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Can Courts Repair the Crumbling Foundation of Good Citizenship? An Examination of Potential Legal Challenges to Social Studies Cutbacks in Public Schools

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NOTE

CAN COURTS REPAIR THE CRUMBLING FOUNDATION OF GOOD CITIZENSHIP? AN EXAMINATION OF POTENTIAL LEGAL CHALLENGES TO SOCIAL STUDIES CUTBACKS IN PUBLIC SCHOOLS

*Eli Savit**

In the wake of No Child Left Behind, many public schools have cut or eliminated social studies instruction to allot more time for math and literacy. Given courts' repeated celebration of education as the "foundation of good citizenship," this Note examines potential legal claims and litigation strategies that could be used to compel social studies instruction in public schools. This Note contends that the federal judiciary's civic conception of education leaves the door slightly ajar for a Fourteenth Amendment challenge on behalf of social studies-deprived students, but the Supreme Court's refusal in San Antonio v. Rodriguez to recognize education as a fundamental right leaves potential federal challenges with substantial barriers to success. A state-law litigation strategy might prove more effective. In many states, constitutional education provisions or education-related judicial precedent strongly imply that public schools have a duty to provide students with social studies. States' education standards or the history surrounding the adoption of education provisions may also suggest that a constitutionally adequate education necessarily includes social studies instruction. Thus, although challenges to schools' curricular decisions are not sure to succeed, courts present a potential venue in which social studies-deprived students may be able to vindicate a right to civic education.

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INTRODUCTION

Although Sacramento's Martin Luther King Jr. Junior High (M.L.K.) bears the name of a civil rights titan, a number of its students are barred from taking classes dedicated to such topics as slavery, the Bill of Rights, and the Civil Rights Act. In fact, many students at M.L.K. are forbidden from taking classes that include explicit instruction about their school's namesake. Of course, if curiosity gets the best of them, every one of the school's students is presumably free to check out a biography of Dr. Martin Luther King from the public library, watch a History Channel show on the civil rights movement, or look up the Bill of Rights on Wikipedia. But while students are presumably allowed to study history, civics, and government on their own time, about 125 low-performing M.L.K. students are barred from taking any formal classes dedicated to these subjects.¹ Indeed, while they are inside the schoolhouse gates, the school's lowest-performing students are prohibited from taking any subjects except reading, math, and gym.²

M.L.K.'s de-emphasis of civic education is hardly anomalous. In the wake of the federal No Child Left Behind law—which largely ties federal school funding to students' scores on reading and math tests³—36 percent of American school districts reported reducing or eliminating civics, history, economics and government instruction (hereinafter collectively referred to as "social studies").⁴ Districts containing academically struggling schools

1. See Sam Dillon, *Schools Cut Back Subjects to Push Reading and Math*, N.Y. TIMES, Mar. 26, 2006, at A1.

2. *Id.*

3. No Child Left Behind Act of 2001, 20 U.S.C. § 6311 (2006).

4. CTR. ON EDUC. POLICY, CHOICES, CHANGES, AND CHALLENGES: CURRICULUM AND INSTRUCTION IN THE NCLB ERA 7 (rev. 2007), available at <http://civicmissionofschools.org/site/>

that, like M.L.K., serve predominantly black, Hispanic, or lower-income populations⁵ are apparently most likely to cut social studies: districts with high minority or socioeconomic populations are most likely to contain schools that are “designated for improvement” under No Child Left Behind,⁶ and over half of the school districts that contain a school “designated for improvement” under No Child Left Behind reported reducing or eliminating social studies instruction.⁷ Of course, an increased emphasis on reading and math—and a corresponding de-emphasis of other subjects—is in some ways an inevitable response to No Child Left Behind. No Child Left Behind requires states to impose a series of consequences on schools whose students fail to make adequate progress towards math and reading proficiency,⁸ and it is only natural that schools and districts would increase instruction time allotted to these subjects.

But No Child Left Behind is not solely responsible for the decline in civic education. In fact, schools’ commitment to social studies has steadily eroded since the 1960s,⁹ when students were commonly required to take as many as three courses in civics, democracy, and government.¹⁰ The reasons that schools de-emphasized social studies in the pre-No Child Left Behind era are unclear, but at least one commentator suggests that schools feared criticism or litigation if teachers dared broach politically or historically controversial subjects.¹¹

Given the state of social studies in America, it is perhaps predictable that many American students fail to meet grade-appropriate standards in civics, history, and government. According to the 2006 National Assessment of Educational Progress (N.A.E.P) report, only 24 percent of American fourth

documents/choices-changes-and-challenges-curriculum-and-instruction-in-the-nclb-era.pdf/view?searchterm=None (finding that 36 percent of all school districts had reduced social studies instruction after the passage of the No Child Left Behind Act).

5. See Dillon, *supra* note 1.

6. See U.S. GOV’T ACCOUNTABILITY OFFICE, NO CHILD LEFT BEHIND ACT: EDUCATION ACTIONS COULD IMPROVE THE TARGETING OF SCHOOL IMPROVEMENT FUNDS TO SCHOOLS MOST IN NEED OF ASSISTANCE 25 (2008), available at <http://www.gao.gov/new.items/d08380.pdf>.

7. CTR. ON EDUC. POLICY, *supra* note 4, at 7. In fact, these statistics may actually overstate the amount of instructional time dedicated to social studies, because many school districts encourage their teachers to teach reading or math skills during classes that are theoretically devoted to social studies. See *id.* at 8 (“[O]fficials from one school in Chicago explained that the school . . . tries to fit in at least 30 minutes for all other disciplines; however, as one Chicago school official pointed out, ‘our major focus is in reading and math.’”); *id.* at 9 (quoting an Escondido Union school official as saying that the district unsuccessfully “tri[es] to integrate . . . social studies standards at the same time [as] . . . literacy”).

8. 20 U.S.C. § 6311.

9. See CARNEGIE CORP. OF N.Y. & CTR. FOR INFO. & RESEARCH ON CIVIC LEARNING & ENGAGEMENT, THE CIVIC MISSION OF SCHOOLS 14–20 (2003), available at <http://civicyouth.org/PopUps/CivicMissionofSchools.pdf> (documenting a steady de-emphasis of civic education requirements in the 1980s and 1990s); Charles N. Quigley, *Civic Education: Recent History, Current Status, and the Future*, 62 ALB. L. REV. 1425, 1431 (1999) (thirty states do not require high school students to take civics or American government).

10. CARNEGIE CORP. OF N.Y. ET AL., *supra* note 9, at 14.

11. *Id.* at 15.

graders, 22 percent of eighth graders, and 27 percent of twelfth graders scored at or above a “proficient” level on a federally administered civics assessment.¹² A 2008 study by the educational advocacy group Common Core concluded that “too many young Americans do not possess . . . basic knowledge . . . about U.S. history and culture.”¹³ Fewer than half of the American seventeen-year-olds questioned by Common Core could place the Civil War in the proper half-century, nearly a quarter could not identify Adolf Hitler, and a third did not know that the Bill of Rights guarantees freedom of speech and religion.¹⁴ Studies also reveal a social studies achievement gap: African American and Hispanic students consistently perform worse than their white counterparts on civics tests; middle- and upper-income students consistently outperform their lower-income peers.¹⁵ Unsurprisingly, the social studies achievement gap manifests itself among adults as well. One comprehensive survey of adults showed that on each of sixty-eight questions testing respondents’ civic and political knowledge “whites are more informed than blacks; those with higher incomes are more informed than those with lower incomes; and older citizens are more informed than younger ones.”¹⁶

The de-emphasis of social studies in American schools has been widely criticized on both pedagogical and policy grounds.¹⁷ Professor E.D. Hirsch, for example, argues that schools’ focus on reading and writing at the expense of social studies actually *hinders* students’ reading comprehension.¹⁸ On Professor Hirsch’s account, literacy requires “domain-specific” background knowledge over and above the meaning of words.¹⁹ Without knowing the rules of baseball, for example, an individual can never make sense of a sentence that reads “Jones sacrificed and knocked in a run,” even if that person understands the literal meaning of the words on the page.²⁰ And just as

12. ANTHONY D. LUTKUS & ANDREW R. WEISS, U.S. DEP’T OF EDUC., THE NATION’S REPORT CARD: CIVICS 2006 1 (2007), available at <http://nces.ed.gov/nationsreportcard/pdf/main2006/2007476.pdf>.

13. Lynne Munson, *Letter from the Executive Editor*, in FREDERICK M. HESS, STILL AT RISK: WHAT STUDENTS DON’T KNOW, EVEN NOW 1 (2008), available at http://www.commoncore.org/_docs/CCreport_stillatrisk.pdf.

14. *Id.* at 1–2.

15. Meira Levinson, *The Civic Achievement Gap 5* (Ctr. for Info. & Research on Civic Learning & Engagement, Working Paper No. 51, 2007), available at <http://www.civicyouth.org/PopUps/WorkingPapers/WP51Levinson.pdf>.

16. *Id.* (quoting MICHAEL DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 157 (1996)).

17. See, e.g., Ctr. for Civic Educ., Talking Points on the Need to Restore the Civic Mission of Schools, <http://www.civiced.org/pdfs/campaignToPromote/TalkingPoints.pdf> (last visited Feb. 14, 2009). See generally E.D. HIRSCH, JR., THE KNOWLEDGE DEFICIT (2006) (arguing that American students’ poor reading scores are a result of a lack of “cultural knowledge”).

18. E.D. Hirsch, Jr., *The Case for Bringing Content into the Language Arts Block and for a Knowledge-Rich Curriculum Core for All Children*, AM. EDUCATOR (Am. Fed’n of Teachers, Wash., D.C.), Spring 2006, at 8, 8.

19. HIRSCH, *supra* note 17, at 17.

20. Hirsch, *supra* note 18, at 8.

readers of the sports page must have an adequate understanding of baseball rules, Professor Hirsch argues that a literate individual in America must have an adequate understanding of history, current events, and politics, because background knowledge in those areas is often “taken for granted in . . . public orations, in serious radio and TV, [and] in books and magazines and newspapers addressed to a general audience.”²¹ Professor Hirsch notes that American schools’ de-emphasis of content-based instruction leaves many graduates with insufficient background knowledge to understand even basic newspaper articles, a fact that has “momentous implications for education, and for democracy as well.”²² Professor Hirsch is hardly alone in arguing that social studies cutbacks threaten substantial damage to American democracy.²³ The Center for Civic Education, a group dedicated to reviving social studies instruction, cites a study showing that students who receive explicit instruction in civic education are more likely to vote than students who do not.²⁴ Another study shows that students who receive explicit civic education are significantly more likely to “take personal responsibility for making things better in their community and nation.”²⁵ And former Supreme Court Justice Sandra Day O’Connor has sharply criticized schools’ de-emphasis of social studies, arguing that, in the face of efforts to politicize the judiciary, civic instruction on the structure of American government is the “only long-term solution to preserving an independent judiciary and . . . a robust constitutional democracy.”²⁶

Although no major commentators advocate petitioning the courts to impose minimum standards for a civic education, a judicial challenge on behalf of students who have been deprived of social studies is not obviously unworkable. The American judiciary has a long history of determining schools’ obligations to students and the scope of students’ educational rights.²⁷ More importantly, because many school districts apparently feel pressured by No Child Left Behind to de-emphasize civic education, a judicial order may be necessary to compel social studies instruction. Even the

21. *Id.* at 17.

