

**LEGAL FOUNDATIONS FOR EDUCATIONAL ADEQUACY  
IN THE CALIFORNIA CONSTITUTION**

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## INTRODUCTION

The Education Article of the California Constitution contains two provisions that may be read to establish a requirement of educational adequacy. Article IX, Section 1 says:

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.

Article IX, Section 5 says:

The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

This memo examines the meaning of these provisions in light of their text, structure, history, and interpretation by California and other courts. The purpose of this analysis is to assess the strength of the legal foundations for an adequacy lawsuit in California.

Since the late 1980s, concepts of adequacy have reinvigorated school finance litigation.<sup>1</sup> An adequacy suit in California would build on the momentum of recent plaintiffs' victories in Kansas, Montana, New York, North Carolina, and Texas.<sup>2</sup> As discussed below, *the California Constitution provides ample basis for a judicially*

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<sup>1</sup> Since 1989, plaintiffs have prevailed in 18 out of 29 major decisions on school finance in state high courts, and 16 of the 18 victories involved adequacy theories. See Michael A. Rebell, *Adequacy Litigations: A New Path to Equity?*, in BRINGING EQUITY BACK (Janice Petrovich & Amy Stuart Wells eds., forthcoming 2005).

<sup>2</sup> See *Montoy v. Kansas*, 102 P.3d 1158 (Kan. 2005); *Columbia Falls Elem. Sch. Dist. No. 6 v. Montana*, No. BDV-2002-528, 2004 WL 844055 (Mont. Dist. Apr. 15, 2004), *aff'd* No. 04-390 (Mont. Nov. 9, 2004); *Hoke County Bd. of Educ. v. North Carolina*, 599 S.E.2d 365 (N.C. 2004); *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003); *Campaign for Fiscal Equity v. New York*, 801 N.E.2d 326 (N.Y. 2003).

*enforceable adequacy requirement. At the very least, the constitutional basis is no less firm in California than in other states where adequacy lawsuits have succeeded.*

Two limitations of this memo must be clearly stated. First, although education clauses of state constitutions have provided important leverage in engaging courts in defining and enforcing educational adequacy,<sup>3</sup> the precise language of a state’s education clause offers little guidance in predicting judicial outcomes.<sup>4</sup> Illinois, for example, has one of the strongest education clauses, but the state supreme court has found it judicially unenforceable.<sup>5</sup> By contrast, the New York Court of Appeals recently invalidated the state’s school finance system and will likely order a multibillion-dollar remedy based on its reading of a comparatively bland education clause.<sup>6</sup> Although both Pennsylvania and West Virginia have provisions requiring a “thorough and efficient” education system,

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<sup>3</sup> Reliance on state education clauses may be contrasted with an approach based on “substantive due process,” which courts since *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), have been reluctant to embrace.

<sup>4</sup> See John Dayton, *Serrano and Its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 EDUC. L. REP. 447, 456-57 & n.52 (2001) (grouping state education clauses into four categories from weakest to strongest, but concluding that “a review of judicial decisions on school funding challenges indicates no consistent pattern”); Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281, 285 (1998) (“[E]ven where different states share similar education clauses, no consistent pattern of judicial results has emerged.”).

<sup>5</sup> See *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996). The Illinois Constitution provides: “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. . . . The State has the primary responsibility for financing the system of public education.” ILL. CONST. art. X, § 1.

<sup>6</sup> See *Campaign for Fiscal Equity v. New York*, 801 N.E.2d 326 (N.Y. 2003). The New York Constitution provides: “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.Y. CONST. art. XI, § 1.

adequacy suits in those states have met different fates.<sup>7</sup> Thus, the general and open-ended texture of state education clauses leaves courts with wide interpretive latitude.

This latitude means that sound doctrinal reasoning, though necessary, is not sufficient by itself to win an adequacy lawsuit. As in all litigation, but especially here, legal arguments must be embedded within a broader litigation strategy that creates the optimal “atmospherics” for leading a court to the desired result. Those atmospherics include: a carefully chosen and politically appealing group of plaintiffs with broad geographic, socioeconomic, and racial diversity; a compelling presentation of facts and expert opinions describing the deficiencies of the education system; a clear conception of the desired remedy and the court’s role in enforcing it; and, to the extent possible, strong signals to the court—through amicus briefs, reports by independent commissions, editorials, and other media—of wide political support for the lawsuit and any remedial action arising from it. This memo touches on, but does not fully explore, these critical issues.

Second, this memo addresses the legal foundations for an *adequacy* standard and does not discuss *equity* claims available under the California Constitution. Although a shift from equity to adequacy in school finance litigation has been observed by many commentators,<sup>8</sup> in reality the two concepts are not entirely distinct and are often blended in adjudication. By focusing here on adequacy, I do not mean to discount the

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<sup>7</sup> Compare *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979) (reading “thorough and efficient” clause to require high educational standards) with *Marrero ex rel. Tabalas v. Pennsylvania*, 739 A.2d 110 (Pa. 1999) (finding “thorough and efficient” clause judicially unenforceable).

<sup>8</sup> See, e.g., Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995); William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL’Y 376 (1994).

significance of equity concepts for school finance litigation. Indeed, the California Supreme Court historically has been willing to adopt progressive interpretations of the state Constitution in aid of equal educational opportunity, albeit with uneven political consequences.<sup>9</sup>

Part I of this memo examines the justiciability of adequacy claims under the California Constitution. Part II takes a close look at Article IX, Section 1. Part III focuses on Article IX, Section 5. Part IV offers some preliminary thoughts on how an adequacy suit might be shaped to leverage the requirements of the Constitution.

## I. JUSTICIABILITY

At the outset, an adequacy suit presents two distinct issues. The first is whether the state constitution guarantees a level of adequacy that the current education system does not meet. The second is which branch of government is constitutionally vested with the authority to make that determination. To a court mindful of separation of powers, the second question occurs at the threshold of the suit: Is educational adequacy an issue properly subject to *judicial*, as opposed to legislative, determination? Some courts have

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<sup>9</sup> See, e.g., *Butt v. California*, 4 Cal. 4th 668 (1992) (school closure for lack of funds violates students' fundamental right to basic equality in public education); *Crawford v. Bd. of Educ.*, 17 Cal. 3d 280 (1976) (school districts have constitutional duty to alleviate racial segregation, whether *de facto* or *de jure*, notwithstanding contrary holding under federal Constitution in *Milliken v. Bradley*, 418 U.S. 717 (1974)); *Serrano v. Priest*, 18 Cal. 3d 728 (1976) (tying availability of school revenue to district wealth violates state constitution, notwithstanding contrary holding under federal Constitution in *Rodriguez*). *Crawford* and its progeny were followed in 1979 by a voter-initiated state constitutional amendment limiting school districts' duties for pupil assignment and transportation to the requirements of the federal Constitution. See CAL. CONST. art. I, § 7(a). The implementation of *Serrano* has been criticized for causing a leveling down of school funding throughout the state. See *infra* note 43 and accompanying text.

held that determinations of adequacy are exclusively the province of the legislature and are thus non-justiciable.<sup>10</sup> The majority view, however, is to the contrary.<sup>11</sup>

As a general rule, a controversy may be non-justiciable when it “revolve[s] around policy choices and value determinations constitutionally committed for resolution to the [political branches].” *Schabarum v. Cal. Legislature*, 60 Cal. App. 4th 1205, 1213 (1998) (internal quotation marks and citation omitted). The U.S. Supreme Court has articulated six factors often cited as guideposts for assessing justiciability. See *Baker v. Carr*, 369 U.S. 186, 217 (1962). Two of the factors arguably draw into question the justiciability of educational adequacy. The first is “a textually demonstrable constitutional commitment of the issue to a coordinate political department,” and the second is “a lack of judicially discoverable and manageable standards for resolving it.” *Id.*<sup>12</sup> I consider each in turn.

