent part: “The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years.”²⁸⁶ In justifying its dismissal of the ongoing litigation, the Court described the education clause in terms of the “sole duty” of the legislature beyond the judiciary’s competence to adjudicate.²⁸⁷

Similar to the court in Florida, the Supreme Court of Illinois has addressed an adequacy-based challenge on only one occasion, and like the Florida Supreme Court, the Illinois court affirmed the case’s dismissal on separation of powers grounds.²⁸⁸ The education clause of the Illinois Constitution provides for a “high quality” system of education, and the plaintiffs claimed that the current system, as applied in certain low-wealth districts, was not “high quality.”²⁸⁹ Like the Florida court, though, the Illinois court applied the political question doctrine, and particularly the “judicially manageable standards” provision, as a means of evaluating its potential encroachment on legislative prerogatives.²⁹⁰

Also like the Florida court, the Illinois court construed the education clause as placing the duty to determine the level of education funding, as well as to determine the meaning of “high quality,” squarely on the General Assembly.²⁹¹ Accordingly, deciding that educational adequacy could not be defined through judicially discoverable and manageable standards, the court ordered

²⁸⁴ *Id.* at 408.

²⁸⁵ 836 So. 2d 813 (Ala. 2002).

²⁸⁶ Ala. Const. art. XIV, § 256.

²⁸⁷ *Ex Parte James*, 836 So. 2d at 818-19 (“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 (“the 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.”). The main preceding cases in the long line of litigation in Alabama were *Ex Parte James*, 836 So. 2d 813 (Ala. 2002) (“*Ex Parte James II*”); *Ex Parte James*, 713 So. 2d 869 (Ala. 1997) (“*Ex Parte James I*”); and *Pinto v. Alabama Coalition for Equity*, 662 So.2d 894 (Ala. 1995).

²⁸⁸ *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1193 (Ill. 1996).

²⁸⁹ *Id.* at 1189 (citing Ill. Const. art. X, § 1, which provides, in pertinent part, “The State shall provide for an efficient system of high quality public educational institutions and services . . . The State has the primary responsibility for financing the system of public education.”).

²⁹⁰ *Id.* at 1191.

²⁹¹ *Id.*

the adequacy claim dismissed.²⁹² Importantly, the court also expressed a grave concern for the potential remediation of any successful claim and the “ultimatum” that such remediation would present to the legislature.²⁹³ Ultimately, the court conceded that the system had flaws and called for a “spirited public debate” among legislators and the voters to resolve the funding-related issues facing public education in the state.²⁹⁴

Thus, in Illinois, the court has held that a duty exists to provide legislatively for education funding, but like the courts in Alabama and Florida, the court has recognized that a claim to compel the performance of such duty cannot exist without throwing the branches into conflict.

Pennsylvania’s highest court has addressed an adequacy-based constitutional challenge to education funding once, in *Marrero v. Commonwealth*.²⁹⁵ In *Marrero*, the court upheld the lower court’s dismissal of the entire action based on separation of powers principles, as operationalized through the political question doctrine.²⁹⁶ Although the language of the opinion is somewhat confusing and may admit of more than one Hohfeldian interpretation, the court’s clearest statement of its conception of education came through its approval of the trial court’s interpretation of an earlier education funding case.

The court summarized this interpretation as follows:

The court correctly understood *Danson's* interpretation of the constitution's mandate that the *legislature* provide for a thorough and efficient *system* of public education ‘not [to] confer an individual right upon each student to a particular level or quality of education, but, instead, [to] impose a constitutional duty upon the legislature to provide for the maintenance of a thorough and efficient system of public schools throughout the Commonwealth.’”²⁹⁷

Conceiving of the education clause terms as imposing a duty with no correlative claim-right, the court, like the others in this group, completely abstained from adjudication.

The Supreme Court of Nebraska has addressed an adequacy-based challenge to its state’s education system once, in *Nebraska Coalition for Educational Equity and Adequacy v. Heineman*.²⁹⁸ In *Heineman*, the court upheld the procedural dismissal of the case by the trial court on the grounds that educational funding adequacy was a non-justiciable political

²⁹² *Id.* at 1192-93.

²⁹³ *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].’”) (quoting *Seattle School District No. 1 v. State*, 585 P.2d 71, 128 (Wash. 1978) (Rosellini, J., dissenting)).

²⁹⁴ *Id.*

²⁹⁵ 739 A.2d 110 (Pa. 1999).

²⁹⁶ *Id.* at 113-14.

²⁹⁷ *Id.* at 112 (quoting *Marrero by Tabales v. Com.*, 709 A.2d 956, 961-62 (Pa. Cmwlth. 1998) (emphasis and alterations in original) (quoting *Danson v. Casey*, 399 A.2d 360 (1979))).

²⁹⁸ 731 N.W.2d 164 (Neb. 2007).

question.²⁹⁹ Aided by the popular rejection of a proposed constitutional amendment that would have added substantive “quality” language to the education clause,³⁰⁰ the court determined that the adequacy of education funding was textually committed to the Legislature,³⁰¹ that the education clause was not subject to judicially discoverable and manageable standards,³⁰² and that the court could not render a decision in the case without exhibiting a lack of due respect for the Legislature.³⁰³

Throughout the relevant portion of its opinion, the court referred to the language of the education clause as establishing the Legislature’s affirmative “duty.”³⁰⁴ Although the court conceded that this duty required the legislature to make schools available to all children of the state, the court declined to find any individual rights in the education clause, referring in support to the rejection by popular vote of a proposed constitutional amendment that would have explicitly described a “quality education” as an individual “fundamental right.”³⁰⁵ Thus, like the other courts in this group, the Nebraska court set up a duty correlative to a no-right.

In another group of cases presenting duties correlative with no-rights, courts have shown willingness to both adjudicate the education clause’s meaning and hold it to be violated, suggesting that the legislature has a Hohfeldian duty to provide educational resources at a certain level of adequacy. However, the courts in this group have uniformly abstained from ordering any specific remedial action on the part of state legislatures. Essentially, then, these courts have followed the same approach as courts described in Group 1—just at a different stage of the case. In both sets of cases the plaintiffs have been left with no relief. The only difference has been that, in the second set of cases, courts have declared state legislatures in violation of constitutionally imposed duties prior to denying individuals any rights to compel the performance of such duties. This latter group of courts includes those in Kentucky, Ohio, South Carolina, New Hampshire, Vermont, Montana, Idaho, and Wyoming.