22. HIRSCH, *supra* note 17, at 74. Hirsch cites Thomas Jefferson’s famous quote: “[W]ere it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive these papers and be capable of reading them.” *Id.*

23. *See, e.g.*, Sandra Day O’Connor & Lee H. Hamilton, Op-Ed., *A Democracy Without Civics?*, CHRISTIAN SCI. MONITOR, Sept. 18, 2008, at 9; Richard Gephardt, Editorial, *True Democracy Requires Us to be Engaged in Society*, ST. LOUIS POST-DISPATCH, Sept. 18, 2008, at B9.

24. Ctr. for Civic Educ., *supra* note 17, at 3.

25. *Id.*

26. Seth Schiesel, *Former Justice Promotes Web-Based Civics Lessons*, N.Y. TIMES, June 9, 2008, at E7.

27. *See* *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding that Louisiana could not condition the teaching of evolution on simultaneous teaching of creation science); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (upholding students’ right to engage in symbolic speech on school grounds); *Hobson v. Hansen*, 269 F. Supp. 401, 515 (D.D.C. 1967) (holding that a tracking system that separated students based on test scores was “undemocratic and discriminatory”).

best laid plans for educational reform are likely to fall flat without some counterweight to the current incentives that lead schools to cut social studies in the first place, and a legislative counterweight does not appear to be forthcoming. In the political realm, much of the recent focus on education reform has been on fixing funding shortfalls, expanding early childhood education, and ensuring high teacher quality, not on modifying schools' curriculum-narrowing incentives.²⁸ In fact, public opinion is apparently divided as to whether a renewed focus on social studies is even a worthwhile goal. A recent poll shows that most Americans oppose No Child Left Behind as it is currently written,²⁹ but a slim majority of Americans also think that it is a "good thing" if increased emphasis on reading and mathematics results in reduced emphasis on other subjects.³⁰

But courts are not beholden to public opinion or legislative trends, and the judiciary could easily neutralize schools' curriculum-narrowing incentives by issuing an injunction requiring schools to dedicate instructional time to social studies. Such an injunction would hardly be anomalous: courts regularly exercise oversight over schools' curricular decisions,³¹ and, on occasion, order schools to provide instruction in a certain subject.³² Functionally speaking, a court order requiring social studies instruction would leave local school districts in control over the school day, but would place substantial social studies cutbacks outside the range of permissible curricular options.³³ In this way, judicially mandated social studies instruction would function like state statutes that require public schools to dedicate instructional time to health or physical education.³⁴

This Note examines the potential legal claims that could be brought to compel social studies instruction in public schools that have cut back or eliminated instruction in the subject. Part I argues that the federal judiciary's historic emphasis on citizenship in education laid the groundwork for legal

28. See, e.g., Bruce Alpert, *Obama, McCain Differ on Education; Parts of Both Plans Good, Vallas Says*, *TIMES-PICAYUNE* (New Orleans, La.), Oct. 23, 2008, at 1 (comparing education policies of 2008 major-party presidential nominees).

29. William J. Bushaw & Alec M. Gallup, *Americans Speak Out—Are Educators and Policy Makers Listening?*, 90 *PHI DELTA KAPPAN* 9, 10 (2008).

30. *Id.* at 17.

31. See *Wiley v. Franklin*, 474 F. Supp. 525 (E.D. Tenn. 1979) (retaining supervision over a school district's proposed Bible study curriculum); *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998) (requiring the implementation of full-day kindergarten, technology programs, and college preparatory programs in a New Jersey school district).

32. See *Johnson v. Sch. Comm. of Brockton*, 358 N.E.2d 820 (Mass. 1977) (requiring a high school to provide behind-the-wheel driver's education during school hours).

33. The financial ramifications of such an order would likely depend on the budgetary inclinations of legislators. Individual school districts could be forced to reallocate funds to pay for social studies instruction; alternatively, the legislature could increase total school funding to comply with the judicial mandate.

34. E.g., *FLA. STAT. § 1003.455* (2008) (requiring 150 minutes per week of physical education for elementary students, and one class period per day for middle school students); 105 *ILL. COMP. STAT. ANN. 5/27-6* (West 2008) (requiring daily physical education for all public school students); *ME. REV. STAT. ANN. tit. 20-A, § 4723* (2008) (requiring health education in secondary schools).

challenges to a complete deprivation of social studies under the Equal Protection Clause of the Fourteenth Amendment. But such claims are unlikely to succeed under rational basis review, and the difficulty in identifying a suspect class—combined with the Supreme Court's holding in *San Antonio Independent School District v. Rodriguez*³⁵ that there is no fundamental right to education—presents substantial difficulties to such federal challenges. Still, Part I concludes that a Fourteenth Amendment claim challenging social studies cutbacks might succeed if those cuts were found to infringe upon a constitutionally protected minimum “quantum”³⁶ of education. Part II argues that a more viable litigation strategy would focus on state constitutional law, as many state constitutions' education provisions can be construed to require social studies instruction. In addition, decisions in cases involving school financing schemes have left many states with a judicially defined conception of education that suggests a mandate for social studies instruction. In states that have not already embraced a civic conception of education, Part II argues that litigators can successfully challenge social studies cutbacks if they can show that constitutional framers attached civic meaning to education. Finally, Part II concludes that a court could theoretically require social studies instruction by holding that a state's academic standards for students are the legislative definition of “education” in the state constitution.

I. POTENTIAL FEDERAL LEGAL CHALLENGES TO A DEPRIVATION OF SOCIAL STUDIES

This Part argues that the federal judiciary's historic emphasis on citizenship in education opens the door to legal challenges under the Fourteenth Amendment based on a deprivation of social studies, though such challenges face substantial barriers to success. Section I.A establishes that courts have long held that civic education is a primary goal of public schools. Although courts often construe civic education as a right held by states, Section I.A argues the Supreme Court's decision in *Brown v. Board of Education*³⁷ shows that public schools also have an obligation to provide students with a minimally adequate foundation for participation in civic life. Section I.B examines how an individual right to civic education might be vindicated via Fourteenth Amendment claims brought on behalf of social studies-deprived students. It concludes that, because social studies-deprived students are probably not a suspect class, and because the Supreme Court has held that education is not a fundamental right, there are substantial barriers to the potential success of such claims. Section I.C briefly examines how, in light of these constraints, Fourteenth Amendment claims on behalf of students deprived of social studies might succeed.

35. 411 U.S. 1 (1973).

36. *Rodriguez*, 411 U.S. at 36.

37. 347 U.S. 483 (1954).

A. *The Federal Judiciary's Civic Framing of Education Cases*

For much of the twentieth century, the federal judiciary explicitly embraced the notion that civic education is a primary goal of public schools. In *Pierce v. Society of Sisters*³⁸ the Supreme Court struck down on substantive due process grounds an Oregon law requiring children to attend public school, but gave the state government broad regulatory power over private and parochial schools. The Court was unmistakably concerned with ensuring that private schools provided students adequate civic education: “[n]o question is raised concerning the power of the State reasonably to regulate all schools . . . [because] certain *studies plainly essential to good citizenship must be taught.*”³⁹ In *Bethel School District No. 403 v. Fraser*,⁴⁰ the Court held that schools’ citizenship-training function permits districts to discipline students for obscene speech. Working from the proposition that the “role and purpose of the American public school system [is to] . . . prepare pupils for citizenship in the Republic,”⁴¹ the Court held that it is a “highly appropriate function of public school education” to prohibit students from using language that would be offensive in democratic discourse.⁴² And in *Mozert v. Hawkins County Board of Education*,⁴³ the Sixth Circuit upheld a school district’s right to require students to study a specified curriculum even in the face of their parents’ religious objections. Crucial to the *Mozert* holding was the court’s belief that the state has a legitimate interest in socializing children to act as citizens in a pluralistic society.⁴⁴ Although none of these cases deal with social studies directly, the repeated invocation of public schools’ civic mission suggests that social studies cutbacks may contravene a judicial vision of education.

By itself, though, the federal judiciary’s civic conception of education in cases like *Pierce*, *Fraser*, and *Mozert* are of limited utility in a potential challenge to social studies cutbacks, for nothing in these cases suggests that schools have an affirmative *requirement* to provide a basic civic education. Insofar as civic education is concerned, *Pierce*, *Fraser*, and *Mozert* merely suggest that states have an *interest* in training children to be good, effective citizens. *Pierce* does not impose on states a duty to ensure that children take courses essential to good citizenship; *Fraser* does not require that states instruct students on the norms of democratic discourse; *Mozert* does not mandate a specified curriculum to prepare citizens for life in a pluralistic society. These cases establish citizenship training as a legitimate basis for an exercise of state power—not an affirmative requirement on the state, or a

38. 268 U.S. 510 (1925).

39. *Pierce*, 268 U.S. at 534 (emphasis added).

40. 478 U.S. 675 (1986).

41. *Bethel Sch. Dist.*, 478 U.S. at 681 (internal quotation marks omitted).

42. *Id.* at 683.

43. 827 F.2d 1058 (6th Cir. 1987).

44. See *Mozert*, 827 F.2d at 1069.

source of individual rights. Indeed, the *Pierce* Court's celebration of civic education is most often used *against* parent and student plaintiffs who levy First and Fourteenth Amendment claims in an attempt to escape state oversight of private school or home-school curriculum.⁴⁵

Yet a key passage in *Brown v. Board of Education*⁴⁶—perhaps the most important judicial decision of the twentieth century⁴⁷—suggests that the civic nature of education is a source of individual rights *against* the state as well. In *Brown*, the State of Kansas defended its “separate but equal” system of public schools by arguing that the Fourteenth Amendment could not prohibit segregation in public schools because public schools across America were already segregated in 1868, when the Amendment was ratified.⁴⁸ But, noting that the historical evidence was in any case inconclusive,⁴⁹ the Court declined to consider the state of public education in 1868. Instead, the Court considered “public education in the light of its full development and its present place in American life throughout the Nation.”⁵⁰ Public education, the Court continued, is uniquely important precisely because it serves such a valuable role in training citizens. The Court described education as “the very foundation of good citizenship” and noted that public schools are “a principal instrument in awakening the child to cultural values.”⁵¹ In part because schools give children the knowledge needed to participate as citizens, the Court called public education “perhaps the most important function of state and local governments” and emphasized its “importance . . . to our democratic society.”⁵² Therefore, *Brown* held that when states undertake the responsibility of providing education, it “is a right which must be made available to all on equal terms.”⁵³

45. See *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J., concurring) (“[*Pierce*] lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society.”); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9th Cir. 2005) (citing the “good citizenship” language in *Pierce* in support of a school district’s right to survey elementary school students about sex); *Hanson v. Cushman*, 490 F. Supp. 109, 113 (W.D. Mich. 1980) (citing the “good citizenship” provision of *Pierce* in dismissing home-schooling parents’ claims that the state of Michigan’s teacher certification requirement violated their Fourteenth Amendment rights); *Combs v. Homer Ctr. Sch. Dist.*, No. 04CV1599, 2005 WL 3338885 (W.D. Pa. Dec. 8, 2005) (citing *Pierce* in dismissing home-schooling parents’ claims that state standards that required teaching, among other things, American and Pennsylvanian history violated their First and Fourteenth Amendment rights).