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<sup>10</sup> See *Ex parte James*, 836 So.2d 813, 817 (Ala. 2002); *Marrero v. Pennsylvania*, 739 A.2d 110, 113-14 (Pa. 1999); *Coalition for Adequacy & Fairness in Sch. Funding v. Chiles*, 680 So.2d 400, 408 (Fla. 1996); *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996). In one of the earliest school finance cases, a three-judge federal district court held that the plaintiffs’ equal protection claim, which would have “required that expenditures be made only on the basis of pupils’ educational needs,” presented a non-justiciable question. *McInnis v. Shapiro*, 293 F. Supp. 327, 335 (N.D. Ill. 1968). The U.S. Supreme Court summarily affirmed. See *McInnis v. Ogilvie*, 394 U.S. 322 (1969). Two years later, in *Serrano v. Priest*, 5 Cal. 3d 584 (1971), the California Supreme Court said the significance of the summary affirmance in *McInnis* was “unclear” and expressed no view on the merits of the district court’s finding of non-justiciability. *Id.* at 616-17.

<sup>11</sup> See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 484 (Ark. 2002) (“The court’s refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state.”); *DeRolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997) (“The judiciary was created as part of a system of checks and balances. We will not dodge our responsibility by asserting that this case involves a nonjusticiable political question. . . . We refuse to undermine our role as judicial arbiters and to pass our responsibilities onto the lap of the General Assembly.”); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 208 (Ky. 1989) (“To avoid deciding the case because of ‘legislative discretion,’ ‘legislative function,’ etc., would be a denigration of our own constitutional duty.”); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989).

<sup>12</sup> The other four factors are “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . . the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; . . . an unusual need for unquestioning adherence to a political decision already made; [and] the potentiality of

1. Article IX of the California Constitution expressly assigns “the Legislature” the duty to provide education. At least one court has suggested that judicial review stands on firmer ground when a constitution designates the *state*, not the legislature, as the entity responsible for education. See *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 484 (Ark. 2002) (“The people of this state unquestionably wanted all departments of state government to be responsible for providing [education].”).<sup>13</sup>

However, the California Supreme Court has long construed Article IX’s directives to the Legislature as a source of “enforceable rights” subject to judicial inquiry. *Piper v. Big Pine Sch. Dist.*, 193 Cal. 664, 669 (1924). *Piper* addressed the constitutionality of a state law excluding from public schools any Indian child eligible to attend a school established by the federal government. See *id.* at 667. In striking down the law, the Court explained that the exclusion left the mandate of Article IX, section 5 “wholly ignored,” such that “no legislation whatever has been had in compliance therewith.” *Id.* at 673. *Piper* makes clear that textual commitment of educational responsibility to the Legislature does not bar judicial review.<sup>14</sup>

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embarrassment from multifarious pronouncements by various departments on one question.” *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>13</sup> See ARK. CONST. art XIV, § 1 (requiring that “the *State* shall ever maintain a general, suitable and efficient system of free public schools” (emphasis added)).

<sup>14</sup> California courts have occasionally described the Legislature’s power over the public school system as “exclusive, plenary, absolute, entire, and comprehensive, subject only to constitutional constraints.” *Cal. Teachers Ass’n v. Huff*, 5 Cal. App. 4th 1513, 1524 (1992); see *Hall v. City of Taft*, 47 Cal. 2d 177, 180-81 (1956); *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1134-35 (1999). However, these cases involved disputes over the proper division between state and local control of public schools. See *Hall*, 47 Cal. 2d at 184-89 (finding municipal building regulations preempted by state laws governing school construction); *Wilson*, 75 Cal. App. 4th at 1147 (upholding charter schools as a valid delegation of the Legislature’s power over education); *Huff*, 5 Cal. App. 4th at 1524-25 (relying on the Legislature’s broad power over education to conclude that “regulation of the education system by the Legislature will be held to be controlling over any inconsistent local attempts at regulation or

The weight of authority beyond California confirms this view. Adequacy suits have succeeded in Kansas, Kentucky, Massachusetts, New Hampshire, New York, North Carolina, Ohio, Texas, West Virginia, and Wyoming, among other states—all of which, like California, have constitutions that explicitly assign the legislature (and sometimes the executive branch as well) the duty to provide education.<sup>15</sup> At bottom, the willingness of state courts to enforce these legislative duties is rooted in notions of judicial responsibility: “The judiciary has the ultimate power, and the duty, to apply, interpret, define, and construe all words, phrases, sentences and sections of the . . . Constitution as necessitated by the controversies before it.” *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 209 (Ky. 1989); *accord People v. Lynch*, 51 Cal. 15, 25-26 (1875) (“The courts cannot shirk the responsibility of deciding [constitutional] questions, when presented. . . . This duty must be performed, whatever the consequences.”).

2. In the few jurisdictions where adequacy suits have been held non-justiciable, a perceived lack of judicially manageable standards has been the chief concern. The concern applies both to determining liability and to crafting remedies. *See Marrero v. Pennsylvania*, 739 A.2d 110, 113-14 (Pa. 1999) (“[T]his court is . . . unable to judicially define what constitutes an ‘adequate’ education or what funds are ‘adequate’ to support such a program.”); *Ex parte James*, 836 So.2d 813, 817 (Ala. 2002) (“[T]he pronouncement of a specific remedy ‘from the bench’ would necessarily represent an

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administration of the schools”). The cases do not assert the Legislature’s power over education vis-à-vis the judiciary.

<sup>15</sup> *See* KAN. CONST. art. VI, § 1; KY. CONST. § 183; MASS. CONST. pt. II, ch. 5, § 2; N.H. CONST. pt. II, art. 83; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 1; OHIO CONST. art. VI, § 2; TEX. CONST. art. VII, § 1; W. VA. CONST. art. XII, § 1; WYO. CONST. art. VII, § 1.

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.”).

Because the issue of manageable standards goes to the heart of interpreting the education clauses of the state constitution, the balance of this memo may be understood as a response to this justiciability concern. The task is to show that the concept of adequacy is anchored in constitutional standards that are judicially discoverable and serviceable in adjudication. In approaching this task, three observations may be helpful.

First, the type of standards capable of allaying a court’s concern with overstepping its authority need not be very precise. Courts have treated open-ended terms in education clauses, such as “thorough,” “efficient,” “general,” and “uniform,” as legitimate sources of adequacy standards. If Texas precedent offers any guide, the issue of justiciability poses little obstacle to an adequacy suit in California. The education clause of the Texas Constitution resembles a combination of Sections 1 and 5 of California’s Article IX:

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.