The Kentucky Supreme Court case of *Rose v. Council for Better Education*³⁰⁶ stands as the seminal education finance adequacy case. *Rose* was decided at the beginning of the period of education finance reform litigation known as the “Third Wave”³⁰⁷ and has been followed or

²⁹⁹ *Id.* at 183.

³⁰⁰ *Id.* at 180. The proposed amendment would have declared that a “quality education” is a “fundamental constitutional right” in Nebraska, and would have made the establishment of a “thorough and efficient” education system a “paramount duty of the state.”

³⁰¹ *Id.* at 178.

³⁰² *Id.* at 179.

³⁰³ *Id.* at 181.

³⁰⁴ *Id.* at 179-82.

³⁰⁵ *Id.* at 180.

³⁰⁶ 790 S.W.2d 186.

³⁰⁷ 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, 604-08 (1994) (describing the three waves of education finance reform).

discussed in numerous subsequent state high court cases. The *Rose* case presented a class action, in which several individuals and local education agencies alleged that the education funding system in Kentucky was not adequate to provide “an efficient system of common schools,” as required by the education clause of the Kentucky Constitution.³⁰⁸

The trial court held the system unconstitutional and ordered the General Assembly to completely overhaul the system and to submit a progress report for the court’s evaluation on a date specified by the court.³⁰⁹ The Kentucky Supreme Court upheld the trial court’s ruling as to the unconstitutionality of the system.³¹⁰ However, explicitly relying on the separation of powers clauses of the state constitution, the court reversed the portion of the trial court’s order retaining jurisdiction and mandating progress reports from the General Assembly.³¹¹

Without substantial discussion as to the issue, the court held that education was a “fundamental right” under the Kentucky Constitution.³¹² The court then went on to define the term “efficient system of common schools,” as it is stated in the education clause.³¹³ The court 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.³¹⁴ After identifying these parameters, the court held that the current system, as a whole, was unconstitutional.³¹⁵

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.³¹⁶ The court ultimately held that the trial court’s remedial order mandating that the General Assembly report to the court on its progress at remedying the state educational system was an impermissible “incursion, by the judiciary, on the functions of the legislature.”³¹⁷ The court then reversed the portion of the trial court’s order mandating progress reporting, leaving the mandate as a general one to “re-create and re-establish a system of common schools . . . which will be in compliance with the Constitution.”³¹⁸

The court held that the language of the education clause established a fundamental individual right to education for each Kentucky citizen.³¹⁹ The court also held that the clause

³⁰⁸ *Id.* at 189 (citing Ky. Const. § 183).

³⁰⁹ *See id.* at 191-93.

³¹⁰ *Id.* at 215.

³¹¹ *Id.* at 213-14 (citing Ky. Const. §§ 27, 28).

³¹² *Id.* at 201.

³¹³ *See id.* at 205-13.

³¹⁴ *Id.* at 212-13.

³¹⁵ *Id.* at 213.

³¹⁶ *Id.* at 213-15.

³¹⁷ *Id.* at 214.

³¹⁸ *Id.*

³¹⁹ *See id.* at 212 (“A child’s right to an adequate education is a fundamental one under our Constitution. The General Assembly must protect and advance that right.”).

placed an “absolute duty” on the state General Assembly to enact legislation establishing a system in conformity with the education clause, as interpreted by the court, and that the responsibility for education could not be delegated.³²⁰ Of these two conceptions, the one enforced by the court appears to have been the conception of legislative duty, as the court interpreted the education clause as requiring a very demanding level of resources from the state. However, in abstaining from issuing any order requiring that the legislature provide any funding generally or to the plaintiff districts and individuals, it appears that the court abandoned any idea that an individual right correlates with such a duty.

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 decided similarly to the Kentucky court.³²¹ Unlike the Kentucky court, the Ohio court has explicitly declined to address the plaintiffs’ contentions that education is a “fundamental right.”³²² However, like the Kentucky court, the Ohio court has defined 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.”³²³

The *DeRolph* court went on to hold that the state system was not “thorough and efficient,” as required by the education clause.³²⁴ However, rather than specifying a particular set of remedial measures, the court simply mandated that the General Assembly promulgate a new system of public education that would conform to the court’s decision.³²⁵ Again like the Kentucky court, the Ohio court justified its reluctance to provide any guidelines to the General Assembly based on the principles of the separation of powers, refusing to “encroach on the clearly legislative function of deciding what the new legislation will be.”³²⁶ The court reaffirmed both its judgment of unconstitutionality and its remedial abstention in several subsequent opinions.³²⁷

In the most recent opinion, the court addressed the cases again on a petition by the General Assembly for a writ of prohibition against the trial court, which had begun to address the

³²⁰ *See id.* at 215 (“Since we have, by this decision, declared the system of common schools in Kentucky to be unconstitutional, Section 183 places an absolute duty on the General Assembly to re-create, re-establish a new system of common schools in the Commonwealth. As we have said, the premise of this opinion is that education is a basic, fundamental constitutional right that is available to all children within this Commonwealth.”).

³²¹ *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997) (“*DeRolph I*”).

³²² *Id.* at 740 n.5 (“Appellants also contend that education is a fundamental right and that the current funding system violates equal protection. . . . However, since we decide that Ohio’s school financing system violates the Thorough and Efficient Clause of our state Constitution, we decline to address appellants’ other constitutional claims.”).

³²³ *Id.* at 740-41.

³²⁴ *Id.* at 747.

³²⁵ *Id.*

³²⁶ *Id.* at 747 n.14.

³²⁷ *E.g.*, *DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002) (hereinafter “*DeRolph V*”); *DeRolph v. State*, 678 N.E.2d 886, 888 (Ohio 1997) (hereinafter “*DeRolph II*”).

plaintiff's motion for a compliance conference relating to the Ohio court's 2002 opinion, and cemented its own non-involvement in remediation.³²⁸ The court took the opportunity to order the final dismissal of the case.³²⁹ The court explained its action based on the statement made in *DeRolph VI* that the trial court was mandated to "carry the . . . judgment in this cause into execution," which the court held had finally disposed of the case, leaving the constitutional violation's remedy up to the General Assembly, subject to no coercive order or supervision from the judiciary.³³⁰

The Supreme Court of South Carolina had heard one adequacy-based challenge to date.³³¹ In *Abbeville v. State*, the court cited specific text from the state constitution in support of its decision that the legislature has a Hohfeldian duty to provide adequate educational resources.³³² Article I, Section 23 of the South Carolina Constitution contains a specific admonition that all provisions of the constitution are to be construed as either "prohibitory" or "mandatory," unless designated otherwise. The court examined the education clause set forth below, and based on the word "shall," determined that it was mandatory.³³³ Thus, the South Carolina court construed a Hohfeldian duty from the education clause.