46. 347 U.S. 483 (1954).

47. Review of ROBERT J. COTTRILL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003), <http://www.kansaspress.ku.edu/cotbro.html> (last visited Feb. 14, 2009) (quoting Professor Mark Tushnet as calling *Brown* “the most important decision by the Supreme Court in the twentieth century”).

48. *Brown*, 347 U.S. at 489.

49. *Id.*

50. *Id.* at 492–93.

51. *Id.* at 493.

52. *Id.*

53. *Id.*

The Court's conception of public education—based largely on the proposition that schools play a vital role in citizenship training—was crucial in *Brown*, for the Court's holding was explicitly limited to education. Instead of overruling *Plessy v. Ferguson*⁵⁴ or holding that separate public facilities for blacks and whites constituted a per se violation of the Fourteenth Amendment, the Court made particularized findings that were, in theory, narrowly applicable to the educational realm. *Brown*'s holding is that “in the field of public education the doctrine of ‘separate but equal’ has no place.”⁵⁵ Because findings of fact in the court below showed that the black and white schools at issue enjoyed equal-quality facilities, curricula, and teachers,⁵⁶ the *Brown* decision was based on the notion that separate educational facilities generate a “feeling of inferiority” among black children.⁵⁷ According to the Court, those feelings of inferiority have a tendency to “[retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school.”⁵⁸ *Brown* did not specify the exact educational benefits denied to black students in segregated schools, because the Court was concerned with the ends of education. On the Court's account, feelings of inferiority hindered black students' learning, leaving them on unequal footing in the many dimensions of modern society that abut education.⁵⁹ Key among these was the civic dimension: *Brown*'s language about education's role in a “democratic society” suggests that an inadequate education ultimately left black students on a rickety “foundation of good citizenship.”⁶⁰ In short, *Brown* found segregated schools unconstitutional in part because they systematically caused black students a civic injury.

The Court's conception of education in *Brown* thus provides fertile ground for potential lawsuits on behalf of students who have been deprived of social studies. Social studies-deprived students can allege that they suffer a civic injury that is, if anything, even more direct than the civic injury suffered by the students in *Brown*. After all, a substantial percentage of American school districts have cut or eliminated formal instruction in civics, government, and history—the very subjects, arguably, that most closely correlate to citizenship.⁶¹ A case can be made that large swaths of students are being systematically denied the opportunity for fully adequate participation and engagement in American civic life. Social studies-deprived students may or may not be haunted by “feelings of inferiority,” but, insofar

54. 163 U.S. 537 (1896).

55. *Brown*, 347 U.S. at 495 (emphasis added).

56. *Id.* at 492.

57. *Id.* at 494.

58. *Id.* (alterations in original) (quoting an unreported finding of a three-judge panel sitting in *Brown v. Board of Education*, 98 F. Supp. 797 (D. Kan. 1951)).

59. *See id.* at 493–94.

60. *Id.* at 493.

61. For arguments regarding the centrality of social studies to democracy, see HIRSCH, *supra* note 17, at 74; Schiesel, *supra* note 26; and Ctr. for Civic Educ., *supra* note 17, at 3.

as their subpar education hampers participation in American democracy, their ultimate civic injury is analogous to that in *Brown*.

The federal judiciary's civic conception of education is not strictly necessary for a Fourteenth Amendment suit on behalf of social studies-deprived students; after all, equal protection claims can be raised whenever the state treats people differently.⁶² But the general judicial attitude toward education suggests that courts may be more willing to get involved in states' education policies when those policies abut schools' civic mission. And while cases like *Pierce*, *Fraser*, and *Mozert* show that civic language can be used to justify *deference* to states, *Brown* suggests that courts will also take a hard look at a state's education policy when it derogates civic outcomes for individuals.

B. Levels-of-Scrutiny Analysis: A Barrier to Equal Protection Challenges to Social Studies Cutbacks

A federal claim brought on behalf of social studies-deprived students against public schools would need to be raised under the Fourteenth Amendment's Equal Protection Clause.⁶³ States have no affirmative obligation to provide children with a public education—much less a social studies education—at all. Indeed, for all its celebration of education's civic value, *Brown* itself recognizes the states are not required to operate public schools, holding that education “*where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*”⁶⁴ A Fourteenth Amendment claim on behalf of social studies-deprived students must thus claim that education is not being provided on equal terms, because many states' educational regimes are set up so that large swaths of children are denied a civic education. So long as some schools in the state offer social studies, an equal protection challenge could allege that a state—through its

62. See, e.g., *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (holding that individuals can raise a “class of one” suit alleging differential governmental treatment with no rational basis); *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (holding that a suit brought on behalf of methadone users alleging that New York City policy banning methadone users from working in public transit violated the Equal Protection clause). But see *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2150 (2008) (holding that the “class-of-one” theory does not apply in the public employment context).

63. A state *ban* on social studies instruction in public and private schools could almost certainly be challenged as an unconstitutional deprivation of liberty under the Due Process Clause—indeed, in *Meyer v. Nebraska*, the Court held that the Due Process Clause prohibits states from banning certain scholastic subjects. 262 U.S. 390 (1923) (holding that a state law forbidding public and private schools from teaching languages other than English violates the Due Process Clause). But the Due Process Clause is not likely to help today's social studies-deprived students because no state has actually made social studies instruction *illegal*. In *Meyer*, students were banned from getting a foreign language education anywhere; in states that have cut social studies, students simply cannot receive social studies instruction in their local public school. Although these students are functionally barred from learning social studies, a state is in accordance with the Due Process Clause so long as it does not make illegal parents' rights to have their children learn a certain subject.

64. *Brown*, 347 U.S. at 493 (emphasis added).

public schools—operates a fundamentally unequal educational system when it lets localities make the decision to deny students a civic education.

Yet the mechanism traditionally applied in equal protection cases suggests that a Fourteenth Amendment challenge to social studies cutbacks faces substantial barriers to success. Unless a state action involves a suspect class or impinges on a fundamental right, equal protection challenges to state action are decided under the rational basis test.⁶⁵ Under the rational basis approach, state classifications are given the presumption of constitutionality: courts will not hold that a state action is unconstitutional so long as it is “reasonably tailored to achieve [the State’s legitimate] ends.”⁶⁶ In practice, rational basis review does not lead to the invalidation of states’ distribution of social and economic benefits so long as there is some conceivable, legitimate state objective behind a classification.⁶⁷ And while the wisdom of cutting social studies may be debatable, most schools that cut social studies instruction replace it with math and literacy instruction, so social studies cutbacks seem motivated by a desire to promote literacy and mathematical competence.⁶⁸

Given the broad deference that courts usually grant state actors in rational basis cases, the promotion of literacy and mathematical competence almost certainly qualifies as a legitimate state objective. Indeed, some educators make the argument that students who are struggling in basic math and reading *should not* be forced to spend a substantial part of their day learning social studies. Former U.S. Secretary of Education Margaret Spellings defended schools’ decisions to narrow their curriculum in response to No Child Left Behind, saying “[r]eading and math are fundamental basic skills without which you can’t learn social studies, history, so on, and so forth.”⁶⁹ In the same vein, a school superintendant in a Texas district that cut most subjects in favor of more math and reading said, “it’s like basketball. If you can’t make layups, then you’ve got to work on layups.”⁷⁰ Arguments like these are not necessarily right—indeed, they are hotly debated from a pedagogical perspective⁷¹—but the schools’ motivations are at least tenable, legitimate, and coherent, and that seems to be all that courts require under the rational basis test.⁷²

65. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

66. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 85 (1988) (alteration in original) (quoting *Lindsey v. Normet*, 405 U.S. 56, 78 (1972)).

67. See *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 (1980).

68. See *CTR. ON EDUC. POLICY*, *supra* note 4, at 1.

69. Eddy Ramirez, *The Education Secretary Talks About NCLB*, U.S. NEWS & WORLD REP., Nov. 5, 2007, <http://www.usnews.com/articles/education/2007/11/05/the-education-secretary-talks-about-nclb.html>.

70. Dillon, *supra* note 1.

71. For an excellent argument that cutbacks in the amount of time schools spend teaching social studies actually *hurts* students’ literacy, see HIRSCH, *supra* note 17.

72. Courts rarely inquire into the “correctness of [states’] legislative judgments” under rational basis review, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), so the pedagogical soundness of states’ decisions to cut social studies is unlikely to be at issue. The types

An equal protection challenge to social studies cutbacks could fare better if courts apply strict scrutiny, but—in large part because of adverse precedent in *San Antonio Independent School District v. Rodriguez*⁷³—it is doubtful that courts would find the requisite involvement of a suspect class or impingement on a fundamental right. In *Rodriguez*, a class of public school students alleged that Texas's school financing system violated the Fourteenth Amendment because it allowed for unequal funding of public schools.⁷⁴ Texas did provide all schools with money from the state coffers to ensure a "basic minimum education," but local school districts raised the rest of their funds through property taxes.⁷⁵ As a result, schools in districts with valuable property tended to be better funded than districts with less taxable wealth.⁷⁶ The Supreme Court rejected the plaintiffs' argument that students in financially struggling school districts constitute a suspect class, writing that the "large, diverse, and amorphous" class of children had not been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."⁷⁷

More importantly, *Rodriguez* rejected the claim that education is a fundamental right under the U.S. Constitution. The *Rodriguez* plaintiffs argued that, although it is not mentioned in the Constitution, education is a fundamental right because it bears a close nexus to other Constitutional rights. In particular, the plaintiffs argued that education is "essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote."⁷⁸ While the Court did not dispute the proposition that the "democratic ideal, depends on an informed electorate,"⁷⁹ it denied that the federal judiciary has "either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."⁸⁰ In a striking departure from *Brown's* depiction of public education as the "very foundation of good citizenship,"⁸¹ the *Rodriguez* Court refused to distinguish the civic nature of education from such personal interests as food and shelter. The Court speculated that, like the ill-educated, the "ill-fed, ill-clothed, and

of cases that fail under rational basis review are those where the classification is inexplicable except by "animus toward the class it affects." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

73. 411 U.S. 1 (1973).

74. *Rodriguez*, 411 U.S. at 4–6.

75. *Id.* at 1, 7–9.

76. *Id.* at 11–14.

77. *Id.* at 28.

78. *Id.* at 35.

79. *Id.* at 36 (punctuation omitted).