TEX. CONST. art. VII, § 1. In finding a school finance suit under this provision to be justiciable, the Texas Supreme Court said:

This duty [to provide public free schools] 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.” While these are admittedly not precise terms, they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature’s actions. . . . 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.

*Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989).

Second, courts have utilized diverse but ultimately conventional interpretive methods in elucidating adequacy standards. Beyond close reading of constitutional text, courts have turned to constitutional structure and history to derive the meaning of state education clauses. *See, e.g., McDuffy v. Secretary of Educ.*, 615 N.E.2d 516, 526-48 (Mass. 1993) (examining constitutional structure and reviewing history of public education in Massachusetts). Some courts have deferred to “standards enunciated by the legislature and the state department of education” to inform constitutional adjudication. *Unified Sch. Dist. No. 229 v. Kansas*, 885 P.2d 1170, 1186 (Kan. 1994) (quoting trial court). Moreover, state courts, including California’s, routinely look to interpretations of similar language by other state courts. *See Arcadia Unified Sch. Dist. v. State Dep’t of Educ.*, 2 Cal. 4th 251, 261 (1992) (interpreting Education Article “by looking to other states’ interpretations of similar provisions in their states’ constitutions”); *Rose*, 790 S.W.2d at 209-10 (same). In short, adequacy suits call on courts to be resourceful in interpretive methodology, but they do not require the use of methods unfamiliar to the judicial role.

Third, the issue of justiciability illuminates the more general point that adequacy lawsuits, unlike many other areas of constitutional adjudication, implicate separation-of-powers concerns from beginning to end. Even when justiciability is not at issue, the underlying tension between judicial and legislative roles lingers in the course of evaluating liability and fashioning a remedy. It is thus important for plaintiffs not only to

argue for standards that appeal to a sense of judicial duty and have a firm basis in the text, structure, and history of the constitution, but also to have a clear conception of how far the court should go (*i.e.*, how prescriptive or coercive it should be) in enforcing standards of educational adequacy. Judicial duty notwithstanding, a court may hesitate to find liability or even justiciability if it is unable to see the “endgame” with respect to its involvement in the litigation. *See City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995) (finding adequacy suit non-justiciable and citing the decades-long New Jersey school finance litigation as “a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature”). A successful adequacy suit requires both standards for liability and standards for compliance, with the latter conceptually linked to the former. But standards for compliance must also have political traction and a practical likelihood of attainment, lest the court decline to risk its authority and prestige. This underscores the importance of embedding legal arguments within a broader strategy designed to marshal political support for—and, in turn, judicial confidence in—resort to the courts to remedy educational inadequacy.

## **II. ARTICLE IX, SECTION 1**

From its inception in 1849, Article IX of the California Constitution has been dedicated to “Education.” Section 1 provides:

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.

At least three state supreme courts have found school finance systems to be constitutionally inadequate under similar provisions.<sup>16</sup> I examine Section 1 in light of the Constitution’s text, structure, and history, as well as interpretations by California and other courts.

### A. Text

At a glance, Section 1 appears to paint in broad strokes a mission statement for California’s education system. As such, the provision is susceptible to being construed as hortatory or aspirational, with no substantive or operational bite.<sup>17</sup> The text of Section 1, however, hardly requires such a reading.

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<sup>16</sup> See *Montoy v. Kansas*, 102 P.3d 1160 (Kan. 2005) (interpreting KAN. CONST. art. VI, § 1 (“The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools . . .”), and § 6(b) (“The legislature shall make suitable provision for finance of the educational interests of the state.”)); *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003) (interpreting 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.”)); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002) (interpreting 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.”)).

In addition, the supreme courts of Massachusetts and New Hampshire have found constitutional inadequacy under education clauses older than, though still resemblant of, California’s Section 1. See *McDuffy v. Secretary of Educ.*, 615 N.E.2d 516 (1993) (interpreting MASS. CONST. pt. II, ch. 5, § 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 . . . , it shall be the duty of legislatures and magistrates . . . to cherish the interests of literature and the sciences, and all seminaries of them; especially . . . public schools and grammar schools in the towns . . .”)); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993) (interpreting N.H. CONST. pt. II, art. 83 (“Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government . . . ; it shall be the duty of the legislators and magistrates . . . to cherish the interest of literature and the sciences, and all seminaries and public schools . . .”)).

Indiana, Iowa, Missouri, and Nevada also have education clauses similar to California’s Article IX, Section 1, but no state supreme court decisions assessing educational adequacy under those clauses have been issued.

<sup>17</sup> Cf. *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178, 1187 (Ill. 1996) (construing Ohio constitutional requirement of “efficiency” in system of free schools to be “a purely hortatory statement of principle,” not “an enforceable guarantee of equality,” in light of framing history); *Scott v.*

## 1. “the Legislature shall encourage”

To begin with, the plain language of the provision—“the Legislature *shall* encourage”—imposes a legal duty on the Legislature. The word “shall” is unambiguous. Section 1’s textual injunction to the Legislature is made even more clear by the rule of construction dictated in the Constitution itself: “The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.” CAL. CONST. art. I, § 26.<sup>18</sup>

## 2. “by all suitable means”

The scope of the Legislature’s duty is revealed by the phrase “by all suitable means.” The duty to “encourage” education is not trivial. The Legislature is directed to use “*all* suitable means,” with the word “all” implying a duty to do the utmost. Although the Legislature necessarily has discretion in choosing means, Section 1 contemplates a best or maximal effort.

The word “suitable” further clarifies the Legislature’s duty and, as other courts have held, provides a textual basis for inferring a requirement of educational adequacy. Interpreting the Kansas education clause, which provides that “[t]he legislature shall make suitable provision for finance of the educational interests of the state,” KAN.

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*Commonwealth*, 443 S.E.2d 138, 141-42 (Va. 1994) (construing Virginia constitutional mandate that “[t]he General Assembly . . . shall seek to ensure that an educational program of high quality is established and continually maintained” to be “merely aspirational”).

<sup>18</sup> California courts have made passing references to Section 1 both as a font of legislative “power” or “discretion,” see *MacMillan Co. v. Clarke*, 184 Cal. 491, 500 (1920); *Wilson v. State Bd. of Educ.*, 75 Cal. App. 4th 1125, 1134 (1999), and as a source of legislative “duty,” see *Wetmore v. City of Oakland*, 99 Cal. 146, 150 (1893); *Univ. of So. Cal. v. Robbins*, 1 Cal. App. 2d 523, 528 (1934). These two views are not mutually exclusive. Section 1 vests the Legislature with broad authority and discretion in the educational sphere. At the same time, it expressly commands the Legislature to perform a constitutional duty.

CONST. art. VI, § 6(b), the Kansas Supreme Court said: “The standard most comparable to the Kansas constitutional requirement of ‘suitable’ funding is a requirement of adequacy found in several state constitutions.” *Unified School District No. 229*, 885 P.2d at 1185 (quoting trial court); see *Montoy v. Kansas*, 102 P.3d 1158 (Kan. 2005) (holding school finance system unconstitutional for failure to make “suitable provision”).