The court held that this statement of affirmative duty should be read to require a "minimally adequate education," including:

providing students adequate and safe facilities in which they have the opportunity to acquire:

- 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science;
- 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and
- 3) academic and vocational skills.³³⁴

After articulating this definition, the court held that the plaintiffs had stated a valid, justiciable claim under the education clause and remanded for further proceedings.³³⁵

³²⁸ State ex rel. State v. Lewis, 789 N.E.2d 195 (Ohio 2003).

³²⁹ *Id.* at 202.

³³⁰ *Id.* at 201-02.

³³¹ *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999). At the time of the completion of this study, a decision was pending in the South Carolina Supreme Court.

³³² *Abbeville*, 515 S.E.2d at 539-40 (quoting S.C. Const. art. I, § 23 ("The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or promissory by its own terms.")).

³³³ *Id.* at 540.

³³⁴ *Id.* at 540.

³³⁵ *Id.* at 541.

However, the court also admonished the lower courts not to invade the legislative province by specifying any particular legislative action in the event of a constitutional violation. The court stated:

Finally, we emphasize that the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests on the legislative branch of government. We do not intend by this opinion to suggest to any party that we will usurp the authority of that branch to determine the way in which educational opportunities are delivered to the children of our State. We do not intend the courts of this State to become super-legislatures or super-school boards.³³⁶

In the final analysis, then, the South Carolina court construed a Hohfeldian duty from the education clause, but prospectively instructed the trial court not to require that it be performed, thus undercutting any argument that such duty correlates to an individual claim-right. At this writing, the appeal of the trial conducted on remand has been orally argued, and the parties a decision.³³⁷

New Hampshire's Supreme Court has addressed one adequacy-based constitutional challenge, *Claremont School District v. Governor*, several times at differing stages beginning in 1993.³³⁸ In *Claremont I*, the plaintiffs brought an adequacy-based action challenging, in relevant part, the Legislature's failure to define the nature of the educational rights of the citizens of the state, and its failure to appropriate more than 8 percent of total education funding from statewide sources.³³⁹ The court reversed the trial court's dismissal of the adequacy-based challenge.³⁴⁰ The trial court had dismissed the case for failure to state a claim, based on the rationale that the state's education clause, which directed the Legislature to "cherish" and "encourage" public education, imposed no substantive qualitative standard for the legislature to meet.³⁴¹ The court rejected this reasoning based on its analysis of the original intent of the language, ultimately holding that the education clause imposed a duty on the Legislature and the governor to "provide universal education and to support the schools."³⁴² The court also held that the duty assigned to

³³⁶ *Id.* The Court in this section of its opinion restated the familiar phrase that it would not allow the courts of the state to become "super-legislatures" or "super-school boards."

³³⁷ See Access Quality Education: South Carolina Litigation, Nat'l Access Network, Teachers College, Columbia U., available at http://www.schoolfunding.info/states/sc/lit_sc.php3 (last visited Dec. 31, 2008).

³³⁸ *Londonderry Sch. Dist. SAU #12 v. State*, 958 A.2d 930, 932 (N.H. 2008) ("Londonderry II"); *Londonderry Sch. Dist. S.A.U. No. 12 v. State*, 907 A.2d 988, 995 (N.H. 2006) ("Londonderry I"); *Claremont Sch. Dist. v. Governor*, 725 A.2d 648 (N.H. 1998) ("*Claremont III*"); *Opinion of the Justices*, 712 A.2d 1080 (N.H. 1998); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997) ("*Claremont II*"); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993) ("*Claremont I*").

³³⁹ *Id.* at 1376.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.* at 1381.

the Legislature and the governor by the education clause “extends beyond mere reading, writing, and arithmetic” to include “broad educational opportunities needed in today’s society.”³⁴³ The court also held that the duty implied “an important, substantive right . . . to an adequate education, . . . held by the public to enforce the State’s duty.”³⁴⁴ However, the court conceived of this “right” not as an individual right, but rather as a collective right, which could be enforced by any citizen of the state.³⁴⁵ The court viewed the collective right as corollary to a broad, statewide duty imposed on the Legislature to provide an adequate education to all children within the state.³⁴⁶ The court then admonished the Legislature’s and governor to define an “adequate” education and appropriately fund it.³⁴⁷

In the next appeal to come before it, the court further redefined the right stated in the education clause as an individual “fundamental right.”³⁴⁸ The court also gave the content to the education clause that it originally sought from the Legislature, adopting the seven competencies articulated by the Kentucky Supreme Court in the seminal *Rose* case and declared that the system in existence at the time was in violation of the education clause.³⁴⁹ As in the first appeal, the court left the determination of what sort of education meets the constitutional standard to the Legislature.³⁵⁰ However, the court mandated that the Legislature act to reform the public school financing system to make it constitutional and imposed a deadline for compliance of the end of the next legislative session.³⁵¹

After this ruling, the Legislature attempted to reform the education system in the state by creating new property tax rules, but the court, in an advisory opinion, ruled these proposed measures unconstitutional.³⁵² This ruling led to *Claremont III*.³⁵³ In this third *Claremont* appeal, explicitly citing the separation of powers clause of the New Hampshire Constitution, which forbids one branch from encroaching on the powers of another, the court held that it had fulfilled its “duty to interpret the State Constitution to declare the system of financing public elementary and secondary education in this State unconstitutional,” and ordered the Legislature and the governor to “put into effect a constitutional financing system.”³⁵⁴

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 1380-81.

³⁴⁷ *See id.* at 1380.

³⁴⁸ *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997) (hereinafter “*Claremont II*”).

³⁴⁹ *Id.* at 1359-60.

³⁵⁰ *Id.*

³⁵¹ *Id.* at 1360.

³⁵² *Opinion of the Justices*, 712 A.2d 1080 (N.H. 1998).

³⁵³ *Claremont Sch. Dist. v. Governor*, 725 A.2d 648 (N.H. 1998) (hereinafter “*Claremont III*”).

³⁵⁴ *Id.* at 652 (citing N.H. Const. pt. I, art. 37).