80. *Id.*

81. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

ill-housed are among the most ineffective participants in the political process.”⁸²

Less damning—but still damaging—to an equal protection claim challenging social studies cutbacks is *Rodriguez*'s holding that Texas children in poorer districts do not constitute a suspect class. Even without *Rodriguez*, it would be difficult for students challenging social studies cutbacks to establish suspect class status, as the Court has only held that a handful of classifications—race, gender, and possibly religion—automatically warrant heightened scrutiny under the Equal Protection Clause.⁸³ Additionally, it would be difficult to even *define* a suspect class comprised of social studies-deprived students, as the schools that cut or eliminate social studies serve a diverse cross-section of American students.⁸⁴ *Rodriguez*, though, further constrains the potential avenues that a plaintiff class of students might have used to invoke strict scrutiny. Districts that have cut social studies tend to serve academically struggling students; many districts that have cut social studies contain at least one school that has been designated for improvement under No Child Left Behind.⁸⁵ Most of the schools designated for improvement—though not all—serve high-poverty areas.⁸⁶ But post-*Rodriguez*, classification based on the wealth of a school district cannot establish a suspect class. Furthermore, if a “large, diverse, and amorphous” class of children who go to school in *financially* struggling districts does not qualify as a suspect class, it would be difficult to claim that the “large, diverse, and amorphous” class of children who attend school in *academically* struggling districts demonstrates the “traditional indicia of suspectness.”⁸⁷

Although social studies cutbacks seem to disproportionately affect racial minorities, any attempt to invoke strict scrutiny by claiming a disparate racial impact is also likely to fail. Schools that are “in need of improvement” under No Child Left Behind—and are thereby more likely to cut social studies—do tend to serve high percentages of racial minorities.⁸⁸ As a result, cuts in social studies probably affect racial minorities more than white children, and several studies have shown a racial achievement gap in social studies.⁸⁹ But in disparate impact cases, courts generally require proof of racially discriminatory intent or an invidious purpose by the state decision maker.⁹⁰

82. *Rodriguez*, 411 U.S. at 37.

83. See *Craig v. Boren*, 429 U.S. 190 (1976) (gender); *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (religion); *Korematsu v. United States*, 323 U.S. 214 (1944) (race).

84. See CTR. ON EDUC. POLICY, *supra* note 4, at 6–7 (explaining the results of a study showing that urban, rural, and suburban schools have increased the time devoted to English language arts and math while making corresponding cutbacks in the time devoted to social studies).

85. See *id.* at 7.

86. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 6, at 26.

87. *Rodriguez*, 411 U.S. at 28.

88. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 6, at 25.

89. See *Levinson*, *supra* note 15.

90. *E.g.*, *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976).

There is little evidence that state actors who cut social studies do so with any “invidious” purposes. Again, most schools cut social studies to focus more instructional time on math and reading—hardly the type of evidence of invidiousness that has led courts to invalidate state actions on disparate impact grounds.⁹¹ Absent some contemporaneous or historical evidence that minorities were deprived of social studies for discriminatory or invidious reasons, a disparate impact argument is likely to fail.⁹²

Yet in spite of the limitations imposed by *Rodriguez* and disparate racial impact jurisprudence, it is possible to envision at least one case in which social studies cutbacks could warrant strict scrutiny. In one of the University of Michigan’s affirmative action cases, *Grutter v. Bollinger*, the Court held that *all* governmental race classifications are subject to strict scrutiny, including those ostensibly enacted to aid a minority group.⁹³ Thus, courts would almost certainly apply strict scrutiny if a school *explicitly* used race to determine which students received social studies, even if that classification was meant to help racial minorities succeed in reading and math. For example, a system that required Hispanic students who failed reading tests to forego social studies—while imposing no such restriction on non-Hispanic students—would likely be subject to strict scrutiny. While such *explicit* use of race would likely be subject to strict scrutiny, the triggering of strict scrutiny would not lead to an automatic invalidation of the state classification. As *Grutter* showed, strict scrutiny is not “fatal in fact.”⁹⁴ Yet if a plaintiff class could show that it had been deprived of social studies on the basis of race, strict scrutiny would shift the burden of proof to the state, forcing schools to show how cutting social studies for discrete racial groups is narrowly tailored to achieve a compelling state interest.⁹⁵

The idea that schools would let race determine students’ curricular options is not so farfetched. No Child Left Behind requires that students in each “major racial and ethnic group[.]” make adequate yearly progress in

91. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (invalidating an Alabama statute that disenfranchised people convicted of crimes of “moral turpitude” because race played a decisive role in its passage in 1901); *Rogers v. Lodge*, 458 U.S. 613 (1982) (holding that an at-large system of elections violated the Fourteenth Amendment because of historical evidence that it had been maintained to impede the political participation of African Americans).

92. *Arlington Heights v. Metropolitan Housing Development Corp.* discussed six factors that courts will examine when dealing with state actions that are facially neutral but have a racially disparate impact. 429 U.S. at 266–68. They include 1) whether the impact of a law is so clearly discriminatory that there is no explanation other than that it was adopted for an impermissible purpose; 2) the historical background of a decision; 3) the specific sequence of events leading up to the challenged decision; 4) departures from normal procedural sequence; 5) whether the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached; and 6) legislative or administrative history, especially where there are contemporary statements by members of the decision-making body. *Id.*

93. 539 U.S. 306, 326 (2003).

94. *Grutter*, 539 U.S. at 326 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

95. See *id.* at 327.

math and reading,⁹⁶ and schools manipulate both their data and instruction to ensure that they hit their targets. According to the Associated Press, nearly two million minority students' scores were not counted for the purposes of No Child Left Behind because of a "loophole" that allows individual states to exempt racial subgroups that are not "statistically significant."⁹⁷ On the instructional side, No Child Left Behind often dictates the amount of instructional attention that certain students receive.⁹⁸ To maximize the chances that a school makes adequate yearly progress, teachers in many schools are told to focus the bulk of their instructional time on "bubble kids" who sit on the threshold of passing the state tests.⁹⁹ Given the degree to which students' race and test scores affect data reporting and instruction, it is not implausible that some schools might use race to determine which students receive social studies and which receive remedial math and reading. A race-based system, after all, would help to ensure that the "major racial groups" make adequate yearly progress in math and reading. Such explicit use of race would not be unconstitutional per se, but it would trigger strict judicial scrutiny, allowing students who are denied a civic education on the basis of race a chance to overcome some of the adverse precedent in *Rodriguez*.

C. A Constitutionally Protected Quantum of Civic Education?

In spite of its holding that education is not a fundamental right, *Rodriguez* leaves the door slightly ajar to equal protection challenges based on a denial of public education's civic benefits. Although *Rodriguez* holds that education cases do not necessarily trigger strict scrutiny, the Court speculated that there might be some constitutionally protected "quantum of education" that is a prerequisite to the "meaningful exercise" of First Amendment freedoms and the right to vote.¹⁰⁰ But the Court did not actually reach the question of whether a constitutionally protected quantum of education exists. According to the Court, no charge could seriously be made that Texas violated students' theoretical quantum, because Texas's financing system allowed students to attain the "minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."¹⁰¹ *Rodriguez* thus appears to hold that while an *equal* education is not a fundamental right, federal courts might still entertain arguments that states with operative public schools have an obligation to provide all students with a minimally *adequate* quantum of education. This reading of

96. No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b)(2)(C)(v)(II)(bb) (2006).

97. Associated Press, *2 Million Scores Ignored in 'No Child' Loophole*, MSNBC, Apr. 17, 2006, <http://www.msnbc.msn.com/id/12357165/>.

98. See Jennifer Booher-Jennings, *Rationing Education In an Era of Accountability*, 87 PHU DELTA KAPPAN 756, 758–59 (2006) (reporting that "data-driven" schools are encouraging teachers to focus their energy on "bubble kids" because it is "realistic and time-efficient").

99. *Id.*

100. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973).

101. *Id.* at 37.

Rodriguez is buttressed by a footnote explaining that the plaintiffs' case would be "far more compelling" if they had been "absolutely precluded from receiving an education."¹⁰² Yet because the state of Texas provided what "it consider[ed] to be an *adequate* base education," the Court saw no reason to invalidate its financing system.¹⁰³

*Plyler v. Doe*¹⁰⁴ appears to lend further support to the notion that states cannot deprive certain students of a minimum, constitutionally protected quantum of education. In *Plyler*, the Supreme Court invalidated a Texas statute that allowed local districts to bar children of illegal immigrants from enrolling in public schools. Although the case was brought under the Equal Protection Clause, the Court did not specify a standard of review, and refused to hold that the Texas statute disadvantaged a suspect class or involved a fundamental right.¹⁰⁵ But while the Court cited *Rodriguez*'s holding that education *itself* is not a fundamental right, it also held that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."¹⁰⁶ In differentiating education from other governmental benefits, the Court relied on the civic nature of education—much as it had three decades earlier in *Brown*. Education, the Court wrote, has a "pivotal role . . . in sustaining our political and cultural heritage."¹⁰⁷ Public schools, said the Court, are the "most vital civic institution[s] for the preservation of a democratic system of government."¹⁰⁸ Therefore, by completely denying children of illegal immigrants access to public schools, the Court held that Texas unconstitutionally denied the plaintiff class "the ability to live within the structure of our civic institutions, [thus] foreclos[ing] any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."¹⁰⁹

If a constitutionally protected quantum of education exists, *Plyler* and *Rodriguez* both provide support for the argument that it includes at least a minimal civic component. No court has actually ruled on whether there is a protected quantum of education, so the question of what actually constitutes a constitutionally adequate basic education remains speculative.¹¹⁰ But insofar as *Plyler* and *Rodriguez* endorse the notion of a protected quantum of

102. *Id.* at 25 n.60.

103. *Id.* (emphasis added).

104. 457 U.S. 202 (1982).

105. *Plyler*, 457 U.S. at 219 n.19 ("We reject the claim that 'illegal aliens' are a 'suspect class.'"); *id.* at 223 ("Nor is education a fundamental right . . .").

106. *Id.* at 221.

107. *Id.*

108. *Id.* (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

109. *Id.* at 223.

110. See *Papasan v. Allain*, 478 U.S. 265, 285 (1986) ("[T]his Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.").

education, it seems clear that the Court was at least partially motivated by the civic nature of education. In *Plyler*, the Court was faced with a relatively easy case. The Texas statute allowed districts to *completely* bar a class of students from public schools; logically, an absolute deprivation of education also deprives students of a constitutionally protected quantum. Yet the Court repeatedly discussed some of the concrete benefits education provides, providing a glimpse into what the boundaries of a protected quantum might be. Literacy was one crucial component of education—the Court referred more than once to the costs that illiteracy imposes on both individuals and society.¹¹¹ Critically, the Court also paid tribute to the notion that education allows students to participate in civic institutions, and that public schools preserve a democratic system of government by transmitting to students the “values and skills upon which our social order rests.”¹¹² Unlike cases like *Pierce*, *Fraser*, and *Mozert*—where the state had an *interest* in training public school students to function in civic life—*Plyler*, like *Brown*, presents this socialization interest as a right that can be invoked by individual students *against* the state. Similarly, *Rodriguez* speculates that a constitutionally protected quantum of education is an individual right that would give students the skills and knowledge to adequately exercise their First Amendment rights and enjoy “full participation in the political process.”¹¹³ Although *Rodriguez* rejects the argument that education is a fundamental right, its conception of a protected quantum of education accepts the plaintiffs’ proposition that education bears a close nexus to political rights.