Similarly, construing the Texas Constitution’s mandate that the legislature “make suitable provision” for public education, TEX. CONST. art. XII, § 1, the Texas Supreme Court said: “A public school system dependent on local districts free to choose not to provide an adequate education would in no way be suitable.” *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 580 (Tex. 2003).<sup>19</sup>

A careful look at Section 1 supports this reading of “suitable.” In ordinary usage, “suitable” means appropriate, well-adapted, or conducive to some purpose or goal. The key question is: “suitable” for what? In the context of Section 1, which proclaims the fundamental reasons for establishing public education, the word “suitable” is readily construed to mean *suitable for achieving the purposes and ends of the state education system*. Thus, Section 1 enjoins the Legislature, in discharging its duty to encourage education, to employ all means conducive to or appropriate for realizing the purposes for which the Constitution establishes a system of public education.

Against this interpretation, it may be argued that the meaning of “suitable” is informed not only by educational considerations but also by other factors that may

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<sup>19</sup> See also *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 736 (Tex. 1995) (“Certainly, if the Legislature substantially defaulted on its responsibility such that Texas school children were denied access to that education needed to participate fully in the social, economic, and educational opportunities available in Texas, the ‘suitable provision’ clause would be violated.”).

concern the Legislature when making policy. On this view, the phrase “suitable means” refers to those means that the Legislature, exercising its discretion and judgment, deems appropriate in the total balance of educational, budgetary, and political considerations.

Although nothing in the word “suitable” forecloses this construction,<sup>20</sup> “[i]t is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context.” *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). Although “suitable” may be too elastic to have a “natural” meaning even in context, the unmistakable object of Article IX, Section 1 is to direct the Legislature’s attention to the accomplishment of certain educational purposes. It may not be feasible to wholly preclude considerations of expedience or practicality. But it frustrates the object of Section 1 to interpret “suitable means” as any means that suit the preference, discretion, or political judgment of the Legislature. The educational purposes set forth in Section 1 are properly viewed as the dominant (if not exclusive) concepts that qualify the term “suitable.”

What are those educational purposes? They are plainly stated. The Legislature is to employ all means suitable (1) for achieving “[a] general diffusion of knowledge and intelligence . . . essential to the preservation of the rights and liberties of the people” and (2) for “the promotion of intellectual, scientific, moral, and agricultural improvement.” Together, these phrases give content to a notion of educational adequacy. Let us take a close look at each.

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<sup>20</sup> The term “suitable” does not appear anywhere else in the California Constitution; thus, no guidance is available from other usage.

**3. “A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people”**

The opening clause of Section 1 conveys three ideas. First, to preserve the rights and liberties of the people, the diffusion of knowledge and intelligence must be “general.” By calling for a *general* diffusion, Section 1 contemplates an education system that is democratic and widely accessible. It is not enough for knowledge and intelligence to be diffused to specific groups or sectors of society. It must be diffused “throughout the people.” *McDuffy*, 615 N.E.2d at 524 (construing “generally” in Massachusetts’ education clause, MASS. CONST. pt. II, ch. 5, § 2). Like California’s Section 1, New Hampshire’s education provision begins: “Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government . . . .” N.H. CONST. pt. II, art. 83. The New Hampshire Supreme Court has construed “generally” to mean “so as to include every particular, or every individual.” *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1378 (N.H. 1993) (quoting Oxford English Dictionary); *see also Edgewood*, 777 S.W.2d at 396 (observing that the Texas Constitution requires a “*general* diffusion of knowledge” and that “[t]he present system, by contrast, provides not for a diffusion that is general, but for one that is limited and unbalanced”).

Second, implicit in Section 1’s opening clause is a requirement that the diffusion of knowledge and intelligence be of *sufficient quality* to preserve the rights and liberties of the people. The California Constitution specifies those rights and liberties in detail. They include the right of “pursuing and obtaining safety, happiness, and privacy,” CAL. CONST. art. I, § 1; the right of “acquiring, possessing, and protecting property,” *id.*; the

right to “freely speak, write and publish his or her sentiments on all subjects,” *id.* § 2(a); the right to “instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good,” *id.* § 3(a); the right to trial by jury, *see id.* § 16; and the right to vote, *see* CAL. CONST. art. II, § 2. As Article IX, Section 1 makes clear, the preservation of these rights depends on a certain degree of knowledge and intelligence. *Cf. Hartzell v. Connell*, 35 Cal. 3d 899, 906, 911 (1984) (Section 1 sets forth “the constitutional role of education in preserving democracy”). Section 1 thus envisions a “suitable” education system as one that is adequate to enable the people to meaningfully exercise and thereby preserve their rights and liberties. The Texas Supreme Court recently adopted this reading of Texas’s education clause, which is similar to California’s Section 1:

[B]ecause the State has chosen to rely heavily on school districts to discharge its duty to provide a constitutionally adequate education—that is, “[a] general diffusion of knowledge . . . essential to the preservation of the liberties and rights of the people”—the State must require that school districts achieve this goal; otherwise, the public school system is not suitable for its purpose.

*West Orange-Cove*, 107 S.W.3d at 581 (quoting TEX. CONST. art. VII, § 1).

Third, by declaring “the preservation of the rights and liberties of the people” to be the ultimate aim, Section 1 makes clear that the Legislature’s duty to provide education is owed not only to individual schoolchildren, but to “*the people*” as a whole. *See MacMillan Co. v. Clarke*, 184 Cal. 491, 500 (1920) (construing the initial clause of Section 1 to mean that “the free school system . . . is not primarily a service to the individual pupils, but to the community . . . [and] for the benefit of the general public”). This interpretation recognizes the mutual interdependence inherent to the preservation of

rights and liberties. One’s right to trial by jury, for example, depends on the intelligent exercise of judgment by others; one’s right to possess property is undermined if inadequate education contributes to crime.<sup>21</sup> Section 1 thus takes an expansive view of the stakeholders in the education system, suggesting that diverse sectors of society may seek enforcement of the Legislature’s duty.

**4. “the promotion of intellectual, scientific, moral, and agricultural improvement”**

Finally, Section 1 directs the Legislature to encourage “the promotion of intellectual, scientific, moral, and agricultural improvement.” This phrase contemplates the improvement of society as a whole, underscoring the collective stake in the education system. Further, the word “improvement” means the education system must evolve and continually advance the society from one state of progress to the next. Construing Kansas’s requirement that “[t]he legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools,” KAN. CONST. art. 6, § 1, the state’s high court recently said: “The Kansas Constitution thus imposes a mandate that our educational system cannot be static or regressive but must be one which ‘advance[s] to a better quality or state.’ ” *Montoy v. Kansas*, 102 P.3d 1158, 1163-64 (Kan. 2005) (quoting definition of “improve”). Under Section 1, when the Legislature sustains or acquiesces in a protracted pattern of educational decline, it runs afoul of its affirmative duty to promote intellectual, scientific, moral, and agricultural improvement.

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<sup>21</sup> Cf. *Ward v. Flood*, 48 Cal. 36, 51 (1874) (“The education of youth is emphatically their protection. Ignorance, the lack of mental and moral culture in earlier life, is the recognized parent of vice and crime in after years.”).

To recap: Article IX, Section 1 imposes a duty on the Legislature that is owed to “the people” as a whole. The duty is to employ “all suitable means” for realizing the purposes of the education system. Foremost among these purposes is achieving a “diffusion of knowledge and intelligence” that is “general,” democratic, and accessible, and of sufficient quality to ensure “the preservation of the rights and liberties of the people.” The education system must also “promot[e] . . . intellectual, scientific, moral, and agricultural improvement.” These directives establish the scope of the Legislature’s duty and provide standards for evaluating the adequacy of the education system.

