

# California Constitutional Law: The Right to an Adequate Education

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*Plaintiffs' victory in Vergara v. State, a case about teacher evaluation and employment regulations, has thrust the issue of educational adequacy into the spotlight in California. Campaign for Quality Education v. State, a case based on the California Constitution's education clause, has been fully briefed before the California Supreme Court and is waiting to be set for argument. These cases require California courts to again look to the constitution to determine what the right to education means. Although the California Supreme Court found this right fundamental over forty years ago, no supreme court decision has yet articulated whether this right encompasses the right to an adequate education. There is no dearth of scholarship about adequacy on the national level, but no scholarship has yet synthesized constitutional history and case law in California to test how the court should decide the case. Examining these factors, as well as the failure of the dominant doctrine—equal protection—to define and ensure the right, this Article proposes an adequacy jurisprudence that comports with California's unique circumstances, its history and precedent, and the purposes of education in this state. The need for such an approach has never been greater.*

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## INTRODUCTION

California's free schools guarantee in article IX of the state constitution contains both a purpose (to further intellectual, scientific, moral, and agricultural improvement) and a command (the legislature "shall provide" for a system of common schools).<sup>1</sup> The California Supreme Court has declared education a fundamental right.<sup>2</sup> But the contours of this right remain unclear. Through decades of litigation concerning school finance,<sup>3</sup> charter schools,<sup>4</sup> and everything from busing schemes<sup>5</sup> to school fees,<sup>6</sup> litigants have tested the substance of article IX again and again, with no clear guidance from the supreme court. It is still unclear whether there is a qualitative component to the right to an education in article IX, and if so, what that qualitative measure requires.

This lack of clarity has two causes: first, the failure of the California Supreme Court to directly address adequacy issues, and second, the inability of the dominant litigation doctrine, equal protection, to answer the fundamental question about the scope of article IX.

First, there is little scholarship, and even less law, on how California would decide an adequacy question under its constitution. In *Serrano v. Priest*, the California Supreme Court emphasized that the state constitution guarantees the right to an education that encompasses "more than access to a classroom."<sup>7</sup> Despite this, some have argued that the education clauses confer no rights beyond maintaining basic uniformity and progression of grades, describing "the demise of the common schools clause as a means to pursue students' basic right to education in California."<sup>8</sup> Indeed, two lower courts have found that article IX confers no substantive right to adequacy.<sup>9</sup>

An analysis of the history of education litigation in California, however, reveals that the adequacy issue has appeared time and again in the court's history and cases, with the court receptive not only to hearing cases based on adequacy, but also deciding cases at least in part on that ground as well. This has strong historical underpinnings; from the text of the constitution, to the framers' constitutional debates, to the cases before the supreme

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1. See CAL. CONST. art. IX, § 1.

2. See *infra* Part I.C.

3. *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1244 (Cal. 1971).

4. *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 753–54 (1999).

5. *Manjares v. Newton*, 411 P.2d 901, 902–03 (Cal. 1966).

6. Complaint at 1, *Doe v. California*, No. BC445151 (Cal. Super. Ct. 2010).

7. *Serrano I*, 487 P.2d at 1257.

8. See Rebecca M. Abel, *The Judicial Give and Take: The Right to Equal Educational Opportunity in California*, 9 CAL. LEGAL HIST. 203, 215 (2014).

9. See Order Granting Motion for Judgment on the Pleadings as to Second Cause of Action at 3–4, *Williams v. California*, No. 312236 (Cal. Super. Ct. July 10, 2003); Order Sustaining Demurrers to Complaint and Complaint in Intervention, in Part Without Leave to Amend and in Part With Leave to Amend at 8, *Robles-Wong v. California*, No. RG10-515768 (Cal. Super. Ct. Jan. 14, 2011).

court (in both dicta and the holdings), one can see article IX rights taking shape as a right to an adequate education.

The primary goal of this Article is to highlight these developments throughout California's history and jurisprudence. It seeks to prove that the constitutional guarantee is enforceable as a right to an adequate education, independent from the constitutional guarantee of equality.

Second, this Article will address the inability of equal protection to define and safeguard the right to education in California. Equal protection challenges simply compare two things, seeking to resolve whether they are sufficiently equivalent to pass constitutional muster. Here, that means determining whether two educational programs are comparable. But that analysis, while well-suited to resolving disparate treatment claims, does not concern itself with whether the quality or content of an educational program is constitutionally adequate under article IX.

The limitations of an equal protection approach, for instance, ensuring that children are treated equally in areas such as funding or educational programming, have led to a shift in the litigation landscape. In recent years, litigants in many states have changed their approach to one promoting adequacy, ensuring that all schools meet a baseline of quality. Under this approach, the relevant analysis does not simply compare schools or programs. Instead, it focuses on ensuring that the education provided to every student meets a minimum bar of quality.

Equal protection litigation is still a critical tool for education reform in California, and has led to many of the landmark decisions highlighted in this Article. But relying solely on equal protection is insufficient to define the right, and might deny a fundamental right to many students who might have an "equal," but ineffective, education.

Part I of this Article reviews the text and legislative history surrounding the passage of article IX to show an enforceable, qualitative right to education. These historical sources give a great deal of guidance into what the framers thought about the right to education in California, and its importance to the political, economic, and moral future of the state. This Part also reviews the seminal cases in California education, arguing that although many are phrased in the language of equal protection or the free schools guarantee, they each have adequacy as a logical and ethical underpinning. These cases also show that although the constitution explicitly assigns to the legislature the job of ensuring a public school system, the court will step in where it appears that students are denied the critical components of a decent education.

Part II details why equal-protection-focused education litigation is limited in its ability to guarantee the right to education. First, viewing the right to education solely as an equal protection problem ignores the text and history of the constitutional provision, subsuming it in a discussion of equality when in fact it deserves recognition as a stand-alone right.

Second, equal protection, standing alone, does little to solve the underlying question of what the right entails. This Article rejects the possibility that, as the Kentucky Supreme Court has said, an educational program achieves equality by ensuring “uniformly deplorable conditions” throughout the state.<sup>10</sup> The California Supreme Court has avoided the question by using the phrase “basic educational equality,” implying a baseline, but never defining it.<sup>11</sup> Without a definition, the court is left with the “guess-and-check,” case-by-case approach we see today (finding, for example, free extracurriculars, but not busing, to be part of the right).<sup>12</sup> Finally, this Article argues that equal protection is a misnomer; in addition to being an unattainable goal, true educational equality—that is, making all schools equal—has never been the goal of education litigation. Nor does it alleviate the possibility of “basically equal” but grossly inadequate schools, something that the court (and the framers) would likely find problematic.

Just as with the Sixth Amendment right to counsel in the U.S. Constitution, the right to education in California without a guarantee of quality would render the right hollow. Just as the right to counsel under the U.S. Constitution requires that such counsel be effective, so too does the fundamental right to an education require that an education conform to a minimum guarantee of effectiveness—that is, to a minimum guarantee of quality.

Part III turns to other states whose high courts have wrestled with these same questions. A review of these cases shows that no state supreme court has found a fundamental right to education without a minimum guarantee of quality; where there is a right, there is a minimum. If California continues to affirm the right by upholding *Serrano* but finds no corresponding qualitative mandate, it would stand alone.

Part IV outlines different approaches that the court can take when defining an adequate education. This Article argues that none of the prevailing methods is sufficient to fulfill the California Constitution’s mandate within the context of its history and text. Instead, it proposes a citizenship approach to defining adequacy, based on Justice Goodwin Liu’s influential article, *Education, Equality, and National Citizenship*.<sup>13</sup> This method requires sufficient education to enable citizens to develop a stable economy, become upwardly mobile, and engage in self-government, such that they are able to participate in the political life of the state. This method accords historically with the framers’ intent in

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10. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211 (Ky. 1989).

11. *See, e.g., Butt v. State*, 842 P.2d 1240, 1247 (Cal. 1992).

12. *Hartzell v. Connell*, 679 P.2d 35, 47 (Cal. 1984) (extracurriculars); *Manjares v. Newton*, 411 P.2d 901, 908 (Cal. 1966) (busing).

13. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006).

passing the education clauses in the California Constitution, underlies many of the education cases throughout the California Supreme Court's history, and, in the words of the California Supreme Court, is "directly linked to the constitutional role of education in preserving democracy, as set forth in article IX, section 1 . . . ."<sup>14</sup>

This Article does not aim to curb the policy debate on what constitutes a quality education in California, or how to reduce or eliminate disparities within the school system and beyond. Nor does it seek to foreclose efforts to ensure equal access to education using equal protection litigation; where inequality exists that runs afoul of the equal protection clause, a constitutional claim will (and should) succeed. This Article has only the modest goal of assisting the state judiciary in crafting an analysis for the qualitative issues presented by article IX that it will inevitably face in the coming years.

## I. IMPLICIT ADEQUACY IN THE TEXT AND HISTORY OF THE CONSTITUTION

### A. THE TEXT OF THE CALIFORNIA EDUCATION CLAUSE

The California Constitution guarantees a system of free schools for the children of the state.<sup>15</sup> The text itself is robust, including both a statement of purpose and a functional element. The preamble, codified in article IX, section 1, entitled "Encouragement of education," states that a "general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."<sup>16</sup> Article IX, sections 2 through 4 then establish a Superintendent of Public Instruction and county education boards.<sup>17</sup> Finally, section 5 on the "Common school system" establishes California's school system: "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."<sup>18</sup>

### B. THE HISTORY

The constitutional text is unambiguous in its directive to establish state public schools. But it is ambiguous—indeed silent—on the question of what would run afoul of that directive (aside from violating the requirement of a free school in each district, open for six months every year).

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14. *Hartzell*, 679 P.2d at 43.

15. CAL. CONST. art. IX, § 5.

16. *Id.* art. IX, § 1.

17. *See id.* art IV, §§ 2–4.

18. *Id.* art. IX, § 5.

When texts are ambiguous, we look to history for guidance.<sup>19</sup> The goal here is always “to discern the true intent of their authors, and when that intent has been ascertained,” to construe them as to give it effect.<sup>20</sup> As the California Supreme Court has said, although the constitution is “necessarily couched in general terms or language, it is not to be interpreted according to narrow or supertechnical principles, but liberally and on broad general lines, so that it may accomplish in full measure the objects of its establishment and so carry out the great principles of government.”<sup>21</sup> For these reasons, examining the framers’ perspectives by looking briefly at California’s educational history, the framers’ experiences in other states’ conventions, and the constitutional convention debates is instructive in deciphering the meaning and intended force of article IX.

### *I. The Framers’ Understanding of the Education Clauses*

Understanding the education clauses requires an understanding of the education climate in the late 1870s, including the political climate surrounding school legislation in California before the 1879 constitution and other states’ clauses from that time.

Any review of the history of California schools would be incomplete without reference to John Swett. Swett was born in New Hampshire, moved to California, and became a principal at a school in San Francisco.<sup>22</sup> In 1862, he was elected State Superintendent of Public Schools and became a fierce lobbyist for free schools.<sup>23</sup> He believed strongly in two principles that animated his work: “[f]irst, that it is the duty of a . . . [g]overnment . . . to provide for the education of every child,” and second, that the schools should be provided to students for free.<sup>24</sup> In 1865, he launched a major statewide public relations campaign to lobby for his vision of public schools, including a massive petition campaign targeted at legislators on the value of education,<sup>25</sup> which was described as “an act of self-preservation in a democracy,” and vital to the welfare of the state.<sup>26</sup> He toured the state to evaluate various schools’ conditions, lamenting the physical facilities, desks, and textbooks as well as poor teacher qualifications and pedagogical methods.<sup>27</sup> His lobbying included

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19. *Mejia v. Reed*, 74 P.3d 166, 170 (Cal. 2003).

20. *Bourland v. Hildreth*, 26 Cal. 161, 180 (1864).

21. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1299 (Cal. 1978).