The civic language in *Plyler* and *Rodriguez* thus provides support for an argument that cutbacks to social studies impinge on students’ constitutionally protected quantum of education. After all, a strong case can be made that students need adequate civic instruction if they are to be prepared for “full participation in the political process”¹¹⁴ or participation in civic institutions. Social studies—according to such an argument—is a uniquely important subject because basic knowledge of history and government is the price of admission to equal participation in American democracy. An individual who does not know that the federal Constitution establishes a series of checks and balances is unlikely to understand contemporary debates about the scope of the Vice President’s power;¹¹⁵ an individual who does not know that the Bill of Rights guarantees the freedom of speech may be afraid

111. *Plyler*, 457 U.S. at 222–23.

112. *Id.* at 221.

113. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

114. *Id.*

115. Twenty percent of American seventeen-year-olds could not correctly identify the Constitution as establishing a series of checks and balances in a 2008 survey. Hess, *supra* note 13, at 7. The issue of vice-presidential power was raised in the vice-presidential debate during the 2008 election. See Gwen Ifill, Moderator, Vice Presidential Candidates Debate at Washington University in St. Louis (Oct. 2, 2008) (transcript available at <http://pamm.wustl.edu/debate08/pdf/transcript.pdf>) (“Do you believe as Vice President Cheney does, that the Executive Branch does not hold complete sway over the office of the vice presidency, that it [sic] is also a member of the Legislative Branch?”).

to publicly voice controversial views.¹¹⁶ Indeed, political leaders—who presumably took social studies—tend to assume that the electorate has a basic knowledge of history. For example, during the 2008 presidential campaign, one major foreign policy issue was whether American leaders should negotiate directly with the leaders of rogue nations.¹¹⁷ Opponents of direct negotiations repeatedly referred to World War II and the “appeasement” of Adolf Hitler.¹¹⁸ But a citizen who never learned about World War II—and, like 10 percent of American seventeen-year-olds, thought that Hitler was a German munitions maker¹¹⁹—would be severely disadvantaged if she tried to make sense of, or participate in, that debate. Social studies, the argument goes, prepares students to act as citizens in a democratic society in a way that other subjects do not. Simply teaching children to read and write is inadequate: if schools do not teach students the background knowledge needed to read a newspaper, watch a political speech, or decipher a campaign pamphlet, those students will not be prepared for what *Rodriguez* called the “meaningful exercise”¹²⁰ of participatory democratic rights.¹²¹ Thus, if indeed there is a constitutionally protected quantum of education, *Plyler* and *Rodriguez* suggest that cutbacks in social studies could be out-of-bounds because of the subject’s centrality to the civic nature of education.

Yet the degree to which *Plyler* and *Rodriguez* actually establish heightened protection in the educational realm is unclear. In *Plyler*, the Court went out of its way to avoid holding that the Texas statute impinged on a fundamental right, so the question of whether there even *is* a constitutionally protected quantum of education is still unresolved. Indeed, the Court decided *Plyler* without even establishing a level of scrutiny. Professor Julie Nice has argued that *Plyler* was decided under a “third-strand” of equal protection jurisprudence, in which courts quietly apply heightened scrutiny “not only for fundamental rights or for suspect classes but also for situations where the rights and classes interact in such a way as to raise the Court’s

116. Thirty-three percent of American seventeen-year-olds did not know that the Bill of Rights guarantees freedom of speech and freedom of religion. HESS, *supra* note 13, at 7.

117. Compare Barack Obama, CNN/YouTube Democratic Presidential Debate (July 23, 2007) (transcript available at <http://www.cnn.com/2007/POLITICS/07/23/debate.transcript/>) (“[T]he notion that somehow not talking to countries is punishment to them—which has been the guiding diplomatic principle of this administration—is ridiculous.”), with Glenn Kessler & Juliet Eilperin, *McCain Assails Obama Over Readiness To Talk With Hostile Foreign Leaders*, WASH. POST, May 21, 2008, at A7 (quoting two speeches by John McCain attacking Obama’s willingness to meet with foreign leaders).

118. *E.g.*, President George W. Bush, Address to Members of the Israeli Knesset (May 15, 2008) (transcript available at <http://www.cfr.org/publication/16267/>) (comparing those who would “negotiate with the terrorists and radicals” with Nazi appeasers); Posting of Elisabeth Bumiller to The Caucus: The New York Times Politics Blog, <http://thecaucus.blogs.nytimes.com/2008/05/15/mccain-agrees-with-bushs-remarks/> (May 15, 2008, 11:34 EST).

119. Munson, *supra* note 13, at 1.

120. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973).

121. See HIRSCH, *supra* note 17, at 68–79.

suspicious.”¹²² On Professor Nice’s account, the class of immigrant children in *Plyler* was already marked by illiteracy and undereducation.¹²³ The Texas statute denying those children an education triggered heightened scrutiny precisely because it abridged a benefit that was uniquely important to that class.

But even if Professor Nice’s “third-strand” framework is correct, Professor Nice probably erred in limiting the quasi-suspect class in *Plyler* to immigrant children—as opposed to children generally—so *Plyler* still provides strong support for the notion that there exists a constitutionally protected quantum of education. It is true that the Court considered the relationship between immigrants and education. For example, the Court was concerned that barring a “disfavored group” from schools would deprive them of the means to “raise the level of esteem in which it is held by the majority.”¹²⁴ But the benefits of education cited in *Plyler*—along with civic participation, the Court mentions literacy, self-reliance, and social, economic, and psychological well-being¹²⁵—are benefits that are critical for every member of society, not just a particular class of immigrant children. Indeed, for most of the *Plyler* decision, education is discussed as a right that is of critical importance for every member of society, regardless of affiliation with a quasi-suspect class. *Plyler* approvingly cites *Brown* to note that “it is doubtful that any child may reasonably be expected to succeed” without education.¹²⁶ The Court further notes that “[t]he inability to read and write will handicap the individual deprived of a basic education each and every day of his life.”¹²⁷ Distinguishing education from other forms of social welfare, *Plyler* holds that “the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark[s] the distinction.”¹²⁸ *Plyler* does mention the need to socialize children of immigrants—it warns of “significant social costs . . . when select groups are denied the means to absorb the values and skills upon which our social order rests.”¹²⁹ Presumably, though, the same social costs would attach regardless of the group being denied an education. The relevant characteristic that the plaintiff class shares in *Plyler* is not that they are children of illegal immigrants, but simply that they are children. Indeed, the Court repeatedly refers to the class as “innocent children,”¹³⁰ suggesting that their national origin and documentation statuses are secondary compared to the characteristics

122. Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209, 1211 (1999).

123. *Id.* at 1238.

124. *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

125. *Id.*

126. *Id.* at 223 (emphasis added) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

127. *Id.* at 222 (emphasis added).

128. *Id.* at 221 (emphasis added).

129. *Id.*

130. *Id.* at 224 & n.21, 230.

they share with all other youth in the state of Texas. Thus, even if the Court in *Plyler* quietly applied heightened scrutiny under a third-strand analysis, it did so because it is particularly important for *children* not to be deprived of an education—not because of education’s importance to a narrower class of immigrant children. Because nearly every education case involves children, even a third-strand reading of *Plyler* ends up supporting the notion that there is a constitutionally protected quantum of education.

On balance, though, the notion that federal courts will find that social studies cutbacks impinge on a protected quantum of education remains dubious. The biggest hurdle, of course, is that no court has found that a protected quantum of education even exists. Although the complete deprivation of education in *Plyler* was apparently enough to trigger heightened equal protection scrutiny, the Court subsequently refused to extend *Plyler*’s application “beyond the unique circumstances . . . that provoked its unique confluence of theories and rationales.”¹³¹ Even assuming the existence of a protected quantum, it is not at all clear that social studies would necessarily be included in that quantum, despite the subject’s seemingly close correlation to the civic nature of education. Federal courts often wax poetic about the virtues of a civic education and its role in American democracy, but rarely specify the exact skills or knowledge that students need to, say, ensure the “preservation of a democratic system of government.”¹³² When courts *do* talk about a particular subject in conjunction with civic education, that subject is most often literacy. In *Rodriguez*, for example, the Court endorsed the view that “a voter cannot cast his ballot intelligently unless his *reading skills* and thought processes have been adequately developed.”¹³³ In *Plyler*, the Court paid lip service to the civic nature of education—but the only *specific* burden that *Plyler* mentioned was the cost of illiteracy.¹³⁴ The Court did not mention the hardships that immigrant children face when they are shut out of political debates, or the stigma they endure as a result of not understanding the political process. Of course, a strong argument can be made that individuals are not functionally literate when they lack enough knowledge about history, politics, and government to understand a story in a newspaper.¹³⁵ At the very least, such individuals are probably not literate in a way that allows them to engage in democratic society.¹³⁶ Still, given social studies’ conspicuous absence from judicial decisions, a court could find that a constitutionally protected quantum of education includes only the opportunity to learn the bare essentials of reading and writing.

131. *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459 (1988) (citation omitted) (internal quotation marks omitted).

132. *Plyler*, 457 U.S. at 221.

133. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973) (emphasis added).

134. *Plyler*, 457 U.S. at 223.

135. HIRSCH, *supra* note 17, at 74.

136. *Id.*

Finally, *Rodriguez* was, in many ways, the opening shot in a series of judicial battles in which the federal judiciary ultimately elevated school districts' local control over most other educational considerations. During the Civil Rights Era, the Supreme Court used the *Brown* decision and its desegregation mandate to powerfully and intrusively override local and state government decisions. But *Rodriguez* marked a shift in the judiciary's emphasis, and has been repeatedly cited in support of the proposition that "education is primarily a concern of local authorities."¹³⁷ The federal judiciary's current emphasis on local control over education makes it doubtful that courts will interfere in local districts' curricular choices—even if those choices involve substantial cutbacks to the civic education courts historically celebrated.

II. POTENTIAL STATE LEGAL CHALLENGES TO A DEPRIVATION OF SOCIAL STUDIES

This Part argues that education provisions in state constitutions provide a viable basis for legal challenges based on a deprivation of social studies education.¹³⁸ Section II.A shows that education provisions impose substantive requirements on state legislatures, and many education provisions may, on their own terms, endorse a civic dimension to education. Furthermore, although states diverge in their interpretations of education provisions, many state courts have interpreted education provisions in a way that suggests students must receive social studies instruction. Section II.B examines state courts' methods of interpreting education provisions and concludes that a

137. *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995); *see also* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2826 (2007) (Breyer, J., dissenting) ("[L]ocal school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils."); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs.").