### **B. Constitutional structure**

This reading of the text—in particular, the Legislature’s duty to be guided by educational and not political or other considerations in determining “suitable means”—is supported by the uniqueness of the Education Article in the Constitution as a whole. Besides Article IX, the California Constitution contains *no other provision* requiring the Legislature to establish public welfare or social services.

Indeed, the constitutional clauses concerning other social welfare institutions are couched in permissive not mandatory terms. The Public Finance Article, for example, authorizes but does not require the Legislature to provide assistance to vulnerable groups. *See* CAL. CONST. art. XVI, § 3 (“The Legislature shall have the power to grant aid” to orphans, abandoned children, needy blind persons, and needy physically handicapped persons). The Labor Relations Article authorizes but does not require the Legislature to establish minimum wages, worker protections, and workers’ compensation. *See* CAL. CONST. art. XIV, § 1 (“The Legislature may provide for minimum wages and for the

general welfare of employees . . . .”); *id.* § 4 (granting Legislature “plenary power . . . to create, and enforce a complete system of workers’ compensation”). The only mention of shelter or housing in the Constitution is a set of provisions *limiting* the state’s power to build low-rent housing. *See* CAL. CONST. art. XXXIV. Even the state’s prison system does not owe its existence to any constitutional mandate.<sup>22</sup>

In California’s lengthy Constitution, the Education Article stands alone in its explicit injunction to the Legislature to affirmatively establish a system of provision. This fact confirms the primacy of education in the constitutional scheme, and the text of Section 1, including the phrase “suitable means,” must be read in this light.

### **C. Constitutional history**

The primacy of education is further confirmed by the history of Article IX and in particular Section 1. The Education Article has been a part of the California Constitution since its adoption in 1849. Apart from the three branches of government, education and the state militia were the only public institutions established by the original Constitution. *See* CAL. CONST. of 1849, arts. VII (militia), IX (education).

#### **1. The 1849 Constitution**

Article IX initially included only the declarative portion of Section 1’s current text: “The Legislature shall encourage, by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement.” CAL. CONST. of 1849, art.

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<sup>22</sup> Article X of the California Constitution of 1879 required the establishment of a State Prison Board, but the provision was later repealed. It was replaced by provisions authorizing the Legislature to establish penal institutions, but those provisions were also repealed in 1967 on the ground that they were “merely permissive.” Assembly Interim Committee on Constitutional Amendments 32 (afternoon session, Oct. 26, 1967). The California Constitution currently makes no mention of prisons or correctional facilities.

IX, § 2. The sentence was followed by a provision stating that all proceeds from federal lands granted to California “shall be inviolably appropriated to the support of common schools throughout the State.” *Id.* The history of this latter provision illuminates the importance that the Constitution’s drafters assigned to education in the full context of the government’s functions.

As originally proposed by a drafting committee at the Constitutional Convention of 1849, the federal lands provision ended with the following proviso: “*Provided, That the Legislature may, if the exigencies of the State require it, appropriate to other purposes the revenue derived from the 500,000 acres of land granted by Congress to new States . . . .*”<sup>23</sup> The rationale for the proviso was that the territory granted by Congress included lands thought to be valuable for mining and capable of producing substantial rents and profits for the state. As one delegate explained: “The Committee thought [the use of land profits] should be left open to the Legislature, because if you devote it all to the support of education, it might make too large a fund for the support of education. At any rate, it might deprive the State of the means of supporting itself without too onerous a taxation . . . .”<sup>24</sup> Another delegate argued: “if these lands were located in the gold mines the fund derived from them might rise to such an enormous amount that it might be doing other parts of the State injustice to appropriate all this revenue to school purposes.”<sup>25</sup>

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<sup>23</sup> REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION 203 (1850).

<sup>24</sup> *Id.* (statement of Mr. Sherwood).

<sup>25</sup> *Id.* at 204 (statement of Mr. Crosby).

This argument was met by a motion to delete the proviso, with supporters of the motion declaring the implausibility of devoting too much money to education:

Now, sir, if we can locate in the gold mines and procure a fund sufficient to educate our children without calling upon the parents to do so, we should do it. I am decidedly in favor of placing every farthing that we can, and secure it by constitutional provision, in the hands of this community for the purpose of educating our children. Nothing will have a greater tendency to secure prosperity to the State, stability to our institutions, and an enlightened state of society, than by providing for the education of our posterity.<sup>26</sup>

As to the proposed limitation. I ask you whether you have ever seen a school fund sufficiently large to answer every purpose, or secure too great a spread of knowledge?<sup>27</sup>

[T]here cannot be too large a fund for educational purposes. . . . We should, therefore, carefully provide that this fund shall be used for no other purpose.<sup>28</sup>

The allocation of land proceeds exclusively to education was also defended on the ground that it would encourage immigration to the new state. As one delegate said, it would “be an inducement to a most valuable class of the population to come here—families having children.”<sup>29</sup>

Ultimately, the Convention voted 31-5 to delete the proviso,<sup>30</sup> thereby sustaining the “inviolable” appropriation of land proceeds to common schools. This history provides a glimpse of the exceptional status that the Constitution’s framers accorded to education within the overall functions of the government.

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<sup>26</sup> *Id.* at 203-04 (statement of Mr. McCarver).

<sup>27</sup> *Id.* at 204 (statement of Mr. Semple).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 346-47 (statement of Mr. Lippett); *see id.* at 353 (statement of Mr. McDougal) (“We can create no fund too large for the purpose of education. I call upon my old bachelor friends to support this if they want wives, for it will introduce families into this country.”).

<sup>30</sup> *Id.* at 354.

## 2. The 1879 Constitution

The opening clause of what is now Article IX, Section 1—“A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people”—was added during the Constitutional Convention of 1878-79. The chair of the Convention’s Education Committee, Judge Joseph Winans, explained that this introductory clause in the Education Article was “declaratory of the importance and magnitude of the service, and declaratory of the principle which it involves.”<sup>31</sup> “Public education forms the basis of self-government and constitutes the very corner stone of republican institutions.”<sup>32</sup>

The inclusion of Section 1, with the introductory clause, in the Education Article was opposed by some delegates on the grounds that it was “simply a glimmering generality” that “impose[d] no obligation upon the State,”<sup>33</sup> and that it was “simply a preamble to a proposed Constitution pertaining to education.”<sup>34</sup> In response, one of the delegates defended the language on the following ground:

We have here in this first section the principles, in a modified form, that underlie a system of general education. Here, now, is a republican form of government in which the people are sovereign. This Government must have the means of perpetuating itself, therefore the people must be educated. Again, we must have good rulers, and good legislators to make the laws. These rulers and these statesmen must come up from the ranks of the people; hence the people must be liberally educated. Again, the people must understand the importance of the laws

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<sup>31</sup> 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1087 (1881) (statement of Mr. Winans); *see id.* (observing that the 1879 language was “taken from the Constitutions of Arkansas and Missouri, in part”).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (statement of Mr. Laine).