22. WILLIAM G. CARR, JOHN SWETT: THE BIOGRAPHY OF AN EDUCATIONAL PIONEER 4 (1933).

23. IRVING G. HENDRICK, CALIFORNIA EDUCATION: A BRIEF HISTORY 11 (Nottis Hundley, Jr. & John A. Schutz eds., 1980).

24. CARR, *supra* note 22, at 102.

25. HENDRICK, *supra* note 23, at 13–15.

26. CARR, *supra* note 22, at 102.

27. HENDRICK, *supra* note 23, at 15.

a massive petition campaign targeted at legislatures, to persuade them that a good education meant instruction in reading, writing, and “all manner of practical studies.”<sup>28</sup> He also frequently referred to the “necessity for suitable buildings, capable teachers, adequate equipment, and state inspection and supervision.”<sup>29</sup> He felt that the teacher was “the most potent single factor in determining the efficiency of the school.”<sup>30</sup> Swett mounted such an effective campaign that most legislators quickly joined his cause.<sup>31</sup> His influence remained even after his tenure as Superintendent ended; in 1874, the legislature approved “An Act to Enforce the Education Right of Children,” the state’s compulsory attendance law,<sup>32</sup> and in 1879, the education committee for the constitutional convention “generally agreed on all the major educational issues.”<sup>33</sup>

Looking to extraterritorial influences on the California Constitution, California’s article IX was explicitly based on at least two other states’ constitutions. Joseph W. Winans,<sup>34</sup> chairperson for the convention’s Committee on Education, reported that section 1 was “taken from the Constitutions of Arkansas and Missouri, in part, and from the Constitution of this State.”<sup>35</sup> He emphasized that the “same words” are contained in the Missouri and Arkansas constitutions.<sup>36</sup> Dr. Lucius Morse, who was in Missouri in 1865 during that state’s constitutional convention, recounted that, “We started out in Missouri with the idea of free education, and the idea has been copied throughout the Southern States. Section one of the article on education is in other Constitutions almost in the same language that is embodied in this.”<sup>37</sup>

Missouri’s role in providing its citizens a public education was outlined in its territorial charter in 1812, which stated: “[K]nowledge, being necessary to good government and the happiness of mankind, schools and the means of public education shall be encouraged and

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28. *Id.* at 18. This campaign resulted in dozens of letters daily appearing on the desks of legislatures during the 1866 legislative session. *Id.* at 13–14.

29. CARR, *supra* note 22, at 102. He also believed that the state should enforce minimum standards of safety and sanitation.

30. *Id.* at 104.

31. HENDRICK, *supra* note 23, at 14.

32. *Id.* at 17.

33. *Id.* at 19.

34. Winans was a lawyer and representative from the First Congressional District. ROY W. CLOUD, EDUCATION IN CALIFORNIA: LEADERS, ORGANIZATIONS, AND ACCOMPLISHMENTS OF THE FIRST HUNDRED YEARS 67 (1952).

35. 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1087 (1881) [hereinafter 1879 DEBATES].

36. *Id.*

37. *Id.* at 1089.

provided for . . . .”<sup>38</sup> In 1891, the Missouri Supreme Court called education “a right created by the state, and a right belonging to citizens of this state as such.”<sup>39</sup>

The 1865 Missouri Constitution provides that, “the General Assembly shall establish and maintain free schools, for the gratuitous instruction of all persons in this State, between the ages of five and twenty-one years.”<sup>40</sup> Further, “[o]nly the constitutions of New Jersey in 1844 and Wisconsin in 1848, twenty years earlier, had similarly spoken in terms of ‘all’ children rather than in terms of a ‘system’ of schools, but beginning with the Missouri Constitution of 1865 such language became more common.”<sup>41</sup>

Looking to the history of the Arkansas Constitution, the framers of the first Arkansas Constitution adopted the following Education Clause in 1836:

Knowledge and learning generally diffused through a community being essential to the preservation of a free government; and diffusing the opportunities and advantages of education through the various parts of the State being highly conducive to this end . . . . The General Assembly shall, from time to time, pass such laws as shall be calculated to encourage intellectual, scientific and agricultural improvement by allowing rewards and immunities for the promotion and improvement of Arts, Science, Commerce, Manufactures and Natural History. And countenance and encourage the principals [sic] of humanity, industry and morality.<sup>42</sup>

This provision embodied two fundamental ideas: “the inherent value of education in creating a virtuous citizen and the crucial role of an educated citizenry in a functioning democracy.”<sup>43</sup> In a later Arkansas Supreme Court decision, the court concluded that given this history, “[t]here 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.”<sup>44</sup>

The framers of the California Constitution, by explicitly borrowing from the robust provisions in the Arkansas and Missouri Constitutions, must have intended to give California’s education clause similar force. Swett’s legacy, as well, focused not just on providing education, but also on ensuring that the children of California had enough education to

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38. Territorial Laws of Missouri, vol. I, ch. IV, § 14 at 13 (approved June 4, 1812) (cited in *Comm. for Educ. Equality v. Missouri*, 294 S.W.3d 477, 482 n.5 (Mo. 2009)).

39. *Lehew v. Brummell*, 15 S.W. 765, 766 (Mo. 1891).

40. Mo. CONST. of 1865, art. IX, § 1.

41. John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776–1900*, 42 AM. J. LEGAL HIST. 1, 23 (1998).

42. ARK. CONST. of 1836, art. VII, § 1 (1987).

43. *Lake View Sch. Dist. No. 25 of Phillips Cty. v. Huckabee*, 91 S.W.3d 472, 491 (Ark. 2002).

44. *Id.* at 492.

ensure the perpetuation of democracy. The history, as communicated through the language of article IX, is clear: the framers felt the necessity of an educated populace in furthering the causes of self-government and general well-being. To this end, an adequate education, not simply any education, was the intent of the provision.

## 2. *The 1849 and 1879 Constitutional Conventions*

During the state's first constitutional convention in preparation for the 1849 constitution, the framers had a robust debate concerning the education provision. There, delegate Morton McCarver, using the example of other states, admonished the rest of the convention that there was no greater use for its wealth than to provide schools for future generations, both for the good of the individual child and the good of the state:

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. Some of the ablest men we have in the United States are men from the poorest origin, who have had their minds opened to the advantages of knowledge by public schools. Educate the children of this country, and you will find in the halls of the Legislature of California men, able statesmen too, of the poorest origin.<sup>45</sup>

Robert Semple, the president of the constitutional convention, similarly asked whether any “ha[d] ever seen a school fund sufficiently large to answer every purpose, or secure too great a spread of knowledge[.]”<sup>46</sup> Delegates emphasized the need of a school system to train children to use language, to prepare them to be citizens, to help them prepare to face the conflicts of life, to prepare them for higher education, and to “carry on intelligently and successfully the ordinary labors of life.”<sup>47</sup>

After the 1849 convention, the framers issued a notice “[t]o [t]he People [o]f California,” where they “respectfully submit[ted] the accompanying plan of government for your approval.”<sup>48</sup> In this notice, the framers emphasized that:

A knowledge of the laws, their moral force and efficacy [is] an essential element of freedom, and makes public education of primary importance. In this view, the Constitution of California provides for and guarantees in the most ample manner, the establishment of common schools, seminaries, and colleges, so as to extend the blessings of education

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45. REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849 204 (1850) [hereinafter 1849 DEBATES].

46. *Id.*

47. 1879 DEBATES, *supra* note 35, at 1102; 3 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1412–13 (1881).

48. 1849 DEBATES, *supra* note 45, at 474.

throughout the land, and secure its advantages to the present and future generations.<sup>49</sup>

This enthusiasm for public education remained robust in the 1879 constitutional convention. The framers there, many of whom had been present at the 1849 convention, again engaged in a robust discussion about what language should be included in the final education provision. A review of the transcript shows every speaker in favor of a free education for the children of California. While there was some debate about whether the free schools guarantee should extend past the “common school” (elementary) level,<sup>50</sup> not one delegate disagreed with the language establishing the state’s schools, nor with the importance of educating children. Throughout the debates, the framers referred to education as the gateway to a robust economic future in the state, the key to self-governance, and a gateway out of poverty for the individual. This review supports the idea that a quality school represents the fulfillment of these ideals.

Chairperson Winans extolled the virtues of public education, as “the basis of self-government . . . constitut[ing] the very corner stone of republican institutions.”<sup>51</sup> He noted that in articles from the “original states” constitutions, the subject of education was merely mentioned, but did not take the form of a legislative enactment: “[i]t was merely the broad declaration of a high principle.”<sup>52</sup> Yet, “as the time advanced and the condition of the people improved,” the education clauses finally “attained to the dignity of a complete article in every Constitution.”<sup>53</sup> The framers of the California Constitution wished to endow the right to education with constitutional force, and did so in both the 1849 and 1879 versions.

### 3. *The Holmes Amendment*

The framers’ robust language in adopting the constitutional provision, as well as their references to similarly strong provisions in other states, is persuasive evidence that the framers intended the education clause to incorporate a qualitative element. There was debate, however, on one proposed amendment that would have contained the words “thorough and efficient” in describing the education required

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49. *Id.*

50. As originally adopted, article IX, section 6 defining public schools “provided that all State school funds be used exclusively for the support of primary and grammar schools,” and the 1902 amendment “authorized the legislators to vote a special State school tax . . .” CLOUD, *supra* note 34, at 103.

51. 1879 DEBATES, *supra* note 35, at 1087; *see also* Hartzell v. Connell, 679 P.2d 35, 40 (Cal. 1984) (quoting Winans’s remarks during the 1879 debates and proceedings).

52. 1879 DEBATES, *supra* note 35, at 1087.

53. *Id.*

under the constitution. But its rejection did not signal a rejection of a qualitative mandate, as some have suggested.<sup>54</sup> This same amendment would have limited article IX to the “common schools.”<sup>55</sup> The convention rejected this amendment, preferring to leave the opportunity for the legislature to provide for higher education.

Samuel A. Holmes, a critic of advanced education, moved to eliminate the language in section 1 promoting “intellectual, scientific, moral, and agricultural improvement” by emphasizing simply the system of “common schools.”<sup>56</sup> Holmes advocated striking section 1 and replacing it with: “The Legislature shall provide a thorough and efficient system of free schools, whereby all the children of this State may receive a good common school education.”<sup>57</sup> As delegate Charles W. Cross<sup>58</sup> emphasized during the debate, “[t]his amendment proposes the education merely of children.”<sup>59</sup>

Cross characterized the debate over the amendment as representing two polarized views of the framers: first, those who wanted funding for education “beyond a certain point, that certain point being an education in what is usually termed the common English branches,” and those who believed that “the education of a few to a high grade at the expense of the State finally proves a benefit to the State, far exceeding the expense of that much education.”<sup>60</sup> He says, “I think [Holmes] will not take issue with me on this, that this is the point at which we are to determine . . . whether the State, in its appropriation of public funds, is to be limited to a common school system.”<sup>61</sup> Delegate William F. White, a supporter of the amendment, also framed the debate as “common” school versus higher education: “We are now planning for a system of common school education, and if we want another system we must add it on afterward.”<sup>62</sup> Indeed, this was the urging of Cross, who was in favor of section 1 as it stood:

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54. See Brief for Respondent at 9, *Campaign for Quality Educ. v. California*, No. A134423 (Cal. App. Oct. 19, 2012) (“[T]he framers specifically considered and rejected a proposal to impose qualitative requirements on the Legislature’s support for education . . .”).

55. John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates*, 70 ALB. L. REV. 927, 951 (2007); see also 1879 DEBATES, *supra* note 35, at 1087.

56. Dinan, *supra* note 55, at 951.

57. 1879 DEBATES, *supra* note 35, at 1087.

58. Cross was an attorney from Nevada County. CLOUD, *supra* note 34, at 69.

59. 1879 DEBATES, *supra* note 35, at 1087.

60. *Id.*

61. *Id.* at 1088.

62. *Id.*

[S]o that whenever the people of this State shall feel like encouraging a higher intellectual development, they shall have the power to do so. But if, at any future time in the history of the State, the people wish to say that the expenditure should be limited to the common school branches, then, sir, the State should have the power to so limit it.<sup>63</sup>

The Holmes Amendment failed. Rather than evincing a debate between whether schools should be “efficient,” “thorough,” or “good,” however, or showing that the framers considered and explicitly rejected a qualitative element to education, this debate instead highlights the framers’ disagreement over whether the constitution should mandate only a “common” (grade-level) education, or whether the guarantee extends to higher education. This, not a discussion of whether California schools should deliver a quality education, was the crux of the debate.