In a recent appeal from this litigation, *Londonderry v. State*, the court, citing its role in the three-branch system of government, remained consistent in refraining from ordering that the coordinate branches act to fund any particular substantive goals, or that the political branches provide any particular level of funding.³⁵⁵ However, the court's ruling also contained a prediction that, should the coordinate branches fail to act to specify the substantive content of a constitutionally adequate education by the end of fiscal year 2007, the court would be forced to issue a remedial order either invalidating state funding legislation, appointing a special master to help the court determine the meaning of an adequate education, or remanding to the trial court for findings on the issue.³⁵⁶ This continued jurisdiction was recently terminated by the court's ruling that, in light of the replacement of the challenged legislation with new legislation pursuant to the court's prior mandate, the ongoing litigation was rendered moot, and a new challenge would have to be brought against the new legislation.³⁵⁷

Thus, in New Hampshire, the substantive content of the education clause has been developed into a concept of an arguably Hohfeldian legislative duty, but this duty correlates with collective rights held by the populace as a whole, rather than with individual rights. Further, these rights have been repeatedly held to be better defined by the coordinate branches, and the court has never issued an order compelling the performance of the legislature's duty, though it has come close. Reading the litigation history as a whole, one must conclude that, though the legislature appears to have a duty that is subject to judicial interpretation and is mandatory, no party (individual or collective) can compel the legislature's performance of it.

Vermont's Supreme Court has heard one appeal in part presenting an adequacy-based theory of liability, in *Brigham v. State*,³⁵⁸ a continuation of litigation begun as a pure equity-based challenge.³⁵⁹ Although the main arguments that the plaintiffs sought to advance were rooted in equal protection, the plaintiffs also claimed that state funding of education was inadequate, and that such inadequacy violated their "constitutional right to equal educational opportunity."³⁶⁰ Rejecting the trial court's decision to abstain based on an amorphous concept of "judicial restraint," the court held that where plaintiffs claim that their constitutional "rights"

³⁵⁵ See, e.g., *id.* ("Without intending to intrude upon prerogatives of other branches of government, we anticipate that they will promptly develop and adopt specific criteria implementing these guidelines and, in completing this task, will appeal to a broad constituency.") (internal citations omitted); *Londonderry Sch. Dist. S.A.U. No. 12 v. State*, 907 A.2d 988, 995 (N.H. 2006) (staying the portion of the case containing trial court factual findings concerning inadequacy of funding pending legislative and executive action to determine the substantive content of a constitutionally adequate education).

³⁵⁶ *Londonderry*, 907 A.2d at 995-96.

³⁵⁷ See *Londonderry Sch. Dist. SAU #12 v. State*, 958 A.2d 930, 932 (N.H. 2008) (dismissing the litigation and stating, "Although we are mindful of the petitioners' claims that the new legislation presents new problems, it is precisely for this reason that the controversy before this court is now moot.").

³⁵⁸ *Brigham v. State*, 889 A.2d 715 (Vt. 2005) ("*Brigham II*").

³⁵⁹ *Brigham v. State*, 692 A.2d 384 (Vt. 1997) ("*Brigham I*").

³⁶⁰ *Id.* at 721 ("To support their claim that the State has violated their constitutional right to an equal educational opportunity under *Brigham I*, the students alleged that the State does not provide adequate funding for education. The students argued that because of Act 60's inadequate funding, their schools do not have enough money to spend on curriculum.").

have been violated, the court has a duty to hear the case, which duty it may not “abdicate.”³⁶¹ The court then went on to hold that the plaintiffs’ claims that inadequate total state funding disproportionately impaired their local schools’ educational offerings, in comparison with at least one other local school, stated a valid claim under the Vermont Constitution.³⁶² The court did not attempt to construe any meaning from the education clause, and it did not give any indication that it found the asserted claims to be meritorious.³⁶³ Rather, the court simply held that a claim was stated and remanded for further proceedings.

The Vermont Supreme Court’s only pronouncement as to the actual content of the state’s education clause came out of *Brigham I*, where the court apparently held that education is a fundamental individual right under the state constitution, while also holding that it is a “fundamental obligation of the state.”³⁶⁴ In *Brigham I*, however, after holding that the state’s education funding scheme violated the state constitution’s equal protection clause, the court abstained from ordering any particular remedy, other than for the Legislature to act “to make educational opportunity available on substantially equal terms.”³⁶⁵ The court in *Brigham II* seemed to support this form of judicial restraint, as well, explaining that, in the event that a constitutional violation were to be identified on remand, such violation could be remedied through a declaration of unconstitutionality.³⁶⁶ Taking these cases together, then, Vermont has recognized that the state has a Hohfeldian duty to provide educational resources, but has indicated that, whether it does so inequitably or inadequately, individuals do not have the right to compel action in compliance with the state constitution.

The Supreme Court of Montana has ruled on one adequacy-based constitutional challenge to state education funding, in *Columbia Falls Elementary School District v. State*.³⁶⁷ The case came before the court on appeal from a trial court ruling that the state education finance system was in violation of the education clause of the Montana Constitution, which requires that “The Legislature shall provide a basic system of free quality public elementary and secondary schools.”³⁶⁸ In determining the justiciability of the controversy, the court quickly held that education was an individual “right” under the education clause. Citing two decisions establishing a right to participation in extracurricular activities, the court concluded that, because Section 1 of the education clause “guarantees a right to education,” legislative action establishing

³⁶¹ *Id.* at 720.

³⁶² *Id.* at 720-21.

³⁶³ See *id.* at 721.

³⁶⁴ *Brigham I*, 692 A.2d at 395.

³⁶⁵ *Id.* at 398.

³⁶⁶ *Brigham II*, 889 A.2d at 721-22 (rejecting the state’s argument that the parties did not have standing to bring their challenges because the courts would be unable to redress the plaintiffs’ grievances).

³⁶⁷ *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 109 P.3d 257 (Mont. 2005).