<sup>34</sup> *Id.* (statement of Mr. Filcher); *see id.* (“I am opposed to it, simply because there is nothing in it.”).

that are made; hence the people must be liberally educated. This section expresses that idea . . . .<sup>35</sup>

Another delegate explained: “If the question is asked why the State furnishes free education? the answer is here in this section . . . . That is the basis upon which you found the whole thing.”<sup>36</sup> Yet another delegate emphasized that the language of Section 1 “means something” beyond a mere statement of principle: “This makes it the duty of the Legislature to forward [education] in every way that the Legislature may have the power to do.”<sup>37</sup>

In the context of these arguments, the Convention rejected a proposal to delete Section 1<sup>38</sup> as well as a proposal to delete the introductory clause of Section 1.<sup>39</sup> In the end, Section 1 was approved in 1879 in the form it exists today, with the introductory clause stating the fundamental purpose of the education system as the framers understood it. This statement of purpose broadly defines the scope of the Legislature’s duty.

### III. ARTICLE IX, SECTION 5

The original version of what is now Article IX, Section 5 appeared in the California Constitution as follows:

The Legislature shall provide for a system of common schools, by which a school be kept up and supported in each district at least three months in every year, and any school neglecting to keep and support such a school, may be deprived of its proportion of the interest of the public fund during such neglect.

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<sup>35</sup> *Id.* at 1088 (statement of Mr. Wickes).

<sup>36</sup> *Id.* at 1089 (statement of Mr. Morse). Mr. Morse argued in favor of keeping the full text of Section 1 but conceded that “it is not essential.” *Id.*

<sup>37</sup> *Id.* (statement of Mr. Smith).

<sup>38</sup> *See id.* at 1089 (rejecting amendment offered by Mr. Holmes).

<sup>39</sup> *See id.* at 1090 (rejecting amendment offered by Mr. Johnson).

CAL. CONST. of 1849, art. IX, § 3. In 1879, this language was changed in three ways. First, the Legislature was charged with providing not just “a school” but “a free school.” Second, the requirement of “three months” was changed to “six months.” Third, the deprivation-of-funding clause was deleted. Since 1879, the text has remained unchanged:

The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.

CAL. CONST. art. IX, § 5.

From early on, the California Supreme Court has interpreted Section 5 to confer judicially enforceable educational rights. It is well-established, for example, that Section 5 creates “a legal right” entitling all children “to be educated at the public expense.” *Ward v. Flood*, 48 Cal. 36, 50-51 (1874) (prohibiting Legislature from excluding black children from public schools because of their race, though permitting segregated schools); accord *Piper v. Big Pine Sch. Dist.*, 193 Cal. 664, 669 (1924). Although no authority has squarely defined the educational quality or content guaranteed by Section 5, the case law in California and elsewhere suggest that an adequacy standard is readily inferred from the text and history of the provision.

**A. “a system of common schools . . . a free school”**

The California Supreme Court has held that “the word ‘system,’ as used in article IX, section 5, implies a ‘unity of purpose as well as an entirety of operation, and the direction to the legislature to provide “a” system of common schools means *one* system which shall be applicable to all the common schools within the state.’ ” *Serrano v. Priest*, 5 Cal. 3d 584, 595 (1971) (quoting *Kennedy v. Miller*, 97 Cal. 429, 432 (1893)).

Although *Serrano* declined to hold that Section 5 requires equalized school spending, it cited *Piper* in affirming that “the educational system must be uniform in terms of the prescribed course of study and educational progression from grade to grade.” *Id.* at 596 (citing *Piper*, 193 Cal. at 669, 673).

In fact, the Court in *Piper* said much more about the common-school system contemplated by Section 5:

The public school system of this state is a product of the studied thought of the eminent educators of this and other states of the Union, perfected by years of trial and experience. . . . Each grade forms a working unit in a uniform, comprehensive plan of education. Each grade is preparatory to a higher grade, and, indeed, affords an entrance into schools of technology, agriculture, normal schools, and the University of California. In other words, the common schools are doorways opening into chambers of science, art and the learned professions, as well as into fields of industrial and commercial activities. Opportunities for securing employment are often more or less dependent upon the rating which a youth, as a pupil of our public institutions, has received in his school work. *These are rights and privileges that cannot be denied.*

*Piper*, 193 Cal. at 673 (emphasis added). As this passage suggests, the right to education established in Section 5 is substantial. It is one that “affords an entrance into schools of technology, agriculture, normal schools, and the University of California,” one that opens the door “into chambers of science, art and the learned professions, as well as into fields of industrial and commercial activities,” and one that provides “[o]pportunities for securing employment.” *Id.*

Six decades after *Piper*, the California Supreme Court further elaborated the “constitutionally recognized purposes of education” in the course of deciding whether fees charged for extracurricular activities violate the “free school” guarantee of Section 5. *Hartzell v. Connell*, 35 Cal. 3d 899, 909 (1984). In finding such fees invalid under

Section 5, the Court examined “the nature of the free school concept” in the context of “the overall constitutional scheme,” beginning with Section 1’s proclamation that “[a] general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people.” *Id.* at 906 (observing that Section 1’s opening clause and the free school guarantee were adopted contemporaneously in 1879). The Court understood free schools to be not only a vital safeguard against tyranny, *see id.* at 906-07 (quoting Thomas Jefferson, Horace Mann, and John Swett), but also a means of promoting socioeconomic equality:

“[T]he poor man, whom the law does not allow to take an ear of corn when starving, nor a pair of shoes for his freezing feet, is allowed to put his hand into the pocket of the rich, and say, You shall educate me, not as you will, but as I will: not alone in the elements, but, by further provision, in the languages, in sciences, in the useful and in elegant arts.”

*Id.* at 907 (quoting Ralph Waldo Emerson); *see id.* at 906 (“ ‘a liberal education . . . breaks down aristocratic caste’ ” (quoting statement of delegate John Wickes at the Constitutional Convention of 1878-79)).

The Court in *Hartzell* went on to identify “a political, an economic, and a social dimension” to the free school guarantee. *Id.* at 907. First, “education prepares students for active involvement in political affairs. . . . Without high quality education, the populace will lack the knowledge, self-confidence, and critical skills to evaluate independently the pronouncements of pundits and political leaders.” *Id.* at 907-08. Second, education “prepares individuals to participate in the institutional structures . . . that distribute economic opportunities and exercise economic power. . . . And, it is an essential step in providing the disadvantaged with the tools necessary to achieve

economic self-sufficiency.” *Id.* at 908 (internal quotation marks and citation omitted). Third, “education serves as a ‘unifying social force’ among our varied population, promoting cohesion based upon democratic values.” *Id.* (quoting *Serrano*, 5 Cal. 3d at 608). Reading Section 5 in a way that “does not sever the concept of education from its purposes,” *id.* at 909, the Court offered an expansive view of the educational activities that are “essential,” “integral,” or “fundamental” and thus protected by Section 5’s free school guarantee, *id.* at 909-10.

*Hartzell* addressed only the question whether certain educational programs, if provided by a school, must be provided free of charge. It did not address whether a free school is obligated to provide certain educational programs as an original matter. Nevertheless, *Hartzell* is significant for its broad articulation of the constitutional purposes that inform the Legislature’s duty under Section 5.