#### 4. *The Debate over Section 1*

There was also a larger debate over the legal force of section 1, even apart from the Holmes Amendment. Although some delegates found the language lofty and imprecise, others maintained that it contained the force of law. Ultimately the language about intellectual, scientific, moral, and agricultural improvement endured, including requiring the legislature to create the school system.<sup>64</sup>

Four delegates dismissed section 1 as merely hortatory. Joseph A. Filcher remarked that he was opposed to it “simply because there is nothing in it.”<sup>65</sup> Other delegates felt the same way, including Dennis W. Herrington, who said the section is “meaningless,”<sup>66</sup> and Winans, who stated it is “but a declaration of principle . . . general in its character.”<sup>67</sup> Delegate Thomas H. Laine called section 1 a “glittering generality.”<sup>68</sup>

Three more delegates, however, argued that the provision contained the force of law. John T. Wickes<sup>69</sup> argued that the section was not toothless, saying, “I do not care whether it is called a preamble or not. I take a Constitution to be a philosophic and historic as well as a legal instrument.”<sup>70</sup> Delegates E.O. Smith and Lucius D. Morse, felt the same, with Smith remarking:

I am of the same opinion as Dr. Morse, and I am of the opinion that it means something, too. It provides that it shall be the duty—that the

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63. *Id.*

64. See CAL. CONST. art. I, § 26 (“The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.”); *Woodbury v. Brown-Dempsey*, 134 Cal. Rptr. 2d 124, 134–36 (2003).

65. 1879 DEBATES, *supra* note 35, at 1087.

66. *Id.* at 1089.

67. *Id.* at 1087.

68. *Id.*

69. Wickes was a teacher from Nevada County. CLOUD, *supra* note 34, at 69.

70. 1879 DEBATES, *supra* note 35, at 1088.

Legislature shall encourage, by all suitable means, a promotion of intellectual, scientific, moral, and agricultural improvement. This makes it the duty of the Legislature to forward this matter in every way that the Legislature may have the power to do.<sup>71</sup>

##### 5. *Interpreting the Constitutional Debates*

It is difficult to separate the debate over section 1 from its context, namely the debate over Holmes's Amendment limiting state-funded education to the "common" subjects. Some have argued that section 1 represents a comparatively weak education provision because that section itself lacks a legislative mandate.<sup>72</sup> When combined with the mandatory language of section 5, however, California's provision starts to look much more like those in states whose courts have found an adequacy requirement in their constitutions. The far-reaching language remains in the constitution to this day, commanding the legislature to establish a system of common schools in order to promote intellectual, scientific, and moral improvement.<sup>73</sup> Those looking to discern the true intentions of the constitution's authors and give them effect must find that the framers placed paramount importance on establishing a system of schools, which was essential to developing a stable economy, an upwardly mobile populace, and the people's ability to govern themselves.<sup>74</sup> From the framers' debates, one can see California's founders were concerned primarily with the citizenship aspects of a good education, emphasizing the necessity of being able to participate in the political life of the state. The qualitative mandate inherent in these goals is clear.

#### C. THE CASES

The seminal California education cases are explicit in relying on the Equal Protection Clause. But underlying these cases are two unavoidable conclusions: first, that the constitution endows children with a right to education, and second, that this right means a right to a quality education. In recent years, scholars have begun to examine the theories of equal protection and adequacy in tandem, noting that they often converge in plaintiffs' complaints and eventual court decisions in a national context.<sup>75</sup> The following analysis shows that the California

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71. *Id.* at 1089.

72. See, e.g., Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 337 (1991).

73. See CAL. CONST. art. I, § 26 ("The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."); *Woodbury v. Brown-Dempsey*, 134 Cal. Rptr. 2d 124, 134-36 (2003).

74. See 1879 DEBATES, *supra* note 35, at 1089.

75. See, e.g., Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1, 27 (1997) (describing "hybrid" equality-adequacy lawsuits as "using the language of equality as 'just one measure of adequacy' to advance the quality of

Supreme Court has been taking this hybrid approach for years, using the language (and the practical underpinnings) of adequacy even in discussions that explicitly focus on equal protection or other constitutional guarantees. Through discussions about the purposes of a common school education, the importance of education to the state, or comparing various school attributes, the supreme court has implicitly recognized the basic, logical conclusion that schools must be more than school buildings.

*I. Two Early Cases (Pre-1971): School Access by Minorities*

Throughout its history, the California Supreme Court has been unwavering in its support of public education as a gateway to independence and democracy and as a catalyst to economic success. Even as it upheld separate-but-equal schooling, the court in 1874 held that the quality of a school was a key element in the constitutional right. In *Ward v. Flood*, the court considered whether an African American child could force a White school to admit her, finding that because the Black school was of equal quality to the White school, the right was fulfilled with separate-but-equal schools.<sup>76</sup>

The court's reasoning had three parts. First, the court established the constitutional right to education.<sup>77</sup> It held that the benefit of attending a public school is "secured to it under the highest sanction of positive law," namely "in obedience to the special command of the Constitution."<sup>78</sup> The court found that the right to an education, having been mandated by the constitution, "is, therefore, a right—a legal right—as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and entitled to be protected by all the guarantees by which other legal rights are protected and secured to the possessor."<sup>79</sup> This right, the court reasoned, must be made available to all.<sup>80</sup>

Next, the court discussed the purpose of the schools, namely the "improvement of [a child's] mind and the elevation of his moral condition," in the "recognized interest of society and of the body politic in the education of its members."<sup>81</sup> This language sounds remarkably similar to language contained section 1 of article IX, which was enshrined five years later in the 1879 constitution.

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education"); Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 480 (2014).

76. 48 Cal. 36 (1874).

77. *Id.* at 50.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 51.

Finally, the court found that separating the races was justified, because the Black school “afford[ed] equal advantages,” was taught by “able and efficient teachers,” and was administered “under the same rules and regulations” as the White school.<sup>82</sup> That is, because the school was of equal quality, forcing Black students into segregated schools did not run afoul of the Fourteenth Amendment.

Although its Fourteenth Amendment analysis was eventually repudiated by *Brown v. Board of Education*,<sup>83</sup> the *Ward* court’s discussion of the right to an education remains sound, particularly in its recognition that the right is inexorably tied to its quality. The court could have said that the existence of a Black school was enough to fulfill the right, but it did not—it emphasized the quality of the Black school’s education in safeguarding the right.<sup>84</sup>

Fifty years later, the court again found that the right to an education of a certain quality, not simply an education, was critical to fulfillment of the right. In *Piper v. Big Pine School District of Inyo County*, the court considered the case of a Native American student who wished to be admitted to a White school instead of being forced into a federal, native school.<sup>85</sup> The court found that because the federal school was not supervised by the state board of education, and therefore had no guarantee of quality, efficiency, or value, such a school would not be the fulfillment of the right under the California Constitution.<sup>86</sup>

The court first held that because the state had no control over the efficiency and quality of a federal school, there was no way to measure whether the requirements of article IX had been met.<sup>87</sup> The court found that “[t]he 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,” describing each grade “form[ing] a working unit in a uniform, comprehensive plan of education.”<sup>88</sup>

The court then reaffirmed the right under the constitution, and its critical importance to the state:

[T]he 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.<sup>89</sup>

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82. *Id.* at 45, 55–57.

83. 347 U.S. 483 (1954).

84. *Ward*, 48 Cal. at 55–57.

85. 226 P. 926 (Cal. 1924).

86. *Id.* at 930.

87. *Id.*

88. *Id.*

89. *Id.*

The court found that the advantages of school “cannot be enjoyed as a matter of right by those who, from choice or compulsion, attend schools without the control, supervision, and regulation of the educational departments of the state,” that is, without regulations on what and how children are taught.<sup>90</sup>

In a final note, the court dismissed the local school district’s concern about the cost of educating Native American children. It found that the courts were not responsible for this cost, and that the “economic question is no doubt an important matter to the district, but it may very properly be addressed to the legislative department of the state government.”<sup>91</sup>

These early cases show that evaluating the quality of a school, through indicators such as quality teachers, efficient administration, and government oversight, is critical to evaluating whether that school is fulfilling the article IX right. The mere availability of a school, especially a school with questionable quality, is not sufficient to safeguard the constitutional guarantee.

## 2. *Serrano v. Priest (1971): “More than Access to a Classroom”*

In *Serrano v. Priest (Serrano I)*, the court held for the first time that a school financing scheme was subject to strict scrutiny.<sup>92</sup> There, plaintiffs challenged the state’s school finance scheme that conditioned school funding on local property taxes.<sup>93</sup> The court held that strict scrutiny was warranted both because education is a fundamental right, and because it was being apportioned unequally, in violation of the constitution’s Equal Protection Clause.<sup>94</sup>

Reading this case as addressing only equality, however, ignores the court’s strong language about the importance of education to both the individual and society, critical to everything from economic development to political participation. Recognizing the “distinctive and priceless function of education in our society,” it held that education is a fundamental right under the California Constitution.<sup>95</sup> An unequal apportionment of funds, it held, infringed this right in violation of the Equal Protection Clause.

Although the bulk of the court’s rights analysis was devoted to equal protection, the ruling was based again on assumptions about school quality. The unconstitutionality of the finance scheme was rooted in the

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90. *Id.* at 928.

91. *Id.* at 930.

92. 487 P.2d 1241, 1249 (Cal. 1971).

93. *Id.* at 1244.

94. *Id.* at 1249. Strict scrutiny review in this context requires the state to establish not only that it has a compelling interest that justifies a given law, but that the distinctions drawn by the law are necessary to further that compelling interest.

95. *Id.* at 1258.

fact that it “classifie[d] its recipients on the basis of their collective affluence and ma[de] the *quality of a child’s education* depend upon the resources of his school district and ultimately upon the pocketbook of his parents.”<sup>96</sup> Because students in poorer districts received a different (and presumably poorer) quality of education, and because no compelling state interest justified this, the state’s funding scheme failed the strict scrutiny test.<sup>97</sup> Later, in *Serrano II*, the court discussed quality at length, indicating that some of the marks of educational quality include “higher quality staff, program expansion and variety, beneficial teacher to pupil ratios and class sizes, modern equipment and materials, and high-quality buildings.”<sup>98</sup>

Imputing a right to a quality education is the only logical conclusion from this case. It is highly unlikely that, finding education to be a fundamental right critical to both individual development and the economic and political health of the state, the court could find no required minimum quality for such education. The court emphasized the phrase “all the benefits and detriments that a child may receive from his educational experience,” even condoning the use of “pupil output as a measure of the quality of a district’s educational program.”<sup>99</sup> Here, too, although the case was at its heart about unequal spending, that fact cannot be divorced from the result of the unequal spending at issue: an unequal apportionment of educational quality. Although the court did not explicitly consider what quality of education was required in order to reap the “full enjoyment” of the right, it signaled that “surely the right to an education today means more than access to a classroom.”<sup>100</sup>

### 3. *Butt v. State (1992): What Falls Below the Bar?*

In 1991, the Richmond Unified School District announced it would end the school year six weeks earlier than its scheduled release date, due to a lack of funds.<sup>101</sup> Richmond parents filed for an injunction alleging that the loss of six weeks of instruction would cause “serious, irreparable harm to the District’s 31,500 students and would deny them their ‘fundamental right to an effective public education’ under the California Constitution.”<sup>102</sup> The case reached the California Supreme Court, which emphasized that although local control of schools is a tenet of the California system, the court will intervene where the actual quality of the district’s program, viewed as a whole, “falls fundamentally below

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96. *Id.* at 1263 (emphasis added).

97. *Id.*

98. *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 939 (Cal. 1976).

99. *Id.*

100. *Serrano I*, 487 P.2d at 1257.

101. *Butt v. State*, 842 P.2d 1240, 1243 (Cal. 1992).