³⁶⁸ *Id.* at 258. See also Mont. Const. art. X, § 1(3).

an education system, though nonjusticiable in the abstract, was rendered justiciable under the independent “correlative individual right” to education, as set forth in the same section.³⁶⁹

After resolving the threshold issue of justiciability, the court held that the Legislature was required to provide adequate funding to establish and maintain a “quality” system of education.³⁷⁰ However, the court also held that the Legislature must first determine what a “quality” education was, and that the court would defer to its definition of the term.³⁷¹ The court issued no guidelines as to this definition, other than its determination that the system as then-currently conceived would violate any articulated definition.³⁷²

The Supreme Court of Idaho has heard the same adequacy-based constitutional challenge five times beginning in 1992.³⁷³ In each of these cases, the main plaintiff has been the Idaho Schools for Equal Educational Opportunity, which throughout the case has presented itself as representing this interests of school districts, individual schools, and school officials, rather than individual students. Accordingly, the Idaho Supreme Court has said little about the existence or non-existence of individual rights to educational resources. At most, it has acknowledged that such rights might exist in the relative sense as a basis for an equal protection claim, but has held any such rights to be non-fundamental.³⁷⁴

Despite its failure to directly address individual rights to resources, the court has held at different times that individual students, the ISEEO, and the individual districts have standing to sue to challenge inadequate funding.³⁷⁵ The court then held that, if the plaintiff school districts could prove on remand that the current level of educational funding did not allow them to meet the standards set by the executive branch, then they could succeed on their constitutional challenge.³⁷⁶

Although in past decisions, the Idaho court has employed the language of correlativity, and even has used the term “positive rights,” it has done so in the context of an equal protection claim, and only to reject the notion of a “fundamental right” to education.³⁷⁷ The court has

³⁶⁹ *Id.* at 261 (“Thus the question whether Article X, Section 1(3), presents a “justiciable” controversy cannot be addressed in a vacuum. The clause must be read in the context of any correlative individual rights guaranteed under the Montana Constitution.”).

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *See* Idaho Sch. For Equal Educ. Oppor. v. State, 129 P.3d 1199, 1202-03 (Idaho 2005) (“ISEEO V”) (reviewing the prior cases).

³⁷⁴ Idaho Sch. for Equal Educ. Oppor. v. Evans, 850 P.2d 724, 732-33 (Idaho 1993) (“ISEEO”).

³⁷⁵ *See* ISEEO v. State, 97 P. 3d 453, 457-58 (Idaho 2004) (“ISEEO IV”) (invalidating a legislative enactment that deprived the districts of the “right” to sue their “creator”); ISEEO v. State, 976 P. 2d 913, 921-22 (Idaho 1998) (“ISEEO III”) (holding that individual students have standing to sue despite the failure to include their own districts as necessary parties); ISEEO, 850 P.2d at 736 (stating that the districts and their organization have “interests” in securing adequate funding).

³⁷⁶ *Id.* at 735.

³⁷⁷ *Id.* at 732-33 (“In light of the above holding, we further hold that education is not a fundamental right because it is not a right directly guaranteed by the state constitution. Rather, art. 9, § 1 imposes a ‘duty [upon] the legislature [] to establish and maintain a general, uniform and thorough system of public, free common schools.’ Art. 9, § 1,

clearly stated several times that the state constitution imposes a duty upon the legislature to provide sufficient funding of a “thorough” education system.³⁷⁸ Thus, the duty imposed can be thought of as a Hohfeldian duty. However, as in the other cases reviewed in this Part, in Idaho, this duty is correlative to an individual no-right.

The correlativity of the no-right can be seen most clearly in *ISEEO V*, the most recent iteration of the Idaho litigation. There, the court held that the state’s funding plan did not make adequate provision for the safety of school buildings because it forced local districts to rely on loans for building repair and replacement.³⁷⁹ After upholding the trial court’s judgment as to the constitutional violation, though, the court directed that the Legislature be tasked with fashioning a remedy.³⁸⁰ As in several other cases above, the court was willing to hold the a duty existed, and was even willing to define the duty and hold it to have been violated, but when it came to remedying the violation, the court left the task up to the violator, leaving the plaintiffs (districts or individuals) with no right to compel the duty’s performance. Thus, the appropriate Hohfeldain characterization would derive from the education clause a legislative duty correlative to an individual no-right.³⁸¹

As discussed above, nearly every state constitution expresses its education clause provisions in terms of obligation. However, the duty-based terms used, such as “shall,” “must,” “obligation,” “responsibility,” and of course, “duty,” often do not impose obligations that correlate with individual claim-rights for enforcement. We can see this above in the cases that completely decline review (mostly due to concerns over the propriety of remediation), as well as in the cases where courts engage in review, but abstain from remediation. Each of these actions denies an ostensible holder of a claim-right the opportunity to compel the performance of a correlative duty.

Moral duties are theoretically compelled by the need to do what is morally correct. Theoretically, if one has a conscience and is motivated by it, then one will perform duties that are morally required because one’s conscience compels such performance. Criminal law prohibitory duties are similarly compelled by an entity that does not hold what Hohfeld would term claim-rights. If one is not morally compelled to perform, for example, the duty not to break into another person’s home, the state’s coercive power exists to punish this non-performance,

‘[o]n its face, mandates action by the Legislature. It does not establish education as a basic fundamental right.’”) (alterations and emphasis supplied by the Court).

³⁷⁸ *E.g., id.*

³⁷⁹ Idaho Sch. For Equal Educ. Oppor. v. State, 129 P.3d 1199, 1208-09 (Idaho 2005) (“*ISEEO V*”) (“By listing these alternatives, we are in no way usurping the Legislature’s role; we leave the policy decisions to that separate branch of government, subject to our continuing responsibility to ensure Idaho’s constitutional provisions are satisfied.”).

³⁸⁰ *Id.* (“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 remedy, however, must be fashioned by the Legislature and not this Court.”).

³⁸¹ Interestingly, unlike the plaintiffs in any other duty—no-right 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. *See* Kress v. Coppel-Trout, Case No. CV-07-261-S-BLW (D. Idaho 2007). This suit was ultimately dismissed, but the plaintiffs’ felt need to file and prosecute it points up the perverse nature of a Hohfeldian duty (a duty to perform an act for another’s benefit that one may not decide not to perform) with a correlative no-right.

and the threat of such punishment, again theoretically, compels the performance of the duty. In both cases, no claim-right holder need exist to compel the duty's performance. But what compels the performance of duties outside these two limited contexts? It would seem that only the holders of claim-rights can fill this role.

So, what are we to take from the numerous school finance decisions holding that the legislature has a "duty" to provide for and maintain an educational system, but that individuals do not possess claim-rights to have education provided to them? Two possibilities exist. The first is that school finance presents one more category of duties that simply cannot correlate with individual rights, such as moral duties and duties to obey the criminal laws. The second possibility, and the more plausible one, considering the evidence from the cases analyzed above, is that school finance as currently conceived in the state courts presents only secondary rules, which are correctly described in Hohfeldian terms of power, liability, immunity, and disability.