Moreover, in elucidating an adequacy standard under Section 5, *Campaign for Fiscal Equity v. New York*, 655 N.E.2d 661 (N.Y. 1995), is especially instructive. Similar to Section 5, the New York Constitution provides: “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.Y. CONST. art. XI, § 1. In *Campaign for Fiscal Equity*, the New York Court of Appeals interpreted the guarantee of “a system of free common schools” to require the provision of “a sound basic education,” defined as “an education . . . consist[ing] of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.” *Id.* at 666; see *Campaign for Fiscal Equity v. New York*, 801 N.E.2d

326, 332 (N.Y. 2003) (furthering defining “sound basic education” to require “a meaningful high school education, one which prepares them to function productively as civic participants”).

**B. “kept up and supported”**

A reading of Article IX, Section 5 that requires free common schools to meet a standard of adequacy defined by the constitutional purposes of education is further reinforced by the textual injunction that “a free school shall be *kept up* and supported in each district.” Inherent in the idea of being “kept up” is the notion of a standard. To require schools to be “kept up” is to require them to meet some criteria. The term has both a substantive component (“kept up” to an educational standard) and a temporal component (“kept up” over the course of time).

Several state constitutions express an analogous concept with the word “maintain,” and courts have recognized that the term “implies a continuing obligation to ensure compliance with evolving educational standards.” *Opinion of the Justices*, 624 So. 2d 107, 154 (Ala. 1993) (construing ALA. CONST. art. XIV, § 256 (“The Legislature shall establish, organize, and maintain a liberal system of public schools . . . .”)). In *Campaign for Fiscal Equity*, the New York Court of Appeals held that the constitutional duty of “maintenance and support of a system of free common schools” must be based on “what means the ‘rising generation’ needs in order to function productively as civic participants, . . . measured with reference to the demands of modern society.” 801 N.E.2d at 330. Notably, the California Legislature’s duty under Section 5 to “keep up”

the public schools over time is fully consonant with its duty under Section 1 to promote educational “improvement.”

**C. “at least six months”**

Finally, it bears mention that Section 5’s requirement that public schools be kept up and supported “at least *six months* in every year” cannot plausibly be construed as fixing a constitutional standard of adequacy. As the Court in *Hartzell* made clear, the language of Section 5 must be read in the context of “the overall constitutional scheme” and must be guided by the broad educational purposes stated in Section 1. 35 Cal. 3d at 905.

To read the requirement of “six months” as the constitutional floor would be to imply that other educational prescriptions in the Constitution likewise define the entirety of the Legislature’s duty. *See, e.g.*, CAL. CONST. art. IX, § 6 (requiring Legislature to annually allocate to each district at least \$120 per pupil in average daily attendance or at least \$2,400 total, whichever is greater, from the State School Fund); *id.* (requiring full-time teacher salaries to be at least \$2,400 per year). However, these clauses plainly reflect outdated standards of minimum provision.<sup>40</sup> To read them as establishing present-day minimums would be to mock the guiding statement of constitutional purpose in Section 1, not to mention its express requirement of educational “improvement.” Because “[e]lementary principles of construction dictate that where constitutional provisions can reasonably be construed to avoid a conflict, such an interpretation should

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<sup>40</sup> Indeed, the clauses use the terms “at least” or “not less than,” evincing a recognition that the constitutional duty could well be *greater* than the specified floor.

be adopted,” *Serrano*, 5 Cal. 3d at 596, the controlling standard of adequacy is not the specific minimums but rather the enduring educational purposes stated in Article IX.<sup>41</sup>

#### IV. PRELIMINARY THOUGHTS ON ADEQUACY CLAIMS

Several weaknesses in California’s K-12 education system make it a vulnerable target for an adequacy suit. Below are a few preliminary ideas on how an adequacy suit might be framed to leverage the constitutional requirements discussed above. These ideas suggest some concepts that may anchor a litigation strategy.

1. ***In funding education, the Legislature must be guided by educational standards, not political constraints or compromise.*** There is a firm basis in the text, structure, and history of the Constitution for a requirement that education funding reflect, first and foremost, the educational needs of children. Recent cases have found school finance systems inadequate and unconstitutional on this ground. *See Montoy*, 102 P.3d at 1164 (“the financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise”); *Campaign for Fiscal Equity*, 801 N.E.2d at 348 (“the political process allocates to City schools a share of state aid that does not bear a perceptible relation to the needs of City students”). An adequacy suit should develop evidence that the educational needs of children are presently not the California Legislature’s primary concern in school funding decisions.

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<sup>41</sup> The same argument applies to any suggestion that Proposition 98, *see* Cal. Const. art. XVI, § 8, establishes a constitutional standard of funding adequacy. The Proposition 98 formula is not guided by any notion of what it costs to achieve the educational purposes set forth in Article IX, Section 1. And even if the formula once yielded a level of funding that could be considered adequate, the decline of California’s public schools since the 1988 enactment of Proposition 98 suggests that the formula bears no relation to what might be considered adequate today.

Importantly, requiring the Legislature to center funding decisions on educational needs does not entail a constitutionally mandated level of funding. Its effect is to discipline the legislative process; its valence is procedural. For this reason, the requirement is one that courts need not flinch to embrace, even as it provides a foundation for significant reform, including educational cost studies.

**2. *The thirty-year pattern of decline in California’s public schools reflects an unconstitutional failure of duty by the Legislature.*** Article IX, Section 1’s requirement that the Legislature promote “improvement” provides a strong basis for demonstrating the unconstitutionality of the current system by situating it within a decades-long pattern of decline. Moreover, courts have recognized that “the issue of suitability is not stagnant.” *Montoy*, 102 P.3d at 1163. “[T]he State’s provision for a general diffusion of knowledge must reflect changing times, needs, and public expectations.” *Edgewood*, 917 S.W.2d at 732 n.14; *accord McDuffy*, 615 N.E.2d at 555 (“The content of the duty to educate which the Constitution places on the Commonwealth necessarily will evolve together with our society. Our Constitution, and its education clause, must be interpreted ‘in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning.’ ” (quoting *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (1978))).<sup>42</sup>

Given these pronouncements, putting California’s educational deficiencies within a temporal frame tells a compelling story: As the educational demands of society have grown, the state’s public schools have declined. This is a predicate for finding

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<sup>42</sup> Cf. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492-93 (1954) (“We must consider public education in the light of its full development and its present place in American life throughout the Nation.”).

unconstitutionality that again does not require a substantive theory of educational adequacy and, for this reason, may be appealing to a court.

**3. *The shortcomings of California’s education system are pervasive and systemic, not limited to a particular area or group.*** In their generality and breadth, the deficiencies of California public schools resemble those of the education systems successfully challenged as inadequate in Arkansas and Kentucky. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989). The fact that deficiencies are widespread presents three advantages for framing litigation.