102. *Id.* at 1244.

prevailing statewide standards.”<sup>103</sup> The court’s decision was based in part on the declarations of “[s]everal District teachers” who outlined the effects of the closure in the classrooms, including preventing high school seniors from receiving “intended lessons covering the State’s executive and judicial branches” and qualifying for college admission; “Algebra I students would miss essential instruction in quadratic equations”; first graders would miss instruction in “phonics, reading comprehension, creative writing, handwriting skills,” and so on.<sup>104</sup> The court upheld the trial court’s finding that the “proposed closure would have a real and appreciable impact on the affected students’ fundamental California right to basic educational equality.”<sup>105</sup>

Here again, the case was ostensibly about equal access to the fundamental right to an education. Equality of education, however, was not truly the issue; this was not an attempt to equalize schools. Indeed, the court observed that: “[A] requirement that [the State] provide [strictly] ‘equal’ educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons.”<sup>106</sup> The court explicitly found that the California Constitution does not guarantee uniform “local programs, philosophies, and conditions,” including term lengths.<sup>107</sup>

According to the California Supreme Court, “basic educational equality” was critical.<sup>108</sup> The court did not define what this meant, but what could the addition of the word “basic” mean other than a minimum level of educational quality? The court, with the addition of this word, essentially ruled on what a basic education under the California Constitution requires: a basic minimal level of educational quality. The decision was not based on funding; the Richmond School District received a constitutional level of funding under the state finance scheme. It was not based on pure equality; the court accepted that local control will ensure some variation in schools. It was also not based on disobeying the explicit mandates of the constitution: the school was free, and was longer than the constitutionally minimum six-month requirement. The text of the constitution requires only six months of school,<sup>109</sup> and indeed, the state argued that six months was all that was required.<sup>110</sup> The court rejected this contention.<sup>111</sup>

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103. *Id.* at 1252.

104. *Id.* at 1253, 1253 n.16.

105. *Id.* at 1253.

106. *Id.* at 1252 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982)).

107. *Id.*

108. *Id.* at 1253.

109. CAL. CONST. art. IX, § 5.

110. *Butt*, 842 P.2d at 1247.

111. *Id.*

The decision therefore rested on the idea that a “basic” education, one that meets the requirements of the education article, was one that met “prevailing statewide standards.”<sup>112</sup> The court in *Butt* showed that it was willing to guarantee a minimum level of schooling for students, based on the standards, and that it was prepared to ensure that the state could intervene when a district fails to fulfill its constitutional mandate.

4. *Hartzell v. Connell (1984): When a Free School Is Not Free*

In *Hartzell v. Connell*, taxpayers in the Santa Barbara High School District challenged fees charged by the district for participation in extracurricular activities, arguing the fees violated the “free school” and equal protection guarantees of the state constitution.<sup>113</sup> Defendants argued that the fundamental right to an “education” guaranteed “nothing more than an opportunity to progress from grade to grade and receive a diploma,” regardless of the programs’ actual educational value.<sup>114</sup> The court rejected this contention, finding that because extracurricular activities constitute “a fundamental ingredient of the educational process” they therefore must be offered free of charge.<sup>115</sup> Here again, the court looked beyond the simple provision of an education, instead discussing how the features and quality of a district’s program contribute to the letter and spirit of the constitutional guarantee.

In rejecting the notion that the purpose of an education can be divorced from its provision, the court talked at length about the purposes of a quality public education, drawing on sources from Thomas Jefferson to *Serrano I*.<sup>116</sup> The court specifically called out the role that a “high quality” education plays in participating in the political process.<sup>117</sup> The court rejected the idea that guaranteeing only the classes offered for credit fulfilled the free schools mandate, saying this would “sever the concept of education from its purposes.”<sup>118</sup> These purposes, according to the court, included “the making of good citizens physically, mentally, and morally,”<sup>119</sup> which are “directly linked to the constitutional role of education in preserving democracy, as set forth in article IX, section 1.”<sup>120</sup> The court, in other words, rejected the notion of an empty grade-progression education, looked deeply into the purpose of education,

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112. *Id.* at 1252.

113. 679 P.2d 35, 37 (Cal. 1984).

114. *Id.* at 50 (Bird, J., concurring).

115. *Id.* at 42.

116. *Id.* at 40–41.

117. *Id.* at 41.

118. *Id.*

119. *Id.* at 42.

120. *Id.* at 43.

cited the need for “high quality” in making good citizens, and found that the right is fulfilled only where all aspects of the right are provided free.

Interestingly, the equal protection cause of action was not discussed in the primary opinion of the court. The court based its decision only on the “free schools” guarantee of article IX, section 5: “The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district . . .” This shows that the court has not confined its rulings to equal protection jurisprudence where a basic constitutional guarantee remains unfulfilled.

## II. EQUALITY V. ADEQUACY ANALYSIS

As discussed above, notions of quality and adequacy have long been the foundation of the California Supreme Court’s education jurisprudence, even where the decision was ostensibly based on equal protection. This is for good reason. Although equal protection surely played a critical part in *Serrano I*, *Serrano II*, and other groundbreaking decisions, there are limitations to this doctrine in defining and fulfilling the constitutional right, both doctrinally and practically.

Doctrinally, there are three primary problems with viewing education solely in an equal protection context. First, confining education to an equality-based definition ignores the text and history of the constitutional provision requiring an education for all children, not simply an equal education. Second, equal protection does little to solve the underlying question of what the right entails. It is simply necessary to consider what the right means in the first place in order to determine what elements of that right must be apportioned equally to achieve equality. The court has avoided the question by using the phrase “basic educational equality” from *Butt*, implying some kind of baseline, but never defining it. Without a definition, the court is left with the piecemeal, case-by-case approach we see today. Finally, equal protection is a misnomer; in addition to being an unattainable goal, true educational equality, that is, making all schools equal, has never been the goal of education litigation. Nor does it alleviate the possibility of “basically equal” but grossly inadequate schools, something that the court (and the framers) would surely find problematic.

Practically, equal protection doctrine also has its limitations. Education has been a fundamental right in California for more than forty years, yet California schools are currently ranked tenth lowest in the nation.<sup>121</sup> Only about half of schoolchildren pass even the state’s own

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121. Dan Walters, *California Schools Rank Low—Again—in Education Week Report*, SACRAMENTO BEE (Jan. 10, 2014, 12:25 PM), <http://blogs.sacbee.com/capitolalert/latest/2014/01/california-schools-rank-low---again---in-education-week-report.html>.

standards.<sup>122</sup> There is great variation in students' passage rates even within demographic and economic categories, where the equal protection doctrine does not tread. More must be done to realize the framers' vision of "extend[ing] the blessings of education throughout the land, and secur[ing] its advantages to the present and future generations."<sup>123</sup>

A. EQUAL PROTECTION CANNOT DEFINE THE RIGHT WITHOUT ARTICLE IX.

First, viewing the right to education solely as an equal protection problem ignores the text and history of the constitutional provision, requiring an education for all children, not simply an equal education. As Justice Marshall put it in his dissent in *San Antonio Independent School District v. Rodriguez*: "The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that 'all persons similarly circumstanced shall be treated alike.'"<sup>124</sup>

In the California Constitution, equal protection has its own provision, in article I, section 7, separate from article IX's education provision. Confining the discussion of article IX only to article I protections does not give due regard to the specific mandates contained in the education article, and ignores the explicit and robust constitutional provision requiring the legislature to establish schools and the goals of doing so. If education is a fundamental right for equal protection purposes, education must also be a fundamental right for its own purposes.

Further, requiring equality but not quality ignores the framers' intent to educate the children of California. As noted by the *Hartzell* court, Winans, chairperson for the convention's Committee on Education, called public education "the basis of self-government and [] the very corner stone of republican institutions."<sup>125</sup> Other framers' remarks were similarly forceful in stating the importance of education.<sup>126</sup> The framers intended to enshrine a constitutional provision representing the inherent good of an education to California, not simply the value of providing a service on an equal basis.

Equal protection also does nothing to define the right itself. After *Serrano*, it is clear that education is a fundamental right and that disparate treatment is worthy of strict scrutiny, but still no decision has defined what the right means beyond "more than access to a

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122. See *Standardized Testing and Reporting (STAR) Results*, CAL. DEP'T EDUC., <http://star.cde.ca.gov/> (last updated July 24, 2014).

123. 1849 DEBATES, *supra* note 45, at 474.

124. 411 U.S. 1, 89 (1973) (Marshall, J., dissenting) (quoting *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

125. *Hartzell v. Connell*, 679 P.2d 35, 40 (Cal. 1984) (quoting 1879 DEBATES, *supra* note 35, at 1102).

126. See *infra* Part II.B.1.

classroom.”<sup>127</sup> *Butt* did little to clarify it, by demanding only “basic educational equality” and “basic equality of educational opportunity.”<sup>128</sup> Even these terms obscure more than they clarify: it is unclear which noun the adjective “basic” is meant to qualify.<sup>129</sup> It also “remains unclear whether this basic equity means equality of basic educational inputs, basic equality in educational outcomes, basic equality of educational inputs, basic equality to achieve a certain educational outcome, or some other standard not yet enunciated.”<sup>130</sup> Indeed, “even identical services and facilities will not afford an equal educational opportunity to students who come to school with sharply different needs and abilities.”<sup>131</sup>

Without these definitions and markers, it is impossible to determine whether one district’s offering is equal in the relevant sense to another’s. Without a definition, litigants and lower courts are left without guidance to evaluate whether districts’ teacher layoff plans,<sup>132</sup> provision of educational materials,<sup>133</sup> and school fees,<sup>134</sup> as well as counties’ applications of state property taxes<sup>135</sup> and students’ time spent in the classroom<sup>136</sup> conform with the mandate of equal protection under the law.

Finally, equality does not alleviate the problem of “basically equal” but grossly inadequate schools. The California Supreme Court addressed and disallowed this possibility in *Serrano I* with its admonition that “surely the right to an education today means more than access to a classroom.”<sup>137</sup> As the Kentucky Supreme Court stated in its groundbreaking opinion requiring educational adequacy: “We reject [] a definition which could result in a system of common schools, efficient only in the uniformly deplorable conditions it provides throughout the state.”<sup>138</sup> Yet without

127. *Serrano v. Priest (Serrano I)*, 487 P.2d 1241, 1257 (Cal. 1971).

128. *Butt v. State*, 842 P.2d 1240, 1251 (Cal. 1992).

129. “Basic equality” could mean “forming an essential foundation or starting point” of equality, which would seemingly mandate fundamental, nonnegotiable equality across programs. It could also mean, however, “offering or consisting of the minimum required without elaboration or luxury; simplest or lowest in level” of educational opportunity, mandating only a floor of educational equality, beyond which districts are free to vary by providing more or better services once this baseline has been reached. It could also mean, however, that all programs must be roughly equal—one program must be “basically equal” to another.

130. William S. Koski, *Achieving “Adequacy” in the Classroom*, 27 B.C. THIRD WORLD L.J. 13, 38 (2007).

131. Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 150 (1995).

132. See Findings of Fact, Conclusions of Law, and Order Granting Final Approval of Settlement, *Reed v. State*, No. BC432420, 2011 WL 10893745, at \*2 (Cal. Super. Ct. Jan. 18–21, 2011).

133. See *D.J. v. State*, No. BS142775, 2014 WL 4064226, at \*4 (Cal. Super. Ct. May 24, 2014).

134. Complaint at 1, *Doe v. California*, No. BC445151 (Cal. Super. Ct. 2010).

135. See Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief at 4–6, *California Dep’t of Fin. v. Grimes*, No. 30-2012-00559592 (Cal. Super. Ct. Apr. 5, 2012).

136. Complaint at 1–8, *Cruz v. California*, No. 14727139 (Cal. Super. Ct. May 29, 2014).

137. *Serrano v. Priest (Serrano I)*, 487 P.2d 1241, 1257 (Cal. 1971).

138. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211 (Ky. 1989).

guidance on what more is required, or indeed if anything is required at all, equal schools full of children without basic competency in learning fundamentals are a very real possibility, and indeed may already exist. As a number of scholars have noted, “[t]here is nothing in [an equal protection analysis] . . . that would prevent the state of California, in meeting its constitutional mandate,” from “equally” failing to fund the entire education system, for example establishing only one school in each school district.<sup>139</sup> While it may be difficult to envision a state withdrawing all support for education, there is nothing in the equal protection analysis that would prevent it from doing so.<sup>140</sup> Thus, the schools’ guarantee must lie in article IX, not simply the equal protection clause.