138. There is almost no chance that a court would find such a suit to be preempted by the No Child Left Behind Act, either because Congress means to occupy the field of public education or because social studies presents a conflict to No Child Left Behind's goals. First of all, No Child Left Behind is not even binding on the states—the federal government simply requires that states follow its provisions as a condition for receiving Title I money. No Child Left Behind Act of 2001, 20 U.S.C. § 6311(a)(1) (2006). Second, No Child Left Behind is deferential to state sovereignty, as states are actually permitted to create their own curricular standards, assessments and benchmarks for math and literacy. *Id.* § 6311(b)(1). It is thus extremely implausible that the federal government means to occupy the educational field by enacting a scheme "so pervasive . . . that Congress left no room for the States to supplement it." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Nor would social studies instruction present an obstacle to Congress's goals in No Child Left Behind. It is clearly possible to have students meet standards in math and literacy while taking social studies classes. Therefore, if No Child Left Behind were to preempt lawsuits seeking to vindicate a right to a civic education, one would have to read the statute as having the objective of making students competent in math, reading and (possibly) science and expressly excluding all other subjects. But No Child Left Behind plainly contravenes that reading: one stated purpose of the Act is "to improve the quality of civics and government education by educating students about the history and principles of the Constitution of the United States." 20 U.S.C. § 6712(1). Given a general presumption against preemptory readings of state law, *see, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991), it is extremely unlikely that any suit seeking to vindicate a right to civic education would be preempted.

successful state challenge to a deprivation of social studies would likely focus on a historical conception of education as the foundation of good citizenship. Finally, if education provisions cannot, of their own accord, establish a requirement for states to provide all students with social studies, Section II.C argues that those provisions can theoretically be read in conjunction with state curricular standards to establish that requirement.

A. *The Civic Dimensions of State Education Provisions*

Post-*Rodriguez*, education-related equal protection claims appear to stand a better chance under state constitutions than under the Fourteenth Amendment. Whereas education is not mentioned in the U.S. Constitution, all fifty state constitutions contain a provision requiring the state legislature to provide for a system of public education.¹³⁹ Although the language in state education provisions varies, they tend to be brief, vague, and do not typically impose specific curricular requirements—many merely require the legislature to provide an “efficient” system of public schools,¹⁴⁰ while others require a “quality” education.¹⁴¹ Still, regardless of their precise language, the existence of education provisions in state constitutions means that state courts do not need to search for an *implied* right to education, nor do state courts necessarily need to impose a levels-of-scrutiny analysis for education-related claims.

State courts fall into four major groups when analyzing the role of state education provisions in education-related equal protection cases. Courts in the first and largest group, probably consisting of a majority of states,¹⁴² rely exclusively on the state education provision in ruling on education-related equal protection claims. These courts’ reasons for exclusive reliance on their education provisions vary, but this first group of states can be broken into three subgroups according to the courts’ rationale. In the first subgroup of states, seminal education cases apparently have not invoked equal protection

139. ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. ch. V, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

140. *E.g.*, ARK. CONST. art. XIV, § 1; DEL. CONST. art. X, § 1; KY. CONST. § 183.

141. *E.g.*, FLA. CONST. art. IX, § 1; MONT. CONST. art. X, § 1; VA. CONST. art. VIII, § 1.

142. For a synthesis of state courts’ reasoning in education cases, see *Lobato v. State*, No. 06CA0733, 2008 Colo. App. LEXIS 69 (Ct. App. Jan. 24, 2008).

provisions at all, necessitating an analysis under the education provision.¹⁴³ In the second subgroup, plaintiffs rely on both the education and equal protection provisions of the state constitution, but courts explicitly reject arguments that their equal protection clause imposes any obligations beyond the state education provision.¹⁴⁴ State courts in the third subgroup simply do not reach claims brought under the state's equal protection clause, holding that the state's education provision itself suggests an equal protection component.¹⁴⁵ For example, in *Roosevelt Elementary School District No. 66 v. Bishop*, the Arizona Supreme Court declined to consider arguments that the state's school financing system violated the Arizona Constitution's equal protection clause.¹⁴⁶ Instead, the court read an equal protection component into Arizona's education provision, holding that the clause imposed a duty on the legislature to finance education in a way that "does not . . . create substantial disparities among schools, communities or districts."¹⁴⁷

Other states look beyond their education provision when deciding education-related equal protection cases. A second set of courts—consisting of at least nine states—uses the education provision in the context of an equal protection analysis. These courts analyze education-related equal protection claims under the state equal protection clause, but cite the education provision as proof that education is a fundamental right, thus triggering strict judicial scrutiny.¹⁴⁸ In contrast, the third group of state courts—consisting of Colorado, Illinois, Kansas, Rhode Island, and perhaps Michigan—de-emphasize their state's education provision when deciding whether education is a fundamental right. Rather than focusing on the express obligations that their education provision imposes on the legislature, state courts in this third group analogize their state constitution to the U.S. Constitution, and use *Rodriguez* to explicitly hold that education is not a fundamental right under the state con-

143. See, e.g., *Ex parte James*, 836 So. 2d 813 (Ala. 2002); *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164 (Neb. 2007); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997).

144. See, e.g., *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999).

145. See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 495 (Ark. 2002) ("[B]ecause we conclude that the clear language of Article 14 imposes upon the State an absolute constitutional duty to educate our children, we conclude that it is unnecessary to reach the issue of whether a fundamental right is also implied."); *Idaho Sch. for Equal Educ. Opportunity v. State*, 129 P.3d 1199, 1208 (Idaho 2005) (holding that the "thoroughness" requirement of the Idaho education provision required the legislature to provide funds for poorer Idaho schools to repair building facilities).

146. 877 P.2d 806, 811 (Ariz. 1994).

147. *Roosevelt Elem. Sch. Dist.*, 877 P.2d at 816.

148. See *Serrano v. Priest*, 487 P.2d 1241, 1258 (Cal. 1971); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206 (Ky. 1989); *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997); *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 256 (N.D. 1994); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979); *Vincent v. Voight*, 614 N.W.2d 388, 396 (Wis. 2000); *State v. Campbell County Sch. Dist.*, 19 P.3d 518, 535 (Wyo. 2001).

stitution.¹⁴⁹ Finally, at least four state courts analyze claims involving the distribution of educational resources under *both* the education and the equal protection clauses of their state constitutions, but avoid addressing the question of whether education is a fundamental right.¹⁵⁰

At least in theory, a state claim based on social studies deprivation could prevail under any state regime. Of course, challenges to social studies cutbacks are probably more *likely* to succeed in states where education is seen as a fundamental right, because the state's decision to allow social studies cuts would then presumably be subject to strict scrutiny under a federal equal protection analogue.¹⁵¹ But unlike a federal equal protection challenge, a state constitutional challenge to social studies cutbacks need not be entirely dependent on the application of strict scrutiny. Even in the majority of states, where education is not seen as a fundamental right, the education provision clearly imposes *some* substantive requirements on the legislature. A challenge to social studies cutbacks could thus succeed in any state if it could show that the state legislature is in dereliction of its constitutional duty when it does not provide a civic education to all students.¹⁵²

In fact, in many states, an argument that the legislature has a duty to provide students with social studies can be based on the plain language of the education provision. Although most state constitutions do not impose substantive curricular requirements,¹⁵³ a number of state constitutions endorse the view that education's importance is bound up in the participatory nature of democracy. The education provisions in Indiana and New Hampshire celebrate "knowledge and learning" as "essential to the preservation of a free government,"¹⁵⁴ while Idaho, Minnesota, and South Dakota's provisions declare that the "stability of a republican form of government" depends mainly on the "intelligence of the people."¹⁵⁵ Six other states' education provisions draw on John Adams's language in the Massachusetts

149. See *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1018 (Colo. 1982); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1194 (Ill. 1996); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1188 (Kan. 1994); *E. Jackson Pub. Sch. v. State*, 348 N.W.2d 303, 305 (Mich. Ct. App. 1984); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 49 (R.I. 1995).

150. See *Sch. Admin. Dist. No. 1 v. Comm'r, Dep't of Educ.*, 659 A.2d 854, 857 (Me. 1995); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993); *Brigham v. State*, 692 A.2d 384 (Vt. 1997).

151. See *Claremont Sch. Dist.*, 703 A.2d at 1358 ("When governmental action impinges fundamental rights, such matters are entitled to review under the standard of strict judicial scrutiny."). *But see Bismarck Pub. Sch. Dist.*, 511 N.W.2d at 259 (applying intermediate scrutiny in school *fund-*ing context, while leaving open the possibility that strict scrutiny could be used in other educational contexts).

152. State education cases that are analyzed as "fundamental rights" cases are typically not in danger of being overturned by the post-*Rodriguez* U.S. Supreme Court. State courts base their finding that education is a "fundamental right" on the *state* constitution, so such holdings rest "on an adequate and independent state ground" and are therefore not reviewable in federal court. *Sochor v. Florida*, 504 U.S. 527, 533 (1992).

153. The lone exception is Hawaii, which explicitly requires the legislature to promote "the study of Hawaiian culture, history and language." HAW. CONST. art. X, § 4.

154. IND. CONST. art. VIII, § 1; N.H. CONST. pt. 2, art. LXXXIII.

155. IDAHO CONST. art. IX, § 1; MINN. CONST. art. XIII, § 1; S.D. CONST. art. VIII, § 1.

Constitution of 1780,¹⁵⁶ and assert that the general diffusion of knowledge among the people is essential to “the preservation of [their] rights and liberties.”¹⁵⁷ Three more state provisions see an educated populace as “necessary to good government.”¹⁵⁸ And North Dakota’s education provision makes the nexus between democracy and education explicit, declaring that a “high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people [is] necessary . . . to insure the continuance of that government.”¹⁵⁹

In states that explicitly celebrate the civic nature of education, a litigator challenging the deprivation of social studies could plausibly claim that the legislature is in dereliction of its constitutional duties when it allows schools to cut or eliminate civic education. After all, it seems implausible that the general populace can act to preserve “rights and liberties” if they are unaware of the content of those rights, or even that those rights and liberties exist. Similarly, if a state really believes that a wise and knowledgeable populace is the vanguard of republican government, that populace should presumably be armed with an understanding of that government’s structure, history, and functions. Of course, these hortatory civic education clauses could be read as nothing more than preambles that impose no duties on the legislature.¹⁶⁰ At the very least, though, civic education clauses do suggest a constitutional *conception* of education that is not being met if students receive an inadequate social studies education.

Other states’ education provisions lack this type of civic language, but the legacy of school finance litigation—in which many state courts were asked to define the contours of an “adequate” education—suggests that many state courts still interpret those provisions to require the teaching of social studies. After *Rodriguez* established that wealth-based school funding disparities do not violate the federal Equal Protection Clause, school finance litigation largely shifted to state courts. In state after state, litigants asked courts to decide whether the resources available to a school district could be constitutionally based on the property wealth of the district.¹⁶¹ Although a few state courts initially required legislatures to impose *equal* per-pupil expenditures, most courts that invalidated school financing systems held that

156. John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates*, 70 ALB. L. REV. 927, 940 & n.38 (2007).

157. CAL. CONST. art. IX, § 1; ME. CONST. art. VIII, pt. 1, § 1; MASS. CONST. ch. V, § 2; MO. CONST. art. IX, § 1(a); R.I. CONST. art. XII, § 1; TEX. CONST. art. VII, § 1 (stating that knowledge is “essential to the preservation of the liberties and rights of the people”).