First, the plaintiff class may be drawn broadly, with wide geographic, racial, and socioeconomic diversity encompassing not only the worst-off schools but also average or even above-average schools. A broad plaintiff class signals that the case involves a widely shared “public interest” and not a narrow “special interest.” In the Kentucky case, for example, the suit was brought by a coalition of 66 school districts, more than one-third of all districts in the state. The court centered its finding of inadequacy on the denial of basic opportunities to “[c]hildren in 80% of local school districts.” *Id.* at 198. Second, a systemic perspective focuses attention on the Legislature’s duty to “the people” under Article IX, Section 1 and not to specific groups or individuals. Third, the remedy may be couched as an imperative to upgrade, not necessarily level, resources across the board. This has particular salience given what some believe to be the legacy of

*Serrano*.<sup>43</sup> Framing the litigation in these ways enables a court to avoid singling out certain groups for special protection and broadens political support for judicial intervention.

**4. *National comparisons provide reasonable benchmarks en route to a fully developed adequacy remedy.*** As the experience of other states suggests, adequacy remedies depend fundamentally on an estimate of what it would really cost to provide adequate opportunities to achieve educational standards in light of students' varying needs. Some courts have been willing to align constitutional standards of adequacy with legislatively developed education standards. *See, e.g., Montoy*, 102 P.3d at 1164 (“we need look no further than the legislature’s own definition of suitable education to determine that the standard is not being met under the current financing formula”). If this approach were pursued in California, the cost of an adequacy remedy would likely be substantial given the high level of knowledge and competencies that California’s student performance standards demand.<sup>44</sup> Marshaling public support for such a remedy may present both conceptual and political challenges.<sup>45</sup>

In structuring a remedy, it may help to “ramp up” to a fully elaborated adequacy model by setting compliance benchmarks pegged to national norms. California public

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<sup>43</sup> See William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & POL. 607 (1996). *But see* Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?*, 50 UCLA L. REV. 801 (2003).

<sup>44</sup> Cf. Expert Report of William A. Koski, *What Educational Resources Do Students Need to Meet California’s Educational Content Standards?*, *Williams v. California*, No. 312 236 (Cal. Super. Ct. Sept. 2002), available at [http://www.mofo.com/decentsschools/expert\\_reports/koski\\_report.pdf](http://www.mofo.com/decentsschools/expert_reports/koski_report.pdf).

<sup>45</sup> Conceptually, it may be difficult to explain to the public how a dollar estimate of adequacy is derived from an econometric or professional judgment cost model. Politically, if aligning state constitutional standards with current content and performance standards proves very costly, then policymakers may respond by lowering educational standards instead of raising additional revenue.

schools are far below national averages with respect to resources, effort, and achievement,<sup>46</sup> and courts have regarded such comparisons as probative of inadequacy. *See Lake View*, 91 S.W.3d at 488-89; *Rose*, 790 S.W.2d at 197. To a court and to the public at large, it seems both intelligible and persuasive to contend that, whatever else adequacy might require, it at least requires a level of effort and resources commensurate with what the vast majority of states have seen fit to provide. There is no reason to believe that “the preservation of the rights and liberties of the people” comes more cheaply in California than elsewhere.

Were California to leverage its wealth at a rate equal to the national average, it would spend an additional \$3 billion to \$5 billion annually on education.<sup>47</sup> To bring

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<sup>46</sup> California’s cost-adjusted per-pupil spending (\$6,659) ranked 44th among all states in 2002, nearly \$1,100 per pupil less than the national average (\$7,734). *See Quality Counts 2005*, EDUC. WEEK, Jan. 6, 2005, at 102. When per-pupil spending is also adjusted for student needs, only 4.4 percent of California students are in districts that spend at or above the national average. *See id.* (as corrected at <http://www.edweek.org/ew/qc/2005/tables/17resources-t1b.html>). Whereas state and local education revenue comprised 3.5 percent of California’s gross state product in 2002, it was 3.9 percent in the nation as a whole. *See Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2001-02*, at 8 tbl.1 (June 2004), *available at* <http://nces.ed.gov/pubs2004/2004341.pdf>; U.S. Dep’t of Commerce, Bureau of Econ. Analysis, *Regional Economic Accounts: Gross State Product*, *available at* <http://www.bea.doc.gov/bea/regional/gsp/>. From 1992 to 2003, California fourth- and eighth-graders consistently performed worse on the National Assessment of Educational Progress in both math and reading compared to the national average and to their counterparts in the four next most populous states. *See* STEPHEN J. CARROLL ET AL., CALIFORNIA’S K-12 PUBLIC SCHOOLS: HOW ARE THEY DOING? 123-24 (2005). Average NAEP performance from 1990 to 2003 was lower in California than in all states but two, Louisiana and Mississippi. *See id.* at 128. Even when scores are disaggregated by race and ethnicity, California students of all groups—white, black, Hispanic, and Asian—generally scored lower than their counterparts across the nation. *See id.* at 125-27. And when scores are compared with controls for family characteristics, California students perform worse than students from similar families in every other state. *See id.* at 132-33.

<sup>47</sup> The estimate differs depending on the wealth measure that is used. If California were to exert the same effort as the national average, it would spend \$2.7 billion more than actual state and local education revenue in 2002 if “state personal income” is the measure of state wealth, \$3.1 billion more if “total taxable resources” is the wealth measure, and \$5.3 billion more if “gross state product” is the measure. For the data underlying these estimates, see the U.S. Department of Commerce, Bureau of Economic Analysis website, <http://www.bea.gov/>.

California's cost-adjusted per-pupil spending up to the national average would require an additional \$7 billion to \$9 billion annually over current levels.<sup>48</sup> These figures provide conceptually and politically defensible benchmarks en route to a complete and likely more costly adequacy remedy.

**5. *An adequacy remedy must incorporate a well-developed plan for accountability.*** Even if a court is willing to accept that California public schools are underfunded relative to state standards or national norms, judicial reluctance to order a substantial infusion of new money may stem from uncertainty as to whether the money will be spent in educationally sound and productive ways. State defendants in adequacy suits have not hesitated to argue that, whatever additional resources may be needed, schools and districts are failing to use existing resources efficiently. In the New York litigation, for example, the state pointed to “fraud and corruption” and “purported political or managerial failings of the City or the Board of Education” to explain any shortage of inputs in New York City schools. *Campaign for Fiscal Equity*, 801 N.E.2d at 342-43 (considering but ultimately rejecting the state’s mismanagement argument).

To the extent that experts have succeeded in shifting the debate from “whether money matters” to “*how* money matters,” the task of plaintiffs in an adequacy suit is to assure the court that remedial funding will support educational policies and inputs known to affect outcomes based on the best available research. Such assurance requires

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<sup>48</sup> Using 2002 current expenditures adjusted for regional cost differences, the gap is roughly \$1,100 per pupil, which totals almost \$7 billion for 6.14 million pupils. Using 2002 state and local education revenues adjusted for regional cost differences, the gap is roughly \$1,400 per pupil or almost \$9 billion total. Note that these estimates are not meant to imply that additional spending should be allocated equally on a per-pupil basis. Instead, the method of allocation should be responsive to educational needs.

elaboration of how a funding remedy will be embedded within a system of accountability. Ideally, the accountability mechanism applicable to an adequacy remedy will be part and parcel of the state's overall system of accountability and, in addition, will be designed in a way that permits periodic monitoring by the judiciary. The legislative response to the Kentucky Supreme Court's 1989 decision in *Rose* provides an example of how adequacy litigation can produce a remedy that integrates new funding and accountability.<sup>49</sup>

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<sup>49</sup> See Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 34, 58-59 (Helen F. Ladd et al. eds., 1999).