#### B. EQUAL PROTECTION IS INFEASIBLE AND UNDESIRABLE.

True equality in education is infeasible and undesirable in light of the large variations in educational priorities, disparities in resources, and the longstanding principle of local control. Although equality is appealing in its simplicity, in reality no two educational programs will ever be truly equal. This is true for a number of reasons. First, true equality would be enormously complex, if not impossible, to prove and administer. In the context of education, hundreds of different inputs, from the training of teachers to the competence of administrators to the quality of textbooks to the size of a classroom, all affect how a district or school delivers education; it would be quite simply impossible to equalize all these factors.

Even considering only school funding, the appropriate dimension for comparison has proven elusive despite decades of litigation.<sup>141</sup> As we have seen, equalizing funding does not create equal programs, as “[e]qual expenditures may fail to produce equal schools because of variations, for example, in [the] efficiency of administration, in resource allocation decisions, or in the demands placed on schools by their different student populations.”<sup>142</sup> Particularly in California, with marked differences in cost of living, property tax bases, and demographics, the same dollar can produce vastly different marginal increases in a child’s education.<sup>143</sup> Some even argue that money is not linked to the quality of

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139. See John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776–1900*, 42 AM. J. LEGAL HIST. 1, 30 (1998); see also Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 701 (2010); R. Craig Wood, *Constitutional Challenges to State Education Finance Distribution Formulas: Moving from Equity to Adequacy*, 23 ST. LOUIS U. PUB. L. REV. 531, 551 (2004).

140. See Eastman, *supra* note 139, at 33–34.

141. See Enrich, *supra* note 131, at 145; McUsic, *supra* note 72, at 316.

142. Enrich, *supra* note 131, at 148.

143. See McUsic, *supra* note 72, at 330 (detailing why education costs differ across school districts).

educational outputs at all, and equal funding will not produce anything resembling an equal education.<sup>144</sup> This is a serious problem because plaintiffs in school finance cases “do not seek equal funding merely for the sake of equality; they seek to improve the educational opportunities offered by their schools.”<sup>145</sup>

Educational equality is also a politically infeasible goal. California’s legislature has emphasized local control of schools;<sup>146</sup> this local control will necessarily bring variation. Again turning to the area of funding, wealthier districts have a vested interest in protecting their ability to spend more money to provide their children with a superior education.<sup>147</sup> A significant fear exists that in order to achieve equality, the wealthier districts will either need to restrict their spending or services, or pay for the poorer districts out of their own funds.<sup>148</sup> It also “threatens the wealthy districts’ ability to give their children an advantage in the competition for post-school opportunities,” for which they are willing to spend a great deal of their own wealth.<sup>149</sup> It would likely be impossible to disallow this spending, but equally impossible to bring every school district in the state up to the spending levels of the wealthiest districts.<sup>150</sup>

Moreover, simply equalizing per-pupil funding might not produce better educational opportunities for disadvantaged children because education costs for these children are higher than the costs for other

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144. Aaron Saiger, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 COLUM. L. REV. 1830, 1837–38 (1999) (citing Eric A. Hanushek, *Conclusions and Controversies About the Effectiveness of School Resources*, 4 FED. RES. BANK N.Y. ECON. POL’Y REV. 11, 22 (1998) (“Simply providing more funding or a different distribution of funding [to schools] is unlikely to improve student achievement . . .”).

145. Noreen O’Grady, *Toward a Thorough and Efficient Education: Resurrecting the Pennsylvania Education Clause*, 67 TEMP. L. REV. 613, 631 (1994) (citing Richard J. Stark, *Education Reform: Judicial Interpretation of State Constitutions’ Education Finance Provisions—Adequacy vs. Equality*, 1991 ANN. SURV. AM. L. 609, 613–14).

146. *Butt v. State*, 842 P.2d 1240, 1254 (Cal. 1992) (quoting CAL. CONST. art. IX, §§ 6 1/2, 14).

147. Enrich, *supra* note 131, at 156.

148. *See id.* at 156–57; Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2439 (2004) (“Local citizens, especially parents, do not like to be told that they cannot raise and spend local revenues on their own schools. Many like even less the idea that their locally raised revenues might be redirected to schools throughout the rest of the state.”); McUsic, *supra* note 72, at 328–29 (“In the past the legislative response to court-ordered school finance reform has been inadequate, in part, because property rich districts have ‘impede[d] the efforts of the poorer districts’ citizens to secure a satisfactory legislative remedy,” in part because of the threat of wealth transfer from rich to poor districts.).

149. Enrich, *supra* note 131, at 158; *see also* Rob Reich, *Not Very Giving*, N.Y. TIMES (Sept. 4, 2013), <http://www.nytimes.com/2013/09/05/opinion/not-very-giving.html> (describing how the town of Hillsborough on the San Francisco peninsula raised an additional \$2300 per pupil in 2012 through private contributions, compared to Oakland and San Francisco district foundations, which raised less than \$100 extra per child).

150. *See* William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 754 (1992).

children.<sup>151</sup> For example, “students with low English proficiency or little [family] support . . . require more . . . education[al services] . . . to reach the same achievement level as [more advantaged students].”<sup>152</sup> These variations in education costs to reach equal achievement further demonstrate the infeasibility of evaluating education under an equal protection framework.

### C. ADEQUACY MORE APPROPRIATELY ADDRESSES SOCIETAL GOALS.

Focusing on adequacy has a number of benefits. Among other benefits, the adequacy approach is “grounded in broadly shared societal values concerning the importance of education and the obligation to provide for the basic needs of society’s least advantaged.”<sup>153</sup>

Adequacy is appealing because it does not threaten to lower the level of achievement or spending in some districts in an effort to create equality.<sup>154</sup> Indeed, some equal protection cases, such as *Abbott v. Burke II*<sup>155</sup> in New Jersey, specifically brought about the kind of wealth distribution not required by an adequacy approach.<sup>156</sup> An adequacy analysis does not necessitate defining and comparing different groups within the system; it therefore does not require redistribution.<sup>157</sup>

Adequacy also addresses the societal goal of equity.<sup>158</sup> In states where plaintiffs in adequacy cases have won, the court has defined an “adequate” education as “sufficient to prepare all students, no matter their starting points, to compete equally in the world.”<sup>159</sup> This language “shows adequacy suits’ intent to reach equity.”<sup>160</sup> Adequacy is even better than equal protection in achieving equity because it can create systems where disparities are diminished by giving more to students who

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151. Heise, *supra* note 148, at 2441 (noting that equity-based litigation disfavors urban districts with high per-pupil funding levels); Stark, *supra* note 145, at 657 (“To compensate for the effects of poverty . . . poor children required greater educational resources than affluent children.”).

152. McUsic, *supra* note 72, at 329; *see also id.* at 330 (noting that urban districts must pay higher teacher salaries and higher site and construction costs).

153. Enrich, *supra* note 131, at 170.

154. *Id.*; McUsic, *supra* note 72, at 328–29.

155. 575 A.2d 359 (N.J. 1990).

156. Phil Weiser, *What’s Quality Got to Do with It?: Constitutional Theory, Politics, and Education Reform*, 21 N.Y.U. REV. L. & SOC. CHANGE 745, 774 (1995) (responding to litigation with “targeted aid to an additional two school districts and capped the spending of wealthier districts in order to realize greater distributional equity.”).

157. *Id.* at 758.

158. Meaghan Field, *Justice as Fairness: The Equitable Foundations of Adequacy Litigation*, 12 SCHOLAR 403, 407 (2010).

159. *Id.* at 410 (citing Deborah A. Verstegen, *Towards a Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems*, 23 ST. LOUIS U. PUB. L. REV. 499, 508, 511–12, 523 (2004)).

160. *Id.*

need more; “equality can only make things even.”<sup>161</sup> For example, a true equity-based analysis could give \$5000 to every child in the state, and likely pass a constitutional equity challenge, whether or not some students actually need \$7000 in order to achieve basic literacy and numeracy given their learning needs. Adequacy’s true concern is equality of opportunity, not equality of resources (even if that is facially what the claim asks for) because the resources consist of what each student needs to reach the state-imposed standards, even if those needs differ immensely.<sup>162</sup> A truly adequate education may in fact demand something other than equal resources.<sup>163</sup>

#### D. ADEQUACY IS THE ONLY WAY TO GUARANTEE THE RIGHT.

Without a right to a quality education, the right to education is hollow. The right to counsel is a useful comparison. Article I, section 15 of the California Constitution guarantees a right to counsel.<sup>164</sup> As both the U.S. and the California Supreme Court have found, this right to counsel is the right to the effective assistance of counsel.<sup>165</sup> The U.S. Supreme Court has found that the right to a fair trial is contained not only in the Due Process Clauses, but independently through the right to counsel in the Sixth Amendment.<sup>166</sup> The Supreme Court has also affirmed that this right is not conditioned on wealth.<sup>167</sup> The right to counsel, however, is not satisfied simply if a “lawyer is present at trial alongside the accused.”<sup>168</sup> The constitutional mandate is fulfilled only where counsel renders “adequate legal assistance.”<sup>169</sup>

Similarly, article IX of the California Constitution guarantees a right to education.<sup>170</sup> As this Article argues, this right is guaranteed not only by the equal protection clause, but independently through the education clause itself. The California Supreme Court has also found that the right to an education cannot be conditioned on wealth.<sup>171</sup> Finally, the right to an education is not satisfied simply by “access to a classroom.”<sup>172</sup>

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161. Field, *supra* note 158, at 410 n.29.

162. *Id.* at 410–11.

163. Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL. 483, 500 (1998).

164. CAL. CONST. art. I, § 15.

165. *In re Valdez*, 233 P.3d 1049, 1059 (Cal. 2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

166. *Strickland*, 466 U.S. at 684–85.

167. *Id.* at 685 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

168. *Id.*

169. *Id.* at 686 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)).

170. *See Serrano v. Priest (Serrano I)*, 487 P.2d 1241, 1248 (Cal. 1971).

171. *Id.* at 1257.

172. *Id.*

The parallels between the right to adequate counsel and a right to adequate education have not gone unnoticed by the California Supreme Court; the court compared the two in its first *Serrano* decision, and even noted that “from a larger perspective, education may have far greater social significance” than the right to a fair trial.<sup>173</sup> There are limits to trying to reproduce Sixth Amendment jurisprudence within the context of education (no one has ever been able to plead “ineffective assistance of teacher,” for example). Pointing out the parallels, however, serves to highlight that the supreme court has found that the only way to fulfill the right to counsel is to guarantee adequacy; it should do the same with the right to education. The court should not continue to affirm a fundamental right, as held in *Serrano*, while also finding that article IX holds no qualitative mandate.

### III. OTHER STATES' COURTS

Other states' high courts have dealt with interpreting their education clauses, some substantially similar to California's provisions. California courts may look to the decisions of other state courts that have interpreted similar constitutional provisions because where “words are used which are employed in a certain sense in the constitutions or statutes of other States . . . , it is proper to consider them as employed in the same sense in our Constitution.”<sup>174</sup> The California Supreme Court has repeatedly looked to other states' interpretations of similar provisions in their constitutions, particularly in the context of the free schools provision.<sup>175</sup> Moreover, California's constitutional framers explicitly stated that the language of the education clause was taken from other states' constitutions.<sup>176</sup> Because of this heavy borrowing, logic dictates that a clause that appears in all of the constitutions should be interpreted in a roughly uniform fashion.<sup>177</sup>

Nearly every state's education article contains language that resembles the language in the California Constitution. One category of cases adds words such as “thorough,” “complete,” and “efficient” to the establishment of a school system, but otherwise look similar to California's own article.<sup>178</sup> Another category resembles California's article 9, section 1

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173. *Id.* at 1257–58.

174. *See* *Cty. of Sacramento v. Hickman*, 428 P.2d 593, 599 (Cal. 1967).

175. *See* *Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 825 P.2d 438, 443 (Cal. 1992); *Hartzell v. Connell*, 679 P.2d 35, 38–44 (Cal. 1984).

176. 1879 DEBATES, *supra* note 35, at 1087.