158. MICH. CONST. art. VIII, § 1; N.C. CONST. art. IX, § 2. Arkansas’s education provision states that “intelligence . . . [is] the bulwark of a free and good government.” ARK. CONST. art. XIV, § 1.

159. N.D. CONST. art. VIII, § 1 (emphasis added).

160. See Dinan, *supra* note 156, at 939.

161. See William S. Koski, *Achieving “Adequacy” in the Classroom*, 27 B.C. THIRD WORLD L.J. 13, 20 (2007).

the funding regime did not provide sufficient resources for students to receive an *adequate* education under the state constitution.¹⁶²

To define “adequacy,” state courts read even the barest constitutional provisions as imposing a state responsibility to teach a specific curriculum—one that often included a civic dimension. In *Pauley v. Kelly*, the West Virginia Supreme Court held that the state constitution’s provision for “thorough and efficient” schools required the legislature to provide a system in which every child was offered instruction in core subjects, including government and social ethics.¹⁶³ Ten years later, in *Rose v. Council for Better Education*, the Kentucky Supreme Court cited the West Virginia decision as a mandate to broadly interpret its own constitutional provision requiring an “efficient” school system.¹⁶⁴ The Kentucky court read “efficient” as requiring the state to provide students with the opportunity to attain seven basic “capacities.”¹⁶⁵ At least three of these capacities suggest a need for formal social studies instruction: the court required schools to provide students with the opportunity to attain “sufficient knowledge of economic, social, and political systems,” “sufficient understanding of governmental processes,” and the capacity to “appreciate [their] cultural and historical heritage.”¹⁶⁶ Significantly, both Kentucky and West Virginia’s constitutional education provisions are bare and unadorned. Neither provision contains laudatory language about the civic virtues of education, nor, like some states, do they explicitly require “quality” or “adequate” state schools.¹⁶⁷ Yet both courts read constitutional language requiring “thorough” and “efficient” schools as requiring the legislature to provide for a specific—albeit vaguely defined—curriculum. Most importantly, both courts held that a constitutionally mandated level of instruction required that students receive some semblance of a civic education, suggesting that virtually any education provision can be interpreted as requiring social studies instruction.

In fact, in dealing with school finance cases, a number of state courts seem to suggest that the legislature must provide students with the opportunity to attain a civic education. In *Leandro v. State*, the North Carolina Supreme Court held that the state constitution’s education clause requires

162. *See id.*

163. 255 S.E.2d 859, 877 (W. Va. 1979).

164. 790 S.W.2d 186, 209–10 (Ky. 1989).

165. *Rose*, 790 S.W.2d at 212.

166. *Id.*

167. Compare KY. CONST. § 183 (“The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.”), and W. VA. CONST. art. XII, § 1 (“The Legislature shall provide, by general law, for a thorough and efficient system of free schools.”), with FLA. CONST. art. IX, § 1(a) (“The education of children is a fundamental value of the people of the State of Florida. . . . Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education. . . .”), GA. CONST. art. VIII, § 1 (“[P]rovision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia.”), MONT. CONST. art. X, § 1(3) (“[L]egislature shall provide a basic system of free quality public elementary and secondary schools.”), and VA. CONST. art. VIII, § 1 (“The General Assembly . . . shall seek to ensure that an educational program of high quality is established and continually maintained.”).

the state to provide students with “sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues”¹⁶⁸ The Massachusetts, New Hampshire, and South Carolina Supreme Courts adopted Kentucky’s seven *Rose* competencies as their states’ definition of a constitutionally adequate public education;¹⁶⁹ for good measure, the New Hampshire court added that “broad exposure to the *social, economic, scientific, technological, and political* realities of today’s society is essential for our students.”¹⁷⁰

In a string of school finance cases, New York’s highest court worked under the assumption that its education provision is fashioned to allow public school graduates to “function productively as civic participants capable of voting and serving on a jury.”¹⁷¹ This civic participation reading of the education provision ultimately led the court to conclude that children are entitled to “up-to-date basic curricula such as reading, writing, mathematics, science, and social studies.”¹⁷² In 2003, the New York high court gave its civic participation reading an even sharper bite, affirming a trial court’s holding that productive citizenship “means more than just being *qualified* to vote or serve as a juror, but to do so capably and knowledgeably.”¹⁷³

And in a case that did not directly involve school financing, the California Supreme Court laid out an extremely robust conception of education’s relationship to democracy. The court held that “education prepares students for active involvement in political affairs” by “stimulat[ing] an interest in the political process and provid[ing] the intellectual and practical tools necessary for political action.”¹⁷⁴ Noting the “rise of the electronic media and the development of sophisticated techniques of political propaganda,” the California court held that education was “increasingly critical . . . in fostering . . . habits of open-mindedness and critical inquiry.”¹⁷⁵ Absent a quality education, the court continued, “the populace will lack the knowledge, self-confidence, and critical skills to evaluate independently the pronouncements of pundits and political leaders.”¹⁷⁶

168. 488 S.E.2d 249, 255 (N.C. 1997).

169. *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997). South Carolina modified the *Rose* language slightly. *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) (defining the civic component of a constitutionally adequate education as “the opportunity to acquire . . . a fundamental knowledge of economic, social, and political systems, and of history and governmental processes”).

170. *Claremont Sch. Dist.*, 703 A.2d at 1359 (emphasis added).

171. *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995).

172. *Id.*

173. *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 331 (N.Y. 2003) (quoting *Campaign for Fiscal Equity, Inc. v. State*, 719 N.Y.S.2d 475, 485 (N.Y. Sup. Ct. 2001)).

174. *Hartzell v. Connell*, 679 P.2d 35, 40–41 (Cal. 1984).

175. *Id.* at 41 (internal quotation marks omitted).

176. *Id.*

Decisions that define education in political, civic, or social terms provide a framework within which a challenge to social studies cutbacks could succeed, but such decisions do not, on their own accord, mandate social studies instruction. Even in states where courts decorate their decisions with rhetorical celebrations of civic education, students do not apparently have a real right to an adequate social studies education. In New York City—where many elementary and middle schools do not even teach social studies—over eighty percent of eighth graders failed to demonstrate even basic proficiency in social studies in 2005.¹⁷⁷ In Massachusetts, poorer students commonly do not receive any social studies at all.¹⁷⁸ State decisions celebrating civic education—or even defining education as consisting of certain curricular subjects—did not actually establish judicial enforcement over the teaching of those subjects. In school finance cases, state courts simply directed the legislature to retool school funding systems so that each school *could* potentially provide an adequate education that included social studies.¹⁷⁹ A state court's history of emphasizing civic education may ultimately help win a claim based on a deprivation of social studies, but it does not diminish the need for such a challenge.

Challenges to a deprivation of social studies face even steeper hurdles in states where courts have refused to define a constitutionally adequate education.¹⁸⁰ Many state courts have expressed separation-of-powers concerns when interpreting constitutional provisions that explicitly give the legislature responsibility over schools. In an Illinois school finance case, for example, the state supreme court refused to interpret a constitutional requirement that education be “high quality” or “efficient,” holding that educational policy is almost exclusively within the province of the legislative branch.¹⁸¹ Similarly, the Alabama Supreme Court refused to hold a financing system unconstitutional, because doing so would “involve a

177. David M. Herszenhorn, *Most City 8th Graders Miss State Norm in Social Studies*, N.Y. TIMES, May 10, 2005, at B8.

178. See *Hancock v. Driscoll*, No. 02-2978, 2004 Mass. Super. LEXIS 118, *31, *60, *84 (Super. Ct. Apr. 26, 2004) (detailing the lack of social studies instruction and other academic deficiencies in four “focus districts”).

179. See, e.g., *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1360 (N.H. 1997) (ordering the legislature to come up with a financing model as a prerequisite to the delivery of a constitutionally adequate public education); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 348 (N.Y. 2003) (ordering the State to rework its funding formula so that it met the “actual cost of providing a sound basic education”); *Vincent v. Voight*, 614 N.W.2d 388, 397 (Wis. 2000) (laying out a comprehensive curricular framework deemed a “sound basic education,” but holding that “[s]o long as the legislature is providing sufficient resources . . . [a] school finance system will pass constitutional muster”). *Hartzell v. Connell*, the California case that celebrated the political dimensions of education, held that public schools could not impose fees for extracurricular high school activities. See 679 P.2d 35 (Cal. 1984).

180. Approximately half the states in the U.S. have upheld their funding system as adequate, typically with little explanation of what defines adequacy. See Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147 app. at 1181–82 (2000).

181. *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1189 (Ill. 1996).

usurpation of that power entrusted exclusively to the Legislature,"¹⁸² while the Oklahoma Supreme Court accused the plaintiffs in a school finance case of "attempting to circumvent the legislative process."¹⁸³ Other state courts refused to interpret the education provision because they saw a lack of "judicially manageable standards" for resolving the school finance dispute.¹⁸⁴

Besides not providing an advantageous judicial conception of education, decisions like these—which essentially hold education financing schemes nonreviewable—are tremendously bad precedent for suits challenging a deprivation of social studies. For one thing, establishing a right to social studies will likely cost money, and a state defendant could argue that a judicial requirement for social studies instruction directly impinges the legislature's reserved power over school finance. After all, a district that is forced to teach social studies will have to reallocate money—and probably request more from the state—to hire teachers and purchase books and materials. Even if one assumes that a right to social studies can be established with no redistribution of funds, courts that read education provisions as granting the legislature exclusive *financial* power over schools would likely grant the legislature exclusive *curricular* power as well. In order to establish a right to social studies in these states, a plaintiff class would have to show that cutting social studies is for some reason within a subclass of constitutionally prohibited educational policy choices. But because courts that defer to the legislature in school finance cases typically refuse to read *any* substance into their education provisions, constitutional protection for civic education in these states is unlikely to come from judicial precedent.

B. *Analyzing History so Students Can, Too: A Litigation Strategy Based on Originalist Readings of State Education Provisions*

To convince a state court that social studies cutbacks are constitutionally prohibited, litigators should look—fittingly enough—to the history surrounding the adoption of that state's education provision. Lacking any explicit guidance for how to interpret education provisions, courts often look to constitutional convention debates, the intent of the framers, and historical conceptions of education. The historical record does not necessarily cut one way or another, as a number of courts have used the historical record both to broaden and to restrict the meaning of education provisions.¹⁸⁵ California, for example, established that its education provision contains a political dimension by citing statements to that effect by the Founding Fathers, the chairman

182. *Ex parte James*, 836 So. 2d 813, 819 (Ala. 2002).

183. *Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 158 P.3d 1058, 1066 (Okla. 2007).

184. *E.g.*, *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 111 (Pa. 1999); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995).