Scholars of Hohfeld have recognized that, if one possesses a duty make legal changes, then one 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 (for example, deciding not to make the legal change at all) may run afoul of the duty.³⁸² 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 Constitution to "preserve, protect and defend the Constitution of the United States."³⁸³ 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.³⁸⁴ However, this power has limits. As a matter of fact, the Fourth Amendment's prohibition against unreasonable searches and seizures³⁸⁵ places an independent disability on the President's exercise of his implied surveillance power.³⁸⁶

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

³⁸² See J.H. Grey, *Discretion in Administrative Law*, 17 OSGOODE HALL L. J. 107, 108 (1979) ("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."). 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. United States Dist. Court*, 407 U.S. 297, 310 (1972) ("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.").

³⁸³ U.S. Const. art. II, § 1.

³⁸⁴ *United States Dist. Court*, 407 U.S. at 310.

³⁸⁵ U.S. Const. amend. IV.

³⁸⁶ *United States Dist. Court*, 407 U.S. at 310.

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 in your best interests, in good faith, and rationally. 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. 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 for other candidates, I have violated 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. 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 term, that is—is the duty to set up and maintain some sort of 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 adherence to secondary rules of power, disability, and correlatively, immunity.

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

V. HOHFELD AND BRENNAN

Beyond the “is” question addressed above, however, remains the “ought” question—should state judiciaries recognize individual claim-rights to education as part of a right-duty relationship with the state? Would such recognition be desirable? Justice Brennan’s missive regarding the responsibility of state judiciaries to go beyond the rights judicially recognized in the federal Constitution and develop more rights-protective local regimes would seem to suggest that the answer is yes. But would recognizing individual claim-rights to education actually serve the interests that Justice Brennan sought to serve?

A. *The “Lockstep” Phenomenon in State Courts*

Several scholars have identified the persistence in state courts to apply federal adjudicatory doctrines in “lockstep”—unqualifiedly, in other words. Based on the cases reviewed in the article, it does not appear that this occurs in school finance litigation, but when one looks beneath the surface, the “lockstep” phenomenon is apparent. If “lockstepping” means adopting federal adjudicatory doctrines wholesale, as in applying rational basis review and

holding wealth to be a non-suspect basis for classification, then based on the school finance cases, “lockstepping” is the majority (but certainly not unanimous) approach.

If it means declining to entertain conceptions of legislative duty and individual right that the federal courts would decline to entertain, such as entertaining a basic idea of legislative duty and individual right in education, then, it appears in this general sense that “lockstepping” does not occur. Nearly every state court has at least conceded that the legislature has some responsibility to legislate on education, contrary to the 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.

However, the Hohfeldian perspective employed here illustrates that a more subtle form of “lockstepping” may be prevalent—even dominant—in state supreme courts. This form concerns the adoption of federal conceptions of the nature of constitutional rights in general. As outlined above, despite the greater willingness to at least consider the idea that education may be a constitutional entitlement in many states, and despite the ubiquitous mention of the words “rights” and “duties” in the cases, the overwhelming majority of state supreme courts approach their education clauses as sources of a basic duty or responsibility to legislate, but focus their interpretation, and therefore their adjudication and remediation, on conceptions of legislative power.

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 (such as the Kentucky legislature’s duty not to engage in dueling—this is easy. The court simply prohibitively enjoins the action that violates the duty. Where the violative action is state action prohibited by a negative duty—such as the duty of a police officer not to racially profile drivers—the court prohibitively enjoins state actors likely to take the prohibited action. Where a duty is positive, in contrast, the court naturally must compel action. This is what creates the problem with claim-rights to education.

Where an individual owes a positive duty to another individual who possesses a claim-right to see that duty performed, and the duty is not performed, the court can typically issue a mandatory injunction ordering the performance of the duty. Specific performance of a contractual obligation is the simplest example. Party A has a positive claim-right to purchase a unique piece of property, pursuant to a sale contract, by transferring money to Party B at closing, and Party B has a Hohfeldian duty to convey the property at closing. If Party B receives a higher offer and refuses to close, then Party A may be able to obtain an order from the court requiring Party B to convey.

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 resources to him. This is, in fact, what happens in special education litigation all the time. Special education litigation is brought pursuant to a statutorily created duty, which creates a claim-right in each individual disabled student for a free education appropriate to his disability. The performance of this duty is (partially) subsidized by the entity that created it, and it runs from the school district to the student directly.

Where the duty is breached, a court is empowered to issue a mandatory injunction compelling the district to provide the required services. If the required services cannot be performed in the public district, a new set of claim-rights and duties is created. The student acquires a liberty to attend a private school of his choosing (as long as the services can be

provided there), along with a claim-right against the school district for reimbursement of the costs of attending, which correlates with the district's duty to pay those costs.

Of course, this system has its weaknesses. Local districts have uneven numbers of special education students and uneven abilities to provide the services that may be required. Thus, some local districts spend much larger portions of their budgets subsidizing private schooling or in-school services than others. However, in terms of rights relationships and remediability, the 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 school finance in general under state constitutions. Ostensibly, each individual school-age child in a state could be held to possess a claim-right to educational services at a certain level (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 would receive the required services could be considered a breach of duty, which could then be remedied judicially through an order to provide the services (assuming, of course, that the inability to receive educational services could be causally linked to legislative action or inaction).

Several practical problems would exist in such a relationship, though. The first is the lack of power in most states for the judiciary to mandamus or enjoin the legislature as a body. All school finance litigation is brought against state legislatures, and all school finance litigation depends for its success on the theory that legislative action or inaction in setting appropriations policy has violated rights or breached duties. Thus, where a court finds that such rights or duties have been violated or breached, its proper and most logical recourse is to order the cessation of conduct violating rights or the performance of breached duties. But most state courts are prohibited from ordering or proscribing *conduct* where the violating party is the legislature, and those that are not so prohibited nevertheless often choose not to order legislative appropriations based on general concerns over the separation of powers.

Another practical problem is the problem of causation. Where a complaint brought by an individual claims that the individual has not received equal or adequate educational resources, as mandated by the education clause, which sets up a legislative duty to provide such resources, the claim depends for its success on the establishment of a causal link between legislative action or inaction and the deprivation of resources locally. Although in extreme cases, this link might be easy to establish, in most cases local factors greatly influence resource levels and utilization, so the link to legislative action or inaction will be quite attenuated.

Even assuming, though, that a causal link can be drawn and the legislature can be ordered to remedy a local lack of resources for the individuals asserting their own rights, the court would still be left with the inevitable dilemma of what to do if its order is not followed. A state supreme court cannot conceivably put the legislature in jail for contempt, and it certainly cannot jail only the members who vote against, or even work against, compliance with the order. Any such action would be a serious affront to bedrock principles of representative government.