177. Noreen O'Grady, *supra* note 145, at 630 (citing *McUsic*, *supra* note 72, at 312).

178. *See, e.g.*, ARK. CONST. art. XIV, § 1; COLO. CONST. art. IX, § 2; IDAHO CONST. art. IX, § 1; KY. CONST. § 183; N.J. CONST. art. VIII, § 4, para. 1; OHIO CONST. art. VI, § 2; S.D. CONST. art. VIII, § 15; TEX. CONST. art. VII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WYO. CONST. art. VII, § 1.

(regarding the promotion of intellectual and scientific goals), articulating goals beyond the simple establishment of schools.<sup>179</sup> Still another category looks like California's article I, section 5: "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."<sup>180</sup>

Because of these variations, there are limits to the utility of comparing other states' provisions to that of California. First, it is difficult to compare other states' provisions because of these variations, including the use of the terms "thorough," "efficient," or both. California's article IX, section 5 states only: "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."<sup>181</sup>

Second, California's education rights doctrine does not easily compare to other states' doctrines because in California, the supreme court has long held that education is a fundamental right.<sup>182</sup> This right has not been so clearly established in every state.

Despite these limitations, a review of other states' decisions reveals that there is a movement in favor of finding a substantive, qualitative right to education under state constitutions. "The highest courts of at

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179. See, e.g., MASS. CONST. pt. 2, 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, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them . . ."); MONT. CONST. art. X, § 1 (indicating that the legislature shall provide a basic system of free quality public elementary and secondary schools); N.H. CONST. pt. 2, art. LXXXIII (substantially similar to Massachusetts').

180. See, e.g., ARIZ. CONST. art. XI, § 1 ("The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system."); 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."); 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."); MINN. CONST. art. XIII, § 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 to establish a general and uniform system of public schools."); N.C. CONST. art. IX, §§ 1–2 ("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. . . . The General Assembly shall provide . . . for a general and uniform system of free public schools . . ."); S.C. CONST. art. XI, § 3 ("The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable."); VT. CONST. ch. 2, § 68 ("[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."); WIS. CONST. art. X, § 3 ("The legislature shall provide by law for the establishment of district schools.").

181. CAL. CONST. art. IX, § 5.

182. See *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1258 (Cal. 1971).

least fourteen states . . . have declared that education is a fundamental right under their state constitutions.”<sup>183</sup> Twenty-two have held that there is a substantive guarantee underlying their states’ education clauses, often where plaintiffs alleged inadequate funding.<sup>184</sup>

In the minority of states that have declined to find a right to adequacy, their supreme courts have never found education to be a fundamental right.<sup>185</sup> The Indiana and Rhode Island supreme courts, for example, rejected claims that their constitutional provisions required any kind of minimum adequate quality of schooling, but did so while finding no right to education at all.<sup>186</sup> California, of course, has found a right to education.<sup>187</sup> The conclusion from this review is that no supreme court has ever found its education clause to contain a substantive right to an education with no corresponding guarantee of quality. The flip side, curiously enough, has happened: the Montana Supreme Court refused to rule on whether its state’s constitution conferred a fundamental right to

183. Ken Gormley, *Education as a Fundamental Right: Building a New Paradigm*, 2 F. ON PUB. POL’Y 207, 219 n.63 (2006) (listing Alabama, Arizona, California, Connecticut, Kentucky, Minnesota, New Hampshire, North Dakota, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming as declaring education a fundamental right).

184. Arizona: Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 823 (Ariz. 1994); Arkansas: Tucker v. Lake View Sch. Dist. No. 25 of Phillips Cty., 917 S.W.2d 530, 696 (Ark. 1996); Colorado: Lobato v. People, 218 P.3d 358, 374 (Colo. 2009) (en banc); Connecticut: Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 233 (Conn. 2010); Idaho: Idaho Schs. for Equal Educ. Opportunity v. State, 976 P.2d 913, 914 (Idaho 1998); Kansas: Montoy v. State, 120 P.3d 306, 308 (Kan. 2005); Kentucky: Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 194 (Ky. 1989); Massachusetts: McDuffy v. Sec’y of Exec. Office of Educ., 615 N.E.2d 516, 517 (Mass. 1993); Montana: Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 310 (Mont. 2005); New Hampshire: Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1355 (N.H. 1997); New Jersey: Abbott v. Burke, 575 A.2d 359, 405 (N.J. 1990); New York: Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 331 (N.Y. 2003); North Carolina: Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997); Ohio: DeRolph v. State, 677 N.E.2d 733, 737 (Ohio 1997); South Carolina: Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999); South Dakota: Davis v. State, 804 N.W.2d 618, 624 (S.D. 2011); Texas: Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989); Vermont: Brigham v. State, 692 A.2d 384, 390 (Vt. 1997); Wisconsin: Vincent v. Voight, 614 N.W.2d 388, 397 (Wis. 2000); Washington: Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 85–86 (Wash. 1978); McCleary v. State, 269 P.3d 227, 230–31 (Wash. 2012); West Virginia: Pauley v. Kelly, 255 S.E.2d 859, 870 (W.Va. 1979); Wyoming: Campbell Cty. Sch. Dist. v. State, 907 P.2d 1238, 1263 (Wyo. 1995).

185. Illinois: Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1195 (Ill. 1996) (same); Indiana: Bonner *ex rel.* Bonner v. Daniels, 907 N.E.2d 516, 522 (Ind. 2009) (finding a duty for the legislature but no right or adequacy guarantee); Maryland: Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758, 786 (Md. 1983); Nebraska: Nebraska Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164, 179 (Neb. 2007) (noting that voters had also rejected a 1996 constitutional amendment that would have ensured a “quality” education).

186. *Bonner*, 907 N.E.2d at 522 (finding that the constitution “does not speak in terms of a right or entitlement to education,” therefore no right under the constitution “to be educated to a certain quality or other output standard”); City of Pawtucket v. Sundlun, 662 A.2d 40, 55 (R.I. 1995) (“The education clause confers no such right [to an education], nor does it guarantee an ‘equal, adequate, and meaningful education’”).

187. See *Serrano I*, 487 P.2d at 1248–49.

education, even while finding Montana's school funding system unconstitutional.<sup>188</sup>

What we learn from these cases is that only a minority of states have found that their education clauses confer no substantive right. Where a state's high court has found a right to education, none has found that right to exist without a guarantee of quality. Decades ago, the California Supreme Court established a fundamental right to education in *Serrano*. To find that there is no corresponding adequacy guarantee would not only put California at odds with other states' interpretations of their education clauses, it would render *Serrano* hollow.<sup>189</sup> Unless the supreme court overrules *Serrano*, the continued viability of the right and its interaction with a right to an adequate education are inextricable.

#### IV. THE WAY FORWARD: STANDARDS-BASED ADEQUACY EVALUATION

Establishing the right to an adequate education, as this Article seeks to do, is far from the end of the inquiry. When deciding an education adequacy case, a court must take three steps: (1) defining the meaning of a constitutionally adequate education; (2) determining how to objectively measure whether a school system is adequate; and (3) deciding on a remedy.<sup>190</sup> This Article does not purport to define the best way to apply this analysis; it seeks merely to prove the existence of the right and present a constitutionally-appropriate way to address questions about its substance. Part IV also aims to dismiss any separation of powers concerns.

##### A. SEPARATION OF POWERS CONCERNS

In one adequacy-based case pending before the California Court of Appeal, the State alleges that any adequacy challenges under article IX are nonjusticiable intrusions upon the legislative domain.<sup>191</sup> The argument is based on article IX's instruction that the state legislature "shall provide" for a system of common schools. The court should reject this idea because the doctrine of separation of powers in California has never been subject to a strict formalistic interpretation.

As scholars have noted, since the 1850s the California Supreme Court has not adhered to a formal separation of executive, legislative,

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188. *Columbia Falls*, 109 P.3d at 261.

189. *Dyna-Med, Inc. v. Fair Emp't & Hous. Comm'n*, 743 P.2d 1323, 1387 (Cal. 1987) ("Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.").

190. Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2245 (2003).

191. See Brief for Respondent at 32, *Campaign for Quality Educ. v. State*, No. A134423, 2012 WL 5846476 (Cal. Ct. App. Oct. 19, 2012) (arguing that plaintiffs' adequacy claims are "nonjusticiable because they are matters within the exclusive province of the Legislature").

and judicial powers.<sup>192</sup> Instead, it has adopted a “core powers analysis,” where an action is unconstitutional only where the actions of one branch “materially impairs” the core powers or functions of another branch.<sup>193</sup>

“Under [this] analysis, courts first determine whether the acts of one branch implicate the ‘core zone of authority’ or powers of another branch.”<sup>194</sup> Looking here at the education clause, one can assume that a core power is implicated because the legislature is assigned with the duty to “encourage” and “provide for” schools.<sup>195</sup> However, the analysis does not stop there. Courts then determine whether that power has been materially impaired.<sup>196</sup> Reviewing a legislative action for constitutionality, or even imposing reasonable regulations does not materially impair the legislature’s duty, and does not control the exercise of legislative discretion; it merely limits that discretion in conformance with the California Constitution.<sup>197</sup>

As the court said in *Butt*, the State, acting through the supreme court, is the ultimate guarantor of the constitutional right to education under the California Constitution.<sup>198</sup> There, the court noted that “the State’s ultimate responsibility for public education cannot be delegated to any other entity.”<sup>199</sup> It found that “[t]he Constitution has always vested ‘plenary’ power over education not in the districts, but in the State, through its Legislature . . . . The legislative decision to emphasize local administration does not end the State’s constitutional responsibility for basic equality in the operation of its common school system.”<sup>200</sup> Therefore, under both supreme court precedent and a core powers analysis, the supreme court is well within its constitutional mandate in reviewing education clause claims.

This conforms with other states’ supreme courts’ holdings: once they have found a fundamental right to education under their education clauses, they have also found that the supreme court can guarantee that right.<sup>201</sup> As the California Supreme Court itself has held, “[i]f the

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192. See David A. Carrillo & Danny Y. Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F. L. REV. 655, 672 (2011) (citing *Superior Court v. County of Mendocino*, 913 P.2d 1046, 1054 (Cal. 1996)) (recognizing substantial interdependence by the branches is a fulfillment, not an obstacle, to the “checks and balances” safeguarded by the separation of powers doctrine).

193. *Id.* at 656.

194. *Id.* at 680.

195. CAL CONST. art. IX, §§ 1, 5.

196. Carrillo & Chou, *supra* note 192, at 656.

197. *Id.* at 686.

198. *Butt v. State*, 842 P.2d 1240, 1243 (Cal. 1992).

199. *Id.* at 1248.

200. *Id.* at 1254.

201. See *Neeley v. West Orange-Cove*, 176 S.W.3d 746, 776 (Tex. 2005) (“This is not an area in which the Constitution vests exclusive discretion in the legislature . . . 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.’”).

Legislature were at liberty to avoid the behests of the Constitution by resolution or law, it would become supreme, and its exposition of that instrument would be final and conclusive.”<sup>202</sup> Finding the issue to be outside the province of the courts would hollow out the right itself. The right to education in California is fundamental. To guarantee that right with no way to enforce it would amount to a right without a remedy, violating an elementary principle in legal jurisprudence.<sup>203</sup>

## B. DEFINING ADEQUACY UNDER THE CALIFORNIA CONSTITUTION

Finding a justiciable right, the court should then outline its standard for what constitutes an adequate education. State education clause litigation has typically resulted in three broad definitions of adequacy:

(1) those that articulate a vague and broad qualitative standard aimed at furthering the state’s interest in producing civic-minded and economically productive students but provide little guidance to policymakers; (2) those that identify specific . . . capacities and skills that all children should receive from public education to serve both the state’s and the students’ individual interests . . . ; and (3) those that tie adequacy to state educational content standards, which define with a high degree of specificity what all children should know and be able to do.<sup>204</sup>

But none of these is sufficient to define what the right to education means within the context of California history and precedent. There is a fourth option, based on Justice Liu’s article *Education, Equality, and National Citizenship*,<sup>205</sup> as well as the history and jurisprudence of this state. This method requires sufficient education to enable citizens to develop a stable economy, become upwardly mobile, and engage in self-government, such that they are able to participate in the political life of the state.