185. *See, e.g.*, *Thompson v. Engelking*, 537 P.2d 635, 648 (Idaho 1975) (holding that a delegate to the constitutional convention's statement that the state's duty ends with the teaching of the three R's "cannot be given its literal meaning" today).

of the California Constitutional Convention's Committee on Education, and the "most prominent free school advocate at the time [California's free school clause] was adopted."¹⁸⁶ At the other extreme, the Illinois Supreme Court painstakingly examined debates surrounding the adoption of its education article before denying that Illinois's provision for an "efficient" and "high quality" school system guaranteed any substantive, judicially enforceable educational rights.¹⁸⁷ Other state courts that looked to history to broaden their reading of an education provision include those in Arizona,¹⁸⁸ Kentucky,¹⁸⁹ Massachusetts,¹⁹⁰ Ohio,¹⁹¹ Texas,¹⁹² and West Virginia,¹⁹³ while courts in Georgia,¹⁹⁴ Minnesota,¹⁹⁵ Nebraska,¹⁹⁶ North Dakota,¹⁹⁷ and Rhode Island¹⁹⁸ held that a historical analysis suggested a restricted reading of their education clause. Although the history surrounding state education provisions—and courts' readings of it—is hardly uniform, owning the historical narrative would be critical for litigators acting on behalf of social studies-deprived students. Outside of a historical analysis, different state courts seem to apply wildly different standards and criteria when interpreting education provisions. One study shows that the wording of a state's education provision apparently does not influence whether a court will interpret that clause broadly or narrowly, nor does an examination of precedent from sister states seem to affect states' readings of these clauses.¹⁹⁹

If courts give serious weight to historical conceptions of education—and if, as this Note has argued, those courts find that an adequate civic education requires some instruction in social studies—challenges to social studies cutbacks should succeed in a number of places. At least fifteen states' constitutional provisions *explicitly* endorse a civic dimension to education,²⁰⁰

186. Hartzell v. Connell, 679 P.2d 35, 40 (Cal. 1984).

187. Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1185–89 (Ill. 1996).

188. Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994).

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

190. McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993).

191. Derolph v. State, 677 N.E.2d 733 (Ohio 1997).

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

193. Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979).

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

195. Skeen v. State, 505 N.W.2d 299 (Minn. 1993).

196. Neb. Coal. for Educ. Equity & Adequacy v. Heineman, 731 N.W.2d 164 (Neb. 2007).

197. Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247 (N.D. 1994).

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

199. Swenson, *supra* note 180, at 1175. In fact, Swenson examined a number of structural and legal variables, and found that the only factors that can explain courts' decisions are a) the political ideology in the state, and b) the amount of money being spent per pupil in financing cases. *Id.* at 1179.

200. See ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MASS. CONST. ch. V, § 2; MICH. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; MO. CONST. art. IX, § 1(a); N.H. CONST. pt. 2, art. LXXXIII;

and many other states considered such language during the framing of their constitution.²⁰¹ The framers of a number of state constitutions shared the premise that education is closely tied to citizenship and republican values, even if they did not directly reflect that notion in the education provision.²⁰² The history behind education provisions that were first ratified in the eighteenth or nineteenth century is particularly helpful for challenges to social studies cutbacks, as the dominant understanding of education at the time was a “radical democratic view” that tied education to republicanism.²⁰³ Even in the twentieth century, some constitutional conventions considered adding provisions celebrating civic education, although they were sometimes rejected as having no obvious utility.²⁰⁴ At least one state supreme court held that these twentieth-century debates *themselves* represented a civic consensus on education. In 1910, Arizona’s framers rejected a draft that declared education “essential to the preservation of the rights and liberties of the people . . . and [t]he stability of a Republican form of Government” in favor of one that calls for a “general and uniform” public school system.²⁰⁵ But the Arizona Supreme Court relied on the debate itself to establish conventioners’ belief that a “free society could not exist without educated participants” and that education was intricately tied to voting rights.²⁰⁶ It is beyond the scope of this Note to examine the history behind every state’s education provision. Given courts’ propensity for examining the original intent of education provisions, though, litigators challenging a deprivation of social studies would do well to cite historical records suggesting that states’ constitutional framers demonstrated a civic understanding of education.

N.C. CONST. art. IX, § 1; N.D. CONST. art. VIII, § 1; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; TEX. CONST. art. VII, § 1.

201. See Dinan, *supra* note 156, at 939–41 (describing the debate that took place during the Tennessee Convention of 1977).

202. See, e.g., VA. CONST. art. I, § 15 (recognizing in the bill of rights, rather than in the education provision, that “free government” is dependent “upon the broadest possible diffusion of knowledge, and . . . the Commonwealth should . . . assur[e] the opportunity for [its people’s] fullest development by an effective system of education”).

203. Michael A. Rebell, *Equal Opportunity and the Courts*, 89 PHI DELTA KAPPAN 432, 433–34 (2008); see also *Brigham v. State*, 692 A.2d 384 (Vt. 1997). *Brigham* relied on the view, prominent at the time the Vermont Constitution was ratified, that education was key to fostering “republican values,” *id.* at 394, even though the Vermont Constitution does not celebrate education’s civic virtues, VT. CONST. ch. 2, § 68.

204. See Dinan, *supra* note 156, at 940–41.

205. *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 812 (Ariz. 1994) (internal quotation marks omitted) (quoting THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 1064, 1069 (John S. Goff ed., 1991)).

206. *Id.*

*C. Applying Learning Standards Against the State: A Theoretical
Expansion of the State Definition of “Education”*

If education provisions and the legacy of school finance cases do not, of their own accord, establish a requirement that students receive social studies instruction, a court could, in theory, find that a state’s academic standards establish a right to social studies. In all fifty states, the legislature empowers a group of education specialists to define learning standards that all students are expected to meet; these standards, in theory, drive schools’ curricula.²⁰⁷ Every U.S. state boasts standards in social studies,²⁰⁸ and these standards are often fairly robust. For example, Illinois middle schoolers are expected to “[a]nalyze historical influences on the development of political ideas . . . as enumerated in the Declaration of Independence,”²⁰⁹ while high school students are expected to analyze the differences between world political systems, including democracy, socialism, and communism.²¹⁰ An argument could be made that these standards represent the legislature’s *definition* of “education” in the state’s education clause. The state, therefore, would be in dereliction of its constitutional and statutory duties if it does not provide students with the social studies education detailed in state standards.

So far, though—at least in the school finance context—no state court has held that state standards impose a substantive legal duty on the legislature. Although many judges cite the failure of students to meet state standards as *evidence* that school systems are inadequate, no court has “gone so far as to constitutionalize state educational standards.”²¹¹ The 2003 *Campaign for Fiscal Equity* case exemplified this reluctance to constitutionalize standards. There, the New York high court refused to adopt the state’s ambitious Regents Learning Standards as the definition of a “sound basic education” under the New York Constitution.²¹² Although the court ultimately held that the state’s school funding system was inadequate, it cited its own previous decisions and reaffirmed that a “sound basic education” is one that prepares students to “function productively as civic participants.”²¹³ But in a concurring opinion, Justice Smith argued that the Regents Learning Standards should define the contours of a sound basic education. Conceding that state standards are indeed rigorous, Justice Smith argued they represented the extent to which the government has “determined that being a productive

207. James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1228 (2008).

208. See Developing Educational Standards: Social Studies, <http://edstandards.org/StSu/Social.html> (last visited Feb. 14, 2009).

209. Ill. State Bd. of Educ., *Illinois Learning Standards*, 14.F.3a, http://www.isbe.net/ils/social_science/pdf/goal14.pdf (last visited Feb. 14, 2009).

210. *Id.* at 14.B.5.

211. Koski, *supra* note 161, at 16.

212. *Campaign for Fiscal Equity, Inc., v. State*, 801 N.E.2d 326, 332 (N.Y. 2003).

213. *Id.*

citizen requires learning the skills the Learning Standards impart.”²¹⁴ Although no court has yet adopted Justice Smith’s reasoning, many scholars believe that courts will soon require legislatures to ensure that their standards are actually being met.²¹⁵

Litigation involving social studies cutbacks, though, may be a better catalyst for a constitutionalization of state standards than litigation challenging school funding schemes. Professor James Ryan argues that state courts are reluctant to constitutionalize state standards in part because the issue invariably comes up in school finance cases.²¹⁶ In school finance cases, Professor Ryan argues, courts either implicitly or explicitly adopt a *comparative* approach—courts are, Professor Ryan says, concerned with providing schools with enough money so that students can compete for a limited number of jobs and spots in higher education.²¹⁷ Because courts are concerned with the competitiveness of students, they necessarily look at what other districts—the competition—are spending, and adjust the remedies accordingly. In contrast, Professor Ryan argues, standards are fundamentally noncomparative, because they rest on the “tacit assumption that meeting the standards is enough, even if some schools and students go well beyond legislatively created standards.”²¹⁸ Academic standards, then, do not “fit easily with the approach taken by most courts” in school finance cases.²¹⁹ But unlike school finance cases, a challenge to social studies cutbacks could be noncomparative. Social studies, after all, is geared towards noncompetitive ends, like the ability to act as a citizen, to effectively exercise the right to vote, and to be informed enough to participate in contemporary discourse.²²⁰ For students that have been deprived of social studies, the opportunity to meet state standards could be enough, so an argument based on a deprivation of social studies would not necessarily fail, as both the definition of an adequate social studies education *and* the remedy could be noncompetitive.

Thus, even if a state constitution does not impose a requirement that students receive a civic education on its own right, it is still theoretically possible that, through its standards, the state might impose that requirement on itself. Of course, robust standards cost money to implement, and a state might feel fiscal pressure to scale back the ambitiousness of its standards if forced by a court to actually implement them. At the same time, though, political considerations would likely counsel *against* weakening state education standards. After all, if a state gutted educational standards *too* much in

214. *Id.* at 355 (Smith, J., concurring).

215. *See* Ryan, *supra* note 207, at 1224.

216. *Id.* at 1238.

217. *Id.* at 1239.

218. *Id.*

219. *Id.*

220. One could argue, of course, that learning all that social studies entails places students at a competitive advantage in the marketplace and so learning social studies really *is* competitive. Such a benefit, though, is ancillary to social studies’ basic goal of creating informed, engaged citizens.

response to a judicial decision, it could upset voters who want their children to receive a demanding, top-notch public education. In all likelihood, states would find a middle ground, and water down standards to an affordable, but still politically tenable, level. But for many students who are deprived of social studies, even the implementation of middling standards would likely lead to a more robust civic education. States would probably be unwilling to *completely* eliminate their social studies standards, and judicially mandated implementation of even watered-down standards could give many students exposure to a basic civics education that they might not have otherwise enjoyed.

CONCLUSION

The woeful state of civic education in America stands as a potential affront to the judiciary's historic conception of education as the "foundation of good citizenship."²²¹ Given the judiciary's repeated declarations about the civic nature of education, there is at least a plausible claim that any post-*Rodriguez* quantum of education that is protected by the U.S. Constitution includes a right to social studies instruction. But the questionable existence of such a quantum—combined with the federal judiciary's current emphasis on local, legislative control over schools—means that a federal challenge to a deprivation of social studies faces dubious prospects, at best. State courts provide the best hope for a judicial remedy to social studies cutbacks. The plain text of some education provisions, the history behind the ratification of others, and the framework established by school finance cases all provide plausible bases for challenges brought on behalf of social studies-deprived students. Finally, it is theoretically possible that courts could require states to provide students with the level of education outlined in state standards. If courts act to restore the long-recognized civic aspect of education, they could finally begin to shore up America's crumbling foundations of good citizenship.

221. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