Ultimately, as a coordinate branch of government, the legislature would have the choice whether to comply with this hypothetical order, and if experience is any guide, chances are that it would balk, or it would comply only symbolically. This is undoubtedly why no state court has gone as far as issuing an injunctive order (whether termed “mandamus” or not) and following through using its traditional contempt power when the order has been flouted. In fact, most courts reaching a judgment against the state in school finance litigation have not even gone so far

as issuing any kind of directive remedial order, and have 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.

It seems, based on these challenges, that Hohfeldian claim-rights to educational resources and services are unworkable, at least where claim-rights run against the state legislature. Accordingly, it is likely that the state courts have gravitated toward treating education as a matter of powers, liabilities, immunities, and disabilities in school finance litigation as a matter of necessity and preservation of their institutional legitimacy. As I have explained, this is the same conceptual approach taken toward rights under the federal Constitution. Thus, the “lockstep” phenomenon is alive and well, as state courts mostly have not departed from the “secondary rules” paradigm overwhelmingly present in litigation over federal constitutional rights. Where they have so departed, the results have been less than optimal.³⁸⁷

It would therefore seem that Justice Brennan's hope for an independent and more protective state judicial approach to rights has not been realized, and that a significant reason for this lack of realization is that the state courts remain oriented toward borrowing federal approaches to *conceptions* of rights. Based on the recent trends in the cases, it appears that state courts are no likely to change this orientation. However, it may be that the orientation toward secondary rules of power and liability can be used effectively in protecting the individual interests that they are intended to benefit. In the next section, I outline one perspective as to how this can be so.

B. *Litigating Affirmative Constitutional Commands*

Despite the apparently gloomy landscape painted above, the application of the “secondary rules” paradigm in state courts could be the foundation of a unique, states-specific approach more protective of individual interests than the federal approach. A few unique features of state constitutionalism suggest why this may be so.

First, in its default sense, state legislative power is *plenary*.³⁸⁸ Thus, most state constitutional provisions—even the ones that state affirmative commands—are properly read as limitations on power, not as grants of power. In contrast, in the federal Constitution, legislative power's default state is “no power.” Thus, 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.

The federal courts understandably read grants of legislative power over specific spheres of public policy rather generously. The federal courts undoubtedly take this broad view because they perceive that the Framers saw these legislative ends as important enough to nationalize and, coupled with the Supremacy Clause and preemption doctrine, remove from the states' cognizance.³⁸⁹ Regardless of the validity of this perception, in most cases presenting challenges to Congress's exercise of its enumerated legislative powers, the courts place great weight on the judgments of congressional actors as to whether the challenged legislation fits under the enumerated power in question. For example, Congress has been permitted to substantially define

³⁸⁷ Hanushek & Lindseth new book—no real gains from directed expenditures in New Jersey, Wyoming.

³⁸⁸ See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS, 6-9 (1998).

³⁸⁹ For a critique of this perspective as a modern invention, 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 (2004-2005).

“commerce,” with very few judicial corrections. Where judicial corrections have come recently, they have been based most often on textual limitations that exist elsewhere in the Constitution, such as the Tenth Amendment.³⁹⁰ Only two recent cases, *United States v. Lopez*³⁹¹ and *Morrison v. United States*,³⁹² invalidated Congressional judgments as to what constitutes “commerce,” and these decisions were followed a few years later by *Gonzales v. Raich*,³⁹³ a challenge to federal drug policy, wherein the Supreme Court reaffirmed the principles of *Wickard v. Fillburn*,³⁹⁴ previously maligned by supporters of state superiority as the most expansively deferential decision in the history of the Commerce Clause.

Importantly, the federal courts have also imported this deferential stance into cases reviewing state action.³⁹⁵ Again, the assumption underlying this deference appears to be that the Framers trusted state political processes with most of public policy development,³⁹⁶ and that only in cases where the Framers explicitly spoke to limit state authority (such as the authority to classify people on suspect bases and treat them differently) should judges employ strict review.

³⁹⁰ Professor Schapiro outlines a series of recent federal decisions that he believes constitute a decline in judicial deference. Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 669-690 (2000). However, the cases which Professor Schapiro contends show a decline in deference to Congress most relevant to my argument involve construing the Section Five enforcement power and the Commerce power. The former set of cases do not reject deference to congressional judgments as to the scope of the Section Five power, as long as such judgments are supported by an appropriate record of widespread constitutional violations in the states, and this record would even continue to support prophylactic legislation that proscribes otherwise constitutional conduct. I would argue that this line of authority, while showing a limit to the Section Five power, preserves a scope of that power that reaches beyond the text of the Fourteenth Amendment and is thus broader than the text would indicate. See U.S. Const. amend. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”). As to the commerce power, the case Professor Schapiro identifies, *United States v. Lopez*, along with its successor, *United States v. Morrison*, 529 US 598 (2000) (decided after Schapiro’s article was completed) examined with the benefit of the passage of ten years’ additional time (which benefit Professor Schapiro obviously did not have) appears more an outlier than the sentinel of a new trend in the jurisprudence of deference. In fact, several years after *Lopez*, the Rehnquist Court ruled again on the scope of the Commerce Clause in the context of the supremacy of federal drug policy in conflict with state policy. In so ruling, the Court invalidated local laws permitting marijuana cultivation in one’s home for one’s own medical use, explicitly relying on the case of *Wickard v. Fillburn*, which had until then been perceived by the justices as the apogee of judicial deference to Congress in defining the scope of the Commerce power. Beyond these two lines of cases, Professor Schapiro’s identification of rulings showing a greater willingness in federal courts to adjudicate political questions, while correct as a matter of case outcome, can be explained by the fact that none of the cases actually presented what would traditionally have been considered a political question.

³⁹¹ 514 US 549 (1995).

³⁹² 529 US 598 (2000).

³⁹³ 545 US 1 (2005).

³⁹⁴ 317 US 111 (1942).

³⁹⁵ See Schapiro, *supra* note ____, at 689-90 (explaining that the theory of the decline of deference does not apply to rational basis review of state actions implicating the Equal Protection Clause or the Due Process Clause).

³⁹⁶ See Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, <http://ssrn.com/abstract=1285485>, p. 44 of draft (stating that the assumption that states possess a police power “was a background assumption of the original Constitution”).