### I. Broad Constitutional Standard

*Butt* provides an example of a broad standard that affirms the right but gives little guidance to courts or the legislature for how to implement it. *Butt* held that the constitution requires “basic equality of educational opportunity,”<sup>206</sup> which this Article argues must be a nod to a basic educational standard. The advantage of this approach is that it is flexible;

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202. *Nogues v. Douglass*, 7 Cal. 65, 78 (1857).

203. See *Peck v. Jenness* 48 U.S. 612, 623 (1849) (“A legal right without a remedy would be an anomaly in the law.”); *Barquis v. Merchs. Collection Ass’n.*, 496 P.2d 817, 830 (Cal. 1972) (“There is a maxim as old as law that there can be no right without a remedy . . . .”); *Am. Philatelic Soc’y v. Claibourne*, 46 P.2d 135, 140 (Cal. 1935) (same); *Nogues*, 7 Cal. at 80 (“It is a rule as old as the law itself, that there is no right without a remedy, and wrong without a redress . . . .”).

204. William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 562 (2006).

205. Liu, *supra* note 13.

206. *Butt v. State*, 842 P.2d 1240, 1251 (Cal. 1992).

it does not risk enshrining any one vision of education, and leaves localities with the ability to fashion their own programs. The disadvantage of this approach, however, is that these broad and vague statements do little to guarantee a quality education. *Butt* has been law since 1992, and still, California students continue to score at nearly the bottom of the rankings of nationwide measurements of math and reading.<sup>207</sup> It also leads to a “guess-and-check” approach to education jurisprudence, which keeps litigants, legislators, and courts tied up for years trying to find what is constitutional.<sup>208</sup> The broad standard has done little to define, and therefore guarantee, the right.

## 2. *Court-Defined Minimum Education Requirements*

The court could instead adopt a definition of adequacy like that provided by Kentucky in *Rose v. Council for Better Education, Inc.* In *Rose*, the Kentucky Supreme Court addressed its constitution’s education clause, which simply provided: “The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.”<sup>209</sup> The court held that this language required the legislature to establish a system of common schools “that provides an equal opportunity for children to have an adequate education.”<sup>210</sup>

The *Rose* court announced that an adequate education must contain the following seven “capacities:”

[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public

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207. See *California NAEP Results*, CAL. DEP’T EDUC., <http://www.cde.ca.gov/ta/tg/nr/caresults.asp> (last visited Dec. 5, 2015); see also Jan Mabry, *California Students Rank Near Bottom in Math, Reading on Standardized Tests*, CBS SF BAY AREA (Oct. 28, 2015), <http://sanfrancisco.cbslocal.com/2015/10/28/california-students-rank-near-bottom-in-math-reading-on-standardized-tests/>.

208. See the *Abbott* cases, currently in their twentieth trip to the New Jersey Supreme Court in over more than two decades. *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985); *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018, 1023 (2011).

209. *Rose v. Council for Better Ed., Inc.*, 790 S.W.2d 186, 200 (Ky. 1989).

210. *Id.* at 211.

school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.<sup>211</sup>

Following *Rose*, a number of courts have adopted this approach, including the Kansas Supreme Court earlier last year.<sup>212</sup>

The advantage of this approach is clear direction to the legislature of what the constitutional minimum bar is. It provides guidance to lower courts about the minimum floor below which a constitutionally adequate education plan may not fall, as well as a reference point to localities wishing to provide constitutionally appropriate educations to their children. It also has the advantage of conforming much more closely to the article IX, section 1 goal of fostering “the promotion of intellectual, scientific, moral, and agricultural improvement,” instead of simply “ke[eping] up and support[ing]” a system of free schools (which it does implicitly).<sup>213</sup>

One criticism of this approach is that it constitutes legislating from the bench, intruding on the province of the legislature and the long-standing preference for local control of schools. But the legislature itself, with little guidance from the courts, has already adopted standards that look considerably like the seven *Rose* “capacities.” The *Rose* capacities resemble content standards already present in the California Education Code, including:

(1) English-Language Arts Content Standards for California Public Schools<sup>214</sup> (emphasizing students who are college and career ready in reading, writing, speaking and listening, and language in order to, among other skills, demonstrate independence, build strong content knowledge, comprehend and critique, value evidence, and understand other perspectives and cultures).<sup>215</sup>

(2) History-Social Science Content Standards for California Public Schools<sup>216</sup> (“[N]ot only to acquire core knowledge in history and social science, but also to develop the critical thinking skills that historians and social scientists employ to study the past and its relationship to the

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211. *Id.* at 212. Courts sometimes combine the last two of these seven goals. *See, e.g.*, *Gannon v. State*, 319 P.3d 1196, 1233 (Kan. 2014).

212. *Gannon*, 319 P.3d at 1237–38; *see also* *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); *Abbeville Cty. School Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999).

213. CAL. CONST. art. IX, §§ 1, 5.

214. CAL. DEP’T OF EDUC., CALIFORNIA COMMON CORE STATE STANDARDS: ENGLISH LANGUAGE ARTS AND LITERACY IN HISTORY/SOCIAL STUDIES, SCIENCE, AND TECHNICAL SUBJECTS 9–78 (2013), <http://www.cde.ca.gov/be/st/ss/documents/finaledaccsstandards.pdf>.

215. *Id.* at 6.

216. *See* CAL. DEP’T OF EDUC., HISTORY-SOCIAL SCIENCE CONTENT STANDARDS FOR CALIFORNIA PUBLIC SCHOOLS: KINDERGARTEN THROUGH GRADE TWELVE (2000), <http://www.cde.ca.gov/be/st/ss/documents/histsocscistnd.pdf>.

present,” including teaching students to “approach subject matter as historians, geographers, economists, and political scientists.”<sup>217</sup>

(3) History-Social Science Content Standards for California Public Schools<sup>218</sup> (including studying U.S. and world government institutions, history, and practices in grades two, three, four, five, six, eight, ten, eleven, and twelve).<sup>219</sup>

(4) Health Education Content Standards for California Public Schools<sup>220</sup> (including understanding health enhancing concepts, analyzing influences that affect health, accessing and analyzing health information, using communication skills, decisionmaking, and goal setting to enhance health, among other areas).

(5) Visual and Performing Arts Content Standards (including proficiency in artistic perception; creative expression; historical and cultural context; aesthetic valuing; and connections, relationships, and applications of art across subject areas).<sup>221</sup>

(6) Career Technical Education Standards for California Public Schools<sup>222</sup> (including developing curriculum to ensure that students are career and college ready and to prepare them for future careers).<sup>223</sup>

(7) Career Technical Education Standards for California Public Schools (including the goal of preparing graduates to successfully compete in the global economy).<sup>224</sup>

Given the overlap between the *Rose* factors and California’s own content standards, adopting an explicitly *Rose*-like approach has the advantage of requiring no changes in the content standards as they are currently constituted. There are additional content standards in the California Education Code as well; this is as it should be. The constitutionally required minimum is a floor, not a ceiling.

One criticism of this approach is that it is focused on inputs. Discussions of educational inputs usually focus on funding and resources.<sup>225</sup> While equalizing these inputs sounds appealing at first, such an approach could result in reducing educational resources for all in order to ensure equal

217. *Id.* at I–2

218. *See generally id.*

219. *Id.* at 8–10, 12, 14, 15, 26, 33–35, 38, 42, 45, 47, 50, 54–60.

220. *See generally* CAL. DEP’T OF EDUC., HEALTH EDUCATION CONTENT STANDARDS FOR CALIFORNIA PUBLIC SCHOOLS, KINDERGARTEN THROUGH GRADE TWELVE (2009), [www.cde.ca.gov/be/st/ss/documents/healthstandmaro8.pdf](http://www.cde.ca.gov/be/st/ss/documents/healthstandmaro8.pdf).

221. *Nine Through Twelve-Proficient, Visual and Performing Arts: Visual Arts Content Standards*, CAL. DEP’T EDUC., <http://www.cde.ca.gov/be/st/ss/vaproficient.asp> (last visited Dec. 23, 2015).

222. *CTE Model Curriculum Standards*, CAL. DEP’T EDUC., <http://www.cde.ca.gov/ci/ct/sf/ctemcstandards.asp> (last visited Dec. 23, 2015).

223. CAL. DEP’T OF EDUC., CALIFORNIA CAREER TECHNICAL EDUCATION MODEL CURRICULUM STANDARDS I (2013), <http://www.cde.ca.gov/ci/ct/sf/documents/ctestdfrontpages.pdf>.

224. *Id.* at ii.

225. Julie Zwibelman, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 558 (2001).

funding.<sup>226</sup> Moreover, “equal financial inputs do not yield equal resources,” and “equal funding may not translate into equal education, insofar as the school’s organization and infrastructure ensure that the money is badly spent.”<sup>227</sup>

Output measures, by contrast, look to the graduation rate, the dropout rate, the skill level of students who enter state higher education systems, and students’ test results.<sup>228</sup> A focus only on inputs or only on outputs does not adequately measure educational quality. In order to ensure a quality education, officials should consider both inputs and outputs when measuring school progress.

### 3. *Legislatively-Based Minimums*

The third option is looking to the legislature’s content standards, or the legislature’s own definition of the right, as the constitutional benchmark of an adequate education.<sup>229</sup> This standard, which focuses on “outputs” such as learning benchmarks rather than “inputs” such as school financing, proposes that courts should look to state-developed content standards as the constitutional standard of adequacy, declare any system where students are not meeting them unconstitutional, and order that student achievement be brought up to the articulated standards.<sup>230</sup> This approach is advantageous because “it cannot be readily accused of intruding upon separation of powers insofar as those educational content standards have been legislatively authorized and (at least tacitly) approved.”<sup>231</sup> Moreover, state content standards are robust and state-specific, reflecting the legislature’s (and by extension, the people’s) priorities in what constitutes an adequate education.

The drawbacks to this approach, however, outweigh its advantages. First, as a matter of state constitutional jurisprudence, if the court used this approach, it would be abdicating its constitutional authority by allowing the legislature to define what article IX means. Such an approach has no support in the state constitution. Although the California Constitution instructs the legislature to establish a system of common schools, nowhere does it cede the power to define the right. The legislature allocates funding, reviews and updates statewide curriculum,

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226. Debra Satz, *Equality, Adequacy, and Educational Policy*, 3 *EDUC. FIN. & POL’Y* 424, 426–27 (2008).

227. *Id.*; see also *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 939 (Cal. 1976) (“[A]n equal expenditure level per pupil in every district is not educationally sound or desirable because of differing educational needs . . .”).

228. Satz, *supra* note 226, at 426–27.

229. See *DeRolph v. State*, 677 N.E.2d 733, 747 (Ohio 1997) (directing the state legislature to define adequacy); *McUsic, supra* note 72, at 337.

230. *McUsic, supra* note 72, at 330.

231. Koski & Reich, *supra* note 204, at 564 (citing William S. Koski, *Educational Opportunity and Accountability in an Era of Standards-Based School Reform*, 12 *STAN. L. & POL’Y REV.* 301, 307 (2001)).

certifies teachers, and oversees school facilities upkeep, but all this speaks to its ability to fulfill the minimum statewide standards, not to define them.

In addition to being constitutionally suspect, a standards-based approach prevents the court from acting as a backstop to prevent the legislature from defining the right in such a way that it amounts to no right at all.<sup>232</sup> The highest courts of both Texas and New York acknowledged this problem, retaining in the judiciary the ultimate power to determine what the right entails.<sup>233</sup>

There are additional practical difficulties with constitutionalizing state standards. State standards, particularly California's, are robust, covering the entire range of K-12 curriculum, including English-Language Arts, Mathematics, English Language Development, Career Technical Education, Health Education, History-Social Science, Physical Education, Science, Visual and Performing Arts, World Language, and guidelines for a Model School Library.<sup>234</sup> While commendable, it is difficult to connect some of these goals either to article IX (education to "further intellectual, scientific, moral, and agricultural improvement"), or to the history of the education clauses.<sup>235</sup> The requirements for health education or physical education, for example, might be best practices in education standards, but this does not automatically entitle them to constitutional significance.