Consistent with the “lockstep” theory, state courts have, by and large, followed this federal practice of substantially deferring to legislative definitions and exercises of power, both on enumerated legislative objects and in evaluating alleged conflicts with statements of individual immunities, such as state due process clauses. However, as Justice Brennan and many commentators since have pointed out, nothing compels state courts to follow the deferential federal model. If, properly conceived, the purported grants in state constitutions of legislative authority over public policy areas are to be read as 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.³⁹⁷ 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 contain any standards.³⁹⁸ 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.³⁹⁹ In contrast, state grants of power are unnecessary, as state legislatures already have all powers not ceded to the federal government.⁴⁰⁰ The structure of state grants of power is to name a policy area, and then place standards for what should be legislatively pursued in that policy area.

The assumptions underlying deference toward the exercise of enumerated powers in the two systems, properly conceived, should be reversed. Just as Congress is entitled to deference from federal courts due to the judgment that it possesses the authority to determine the wisdom of public policy choices in regulating, say, interstate commerce, state legislatures are burdened with the opposite inference of framers’ intent. That is, if state legislative authority is plenary, yet the framers of a state constitution chose to place guidelines directing or guiding the exercise of such authority as to, say, education policy, 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.⁴⁰¹ Therefore, unlike federal courts, which appear to focus on the “power” cell in interpreting basic grants of power, state courts should focus on the “disability” cell.

³⁹⁷ See Schapiro, *supra* note ___, at 709-10 (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. 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. It seems logical that even a contextualist can begin with a defining feature of a constitution that sets up a baseline “context.” (CITE historical source indicating a favoring of legislative over executive and judicial power in the states).

³⁹⁸ The most notable that do are the General Welfare Clause and the Necessary and Proper Clause, but these clauses are not grants of power in their own right. Rather, they impose disabilities on otherwise unlimited grants of power to enumerated policy objectives. The General Welfare Clause limits the spending power. The Necessary and Proper Clause limits all of the other powers in Article I, Section 8.

³⁹⁹ See *supra*, Part II.

⁴⁰⁰ See G. ALAN. TARR, UNDERSTANDING STATE CONSTITUTIONS, 6-9 (1998).

⁴⁰¹ Schapiro, *supra* note ___, at 710.

The inference that a purported enumeration of power in a state constitution is actually a limitation on power thus seems to justify a more searching form of review over enumerated legislative powers than that found in the federal courts. Indeed, counter-intuitively, this inference would justify more searching judicial review over enumerated state powers than it would over unenumerated (and thus plenary) state powers. Under this formulation, most state legislatures would possess far more discretion in enacting, say, commercial codes than they would in enacting valid school finance plans.

Another salient feature of state constitutions—the greater *specificity* in defining the powers enumerated—supports this idea. The United States Constitution defines its enumerated powers broadly and generally—one might even say vaguely.⁴⁰² In contrast, state constitutions often specify the powers they grant in great detail. State education clauses are most often stated more vaguely, but they all contain significantly more content and textual guidance than the Commerce Clause or the Courts Clause, 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 merely 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, the affirmative character of state education clauses is often invoked by commentators and courts 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 denying claimants the right to compel performance of such “duties.”

Despite this textual disconnect, the affirmative character of the constitutional provisions in question arguably 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 with other state functions, such as the appropriations or taxing powers. Indeed, in some state constitutions, this conclusion is explicit in the text.⁴⁰³

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, it seems that the proper judicial remedy would be to invalidate the challenged legislative act. The important question is when to take such action. And the cases provide an intelligible and workable answer. If the state constitution by enumerating the duty to fund education, has imposed a legislative disability correlative to an individual immunity to legislative power, and if the text in the education clauses found in state constitutions can generally be read to reflect similar goals—to have a “thorough” system, an “efficient” system, a “high-quality” system, etc.—and these terms do not admit of a principled interpretation, then they should be read to impose a disability against legislative action in arbitrary defiance of the shared goal of a system that educates the people.

⁴⁰² See Barnett, *supra* note ___, at ___ (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).

⁴⁰³ Washington; Georgia; Florida (each referring to the duty as “paramount”).

The clauses in Texas, Massachusetts, and arguably Pennsylvania have arguably already been read in this way.⁴⁰⁴ Each state supreme court articulated its own disability-based standard, and the results were different in each case, but the common feature in the three states is a general prohibition on legislation not directed to the progressive realization of a system that educates. As a legislative goal, this goal is certainly legitimate, and as a judicial matter, it is certainly subject to limited enforcement. Even such limited enforcement, however, would greatly exceed that available under the federal Constitution. Thus, though Justice Brennan's call has been widely interpreted as an invitation to embrace "positive rights" and to reject "rationality review,"⁴⁰⁵ a Hohfeldian analysis reveals a possibility that state education rights can be thought of as immunities, correlating with strong disabilities placed on legislative power, and in this way, they can limit arbitrary legislative action in designing an education system.

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 positive 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, these claim-rights have morphed in the cases into liabilities to near-absolute legislative powers, frequently exemplified as unreviewable or irremediable legislative discretionary duties. To the extent that Justice Brennan had negative 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. In both cases, it appears that Justice Brennan's expectations have been frustrated.

As a normative matter, however, Justice Brennan's goals are both worthy of realization and supported by a proper Hohfeldian conception of state legislative power that would construe constitutionally imposed disabilities as far stronger limitations on enumerated power than the disabilities imposed on federal legislative power. The exercise of enumerated powers in the federal courts examines only whether the scope of the policy arena identified encompasses the legislation enacted. If properly focused on the disabilities presented by constitutional text—where such disabilities, due to their "nebulous" character, can only be fairly 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.

Asking whether an enactment furthers a state policy objective allows a state court to go beyond the role fulfilled by the federal courts of defining the contours of terms such as "commerce," but leaving for the legislature alone the wisdom of enactments within the policy area. Rather, this question allows for the limited institutional check of judicial review to prevent arbitrary and cynical uses of legislative power, even in a purely substantive sense. Further, an approach that focuses on secondary rules leaves invalidation as the most appropriate remedy for unconstitutional legislation and leaves positive injunctive orders for extreme cases of vestigial deprivation. This limitation on judicial power both ensures that judges will not encroach into policy making and allows for courts to interpret the state document.

Ultimately, then, in the subtle sense in which I have identified it, the lockstep phenomenon may actually operate to fulfill Justice Brennan's hope. Thinking about state

⁴⁰⁴ See discussions of each state, *supra*.

⁴⁰⁵ Hershkoff, *supra* note ____.

constitutional “rights” in terms of Hohfeldian correlatives, and focusing adjudication on an approach to ostensible “affirmative rights” as secondary rules of power, disability, liability, and immunity, illustrates both the possibility and the promise of a more refined role for state supreme courts in enforcing state constitutional norms.