The California legislature should be encouraged to adopt robust state standards for education, and change them where appropriate, without fear that such new standards would create new causes of action in state courts. For example, if this year's state standards mandate a certain student to teacher ratio as a benchmark of quality education and then next year's mandate adjusts that standard to create larger class sizes, could every child in a newly overcrowded classroom sue for a smaller class? If the right to an adequate education is tied directly to the state standards, there is little reason why not. Rather than encouraging the legislature to experiment with state standards in an effort to create a

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232. William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1241 (2003).

233. *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 332 (N.Y. 2003) ("[S]o to enshrine the Learning Standards would be to cede to a state agency the power to define a constitutional right."); *Neeley v. West Orange-Cove*, 176 S.W.3d 746, 784 (Tex. 2005); *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.2d 717, 730 n.8 (Tex. 1995) ("[T]he Legislature may [not] define what constitutes a general diffusion of knowledge so low as to avoid its obligation to make suitable provision imposed by article VII, section 1" of the Texas Constitution.).

234. *Content Standards*, CAL. DEP'T EDUC., <http://www.cde.ca.gov/be/st/ss/> (last visited Dec. 23, 2015).

235. See *supra* Part I.

cutting-edge education system, this doctrine could create an unintentional “incentive[] for the legislature to water down [its own] standards.”<sup>236</sup>

#### 4. *Citizenship Approach*

In *Education, Equality, and National Citizenship*, then-Professor Liu<sup>237</sup> argued that the guarantee of national citizenship found in the Fourteenth Amendment obligates the national government to ensure educational adequacy.<sup>238</sup> Here in California, the education clauses in article IX are robust enough to obviate the need to couch the right to education inside other constitutional rights, but the effect of these arguments is the same: in order to be a citizen, one must have sufficient education to be able to participate in the political and economic life of the state. Liu argues that “[c]itizenship requires a threshold level of knowledge and competence for public duties such as voting, serving on a jury, and participating in community affairs, and for the meaningful exercise of civil liberties like the freedom of speech.”<sup>239</sup>

This is the right approach to take here. From the framers’ debates, one can see that California’s founders were concerned primarily with the citizenship aspects of a good education, including guaranteeing a stable economy, an upwardly mobile populace, and the ability to self-govern, and emphasized the necessity of being able to participate in the political life of the state.<sup>240</sup> John Swett, arguably the father of public education in California, urged that physical facilities, desks, and textbooks, as well as strong teacher qualifications and pedagogical methods, were essential to providing an adequate education (along with state inspection and supervision).<sup>241</sup>

The California Constitution itself lists a number of rights that are integral to the requirements of citizenship in the state, all of which are instructive when defining an adequate education. Article I, section 3 guarantees the right of the people to petition government for redress of grievances, and to access information concerning the conduct of the people’s business.<sup>242</sup> Article I, section 9 protects the right to contract,<sup>243</sup>

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236. Koski & Reich, *supra* note 204, at 564–65; Bauries, *supra* note 126, at 724 (citing James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1233–38 (2008)).

237. Now an associate justice of the California Supreme Court.

238. Liu, *supra* note 13, at 330.

239. *Id.* at 345. This is the approach of at least one court to address the adequacy issue. In New York, adequacy requires learning 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.” *Campaign for Fiscal Equality v. State*, 655 N.E.2d 661, 666 (N.Y. 1995).

240. 1879 DEBATES, *supra* note 35, at 1087.

241. CARR, *supra* note 22, at 102; HENDRICK, *supra* note 23, at 15.

242. CAL. CONST. art. I, § 3.

243. *Id.* art. I, § 9.

and article II, section 2 guarantees the right to vote.<sup>244</sup> Finally, article I, section 19 guarantees the right to trial by jury.<sup>245</sup> Each of these rights is dependent on an educated populace, with sufficient literacy, verbal, math, and civics education to enable it to participate in the economic and political life of the state. For example, one must be able to read to vote, to write to petition one's government, and to do math in order to participate fully in the economic life of the state (including contracting).

This approach, too, inevitably invites criticism. First, these baseline "citizenship" requirements are far less robust than the state standards. Reformers who would argue for a constitutional right to full-service schools (such as those that guarantee healthcare, or nutrition) would not find the underpinning of that right in this theory. Second, these goals are, in some senses, a moving target. The literacy skills necessary to vote and serve on juries might have been different at the founding than they are now. Similarly, the numeracy skills critical for participating in economic life today might in the future be eclipsed by the ability to write code.

Tying the definition to societal norms might produce a more just result, however, for as society changes, the minimum requirements of education must change with it. The court could evaluate claims based on the citizenship approach to adequate education using a combination of inputs (facilities, teaching tools, textbooks, and funding) and outputs (ability of students to pass state tests in certain subjects). Both methods find support in California Supreme Court case law.<sup>246</sup>

#### V. THE COURT MUST DEFINE AND CLARIFY THE RIGHT TO EDUCATION IN ORDER TO PREVENT CONFUSION AMONG LOWER COURTS.

The Supreme Court of California must eventually define the meaning of article IX. Even now, there are ongoing lawsuits about teacher tenure, layoffs, dismissal,<sup>247</sup> inadequate instructional time,<sup>248</sup> and statewide denial of English learner instructional services,<sup>249</sup> all of which will touch on, if not rely on, the court's interpretation of what article IX requires. Recent settlements regarding teacher layoffs,<sup>250</sup> the use of unproven teaching methods,<sup>251</sup> and school fees,<sup>252</sup> as well as the ongoing procedure

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244. CAL. CONST. art. II, § 2.

245. CAL. CONST. art. I, § 19.

246. See *Serrano v. Priest* (*Serrano II*), 557 P.2d 929, 939 (Cal. 1976) (ascribing differences in pupil achievement to "differences in dollars," but also condoning the use of "pupil output as a measure of the quality of a district's educational program").

247. *Vergara v. State*, No. BC484642 (Cal. Super. Ct. June 1, 2014).

248. Complaint at 1-8, *Cruz v. State*, No. 14727139 (Cal. Super. Ct. May 29, 2014).

249. *D.J. v. State*, No. BS142775, 2014 WL 4064226 (Cal. Super. Ct. May 24, 2014).

250. Complaint, *Reed v. State*, No. BC432420, 2011 WL 10893745 (Cal. Super. Ct. Jan. 18-21, 2011) (settled in 2014).

251. Complaint, *Doe 1 v. State*, No. 34-80001164 (Cal. Super. Ct. May 30, 2012) (settled in 2012).

in place after the settlement in *Williams v. State*<sup>253</sup> regarding school resources, show that courts at all levels remain actively involved in defining the right to education.

Lower courts need guidance from the supreme court to decide these critical questions. In recent education cases, courts have shown confusion about California's education jurisprudence and a misunderstanding about the constitutional mandate. For example, in a superior court order in *Reed*, the court alternated its discussion of "basic equality of educational opportunity," an equal-protection-focused phrase coined in *Butt*, with a description of "basic educational opportunity," implying an adequacy mandate.<sup>254</sup> Other courts have split on their interpretation of *Butt's* command for "basic educational equality."<sup>255</sup>

For example, in *Williams*, plaintiffs alleged that California failed to provide adequate, safe, and healthy facilities; enough qualified teachers, libraries, and instructional materials; and schools that were not overcrowded.<sup>256</sup> There, the superior court in San Francisco dismissed plaintiffs' causes of action under article IX, sections 1 and 5, holding that these sections are not self-executing in all circumstances because education is assigned to the state legislature.<sup>257</sup> Even while reaffirming a right to "basic educational equality" from *Butt*, the court held that sections 1 and 5 were directed to the legislature, not the courts, and that section 1 "merely indicates principles, without laying down rules by means of which those principles may be given the force of law."<sup>258</sup> The court, notably, avoided deciding whether section 5 creates a "substantive, actionable right to education."<sup>259</sup>

An entirely different interpretation came out of the superior court in Los Angeles, in the recent case of *Vergara v. State*. There, plaintiffs alleged that the state's teacher tenure laws resulted in "grossly

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252. Complaint at 1, *Doe v. State*, No. BC445151 (Cal. Super. Ct. Sept. 10, 2010) (dismissed in 2012 due to new legislation).

253. Order Granting Motion for Judgment on the Pleadings as to Second Cause of Action at 3–5, *Williams v. State*, No. 312236 (Cal. Super. Ct. July 10, 2003).

254. Findings of Fact, Conclusions of Law, and Order Granting Final Approval of Settlement, *Reed v. State*, No. BC432420, 2011 WL 10893745, at \*2 (Cal. Super. Ct. Jan. 18–21, 2011) (affirming right to "basic equality of educational opportunity"); *id.* at \*19 (stating that additional turnover at the targeted schools "would cause material harm to faculty stability and the ability to deliver *basic educational opportunity* to the students.") (emphasis added). This was a lawsuit brought on behalf of Los Angeles school children whose schools were laying off disproportionate numbers of new teachers, disproportionately affecting low-income, minority students. *Id.* at \*1–2.

255. *Butt v. State*, 842 P.2d 1240, 1251 (Cal. 1992).

256. Plaintiff's First Amended Complaint at 21–22, *Williams v. State*, No. 312236 (Cal. Super. Ct. Aug. 14, 2000).

257. See Order Granting Motion for Judgment on the Pleadings as to Second Cause of Action, *supra* note 253, at 3–5.

258. *Id.* at 3.

259. *Id.* at 4.

ineffective” teachers.<sup>260</sup> In finding for the plaintiffs, the court held that “this Court is directly faced with issues that compel it to apply these constitutional principles [of equality] to the *quality* of the educational experience.”<sup>261</sup> It characterized the right to education under the California Constitution as a mix of equality and adequacy, characterizing the right as a right to “a basically equal opportunity to achieve a quality education.”<sup>262</sup> This court, unlike the *Williams* court, found no separation of powers barriers to “apply[ing] constitutional principles of law to the Challenged Statutes as it has done here, and trust[ing] the legislature to fulfill its mandated duty to enact legislation on the issue herein discussed that passes constitutional muster.”<sup>263</sup>

The California Court of Appeal has also weighed in on the issue in the context of home schooling. In *Jonathan L. v. Superior Court*, the court undertook a review of other states’ methods of guaranteeing that their home schooled children were receiving an adequate education.<sup>264</sup> The court went on to detail other states’ mechanisms for ensuring an adequate home school education, including requirements to ensure capable teaching, student progress by way of evaluations, individualized education plans for each student and reports on those plans, annual assessment, and the option to terminate home schooling if objectives are consistently unmet.<sup>265</sup> The court ended its opinion with a plea: “Given the state’s compelling interest in educating all of its children (Cal. Const., art. IX, § 1), and the absence of an express statutory and regulatory framework for home schooling in California, additional clarity in this area of the law would be helpful.”<sup>266</sup>

The supreme court must heed this call. As outlined above, the *Williams* court’s reading of the state’s constitution comports neither with the framers’ intent nor with the history of constitutional litigation in education in this state. Yet, without clear direction about the meaning of the education clauses, courts will continue to produce inconsistent jurisprudence.

#### CONCLUSION

Since the California Supreme Court’s decision in *Serrano I*, there is no doubt that the state constitution guarantees the right to *an* education, and an education that encompasses more than simply “access to a schoolhouse.” Although equal protection litigation has done much to

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260. Tentative Decision at 3, *Vergara v. State*, No. BC484642 (Cal. Super. Ct. June 1, 2014).

261. *Id.* (emphasis in original).

262. *Id.* at 16.

263. *Id.* at 16.

264. See *Jonathan L. v. Superior Ct.*, 81 Cal. Rptr. 3d 571, 595–96 (2008).

265. *Id.* at 596.

266. *Id.*

level the playing field, thousands of students are still deprived of a bare minimum of educational quality—an unconstitutional result given the text and history of the constitution, the education case law in California, and the similar conclusions of supreme courts nationwide. The Supreme Court of California must weigh in on this issue, to reduce confusion in the lower courts and produce a more just educational system for California's children. The citizenship approach, in which the supreme court evaluates whether schools provide enough education to teach students to be citizens, finds support in the history and language of the California Constitution, in corresponding constitutional provisions guaranteeing civic participation, in the education case law, and in the logical underpinnings of article IX. An inadequate education is not an education. This is the approach that the court should take.

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