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# The Gifted Commitment: Gifted Education's Unrecognized Relevance in "Thorough and Efficient" Public Schools

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— Comment —

THE GIFTED COMMITMENT:  
GIFTED EDUCATION’S UNRECOGNIZED  
RELEVANCE IN “THOROUGH AND  
EFFICIENT” PUBLIC SCHOOLS

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INTRODUCTION

In School Year (SY) 2008–09, gifted education funding represented less than 0.15% of state and federal funding.<sup>1</sup> This shortfall in funding is woeful. The deplorable funding reflects America’s inattentiveness toward gifted education, an increasingly vital component of public education in the modern global economy. Our nation is home to millions of gifted students—past, present, and future<sup>2</sup>—who will meaningfully impact our nation’s economic competitiveness in these globalizing times *only if* provided the resources to realize their potential.

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1. See THOMAS D. SNYDER & SALLY A. DILLOW, NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T. OF EDUC., DIGEST OF EDUCATION STATISTICS 2011, at 271 tbl.190 (2012) (listing total revenue for state gifted education funding at \$468 million, while total state revenue for education exceeds \$277 billion and total federal revenue for education is almost \$57 billion).
  2. The National Association for Gifted Children estimates that our nation’s K–12 schools contain three million gifted students. *NAGC at a Glance: Supporting the Needs of High-Potential Learners*, NAT’L ASS’N FOR GIFTED CHILDREN, <http://www.nagc.org/AboutNAGC.aspx> (last visited Oct. 21, 2013).

Part I of this Comment explores the status of American gifted education, touching on federal and state attempts to implement and fund gifted education. Part II explains the value of gifted education to American society and to the public education system. Part III proposes using states' education clauses to improve the gifted services provided in public schools.

## I. INADEQUACIES OF GIFTED EDUCATION

Increased federal involvement has transformed American public education into a key federalism battleground. As the federal government expands into elementary and secondary education, states steadily lose their once-dominant presence in regulating education.<sup>3</sup> In the modern era of education legislation, federal and state governments have conflicted on controversial issues like standardized testing, teacher qualifications, and special education. Yet gifted education remains lost in the battle. Instead of a situation where the federal and state governments clamor to reform and regulate gifted education to their liking, the dual sovereigns largely avoid the issue of gifted education.

The lack of attention is not necessarily surprising. Gifted education appeals to a narrow political constituency and faces some populist resentment. A number of reasons, some obvious, explain the lack of popular support, which consequently hinders efforts to expand gifted education services.<sup>4</sup> Following *Brown v. Board of Education*,<sup>5</sup> some schools used rigid tracking systems to deprive black students of an equal education.<sup>6</sup> Others' views may be tainted by unpleasant personal experiences with public education. People who struggled in or loathed public schooling may begrudge those who excelled and

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3. STEPHEN B. THOMAS ET AL., PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 12–13 (6th ed. 2009); *see also* Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & EDUC. 1, 3–9 (detailing the federal government's expanding role in education since the mid-twentieth century).
  4. Suzanne E. Eckes & Jonathan A. Plucker, *Charter Schools and Gifted Education: Legal Obligations*, 34 J.L. & EDUC. 421, 429 (2005).
  5. 347 U.S. 483 (1954).
  6. *See, e.g., Larry P. v. Riles*, 793 F.2d 969, 979–83 (9th Cir. 1984) (upholding a district court order enjoining a school district from using nonvalidated IQ tests to identify children for its “educable mentally retarded” class that disproportionately included African American children); *McNeal v. Tate Cnty. Sch. Dist.*, 508 F.2d 1017, 1020–21 (5th Cir. 1975) (ordering that an ability-grouping scheme with a segregating impact be subject to heightened scrutiny); *Hobson v. Hansen*, 269 F. Supp. 401, 511–14 (D.D.C. 1967) (abolishing the District of Columbia's tracking system because it failed to track students by ability).

subsequently refuse to support gifted students. Many people wrongly perceive gifted students as not requiring additional services to succeed.<sup>7</sup> And more practically, differentiating the education of gifted students normally requires significant resources. For these reasons, most attempts to provide meaningful services suffer from a lack of popular support that produces disappointing returns.

Because substantial public support of gifted education rarely persists, the resulting legislative policies have been similarly lackluster. To better understand the current state of gifted education in America, the following sections outline the limited efforts by federal and state governments to regulate and fund gifted education. This review concludes by describing the judiciary's passive approach to gifted education issues.

#### A. *Federal Gifted Education Initiatives*

Since the enactment of the Elementary and Secondary Education Act of 1965<sup>8</sup> (ESEA), Congress has increasingly inserted itself into education policy by extending conditional funding to states. For the most part, states have accepted the funds in exchange for adopting federally endorsed education policies. But while Congress has enacted noteworthy legislation regarding standardized assessments and education of students with disabilities, gifted education has only sparingly been a priority.<sup>9</sup>

Before the ESEA, Sputnik's 1957 ascension to the cosmos raised tremendous concern about America's ability to compete globally in science and technology. The threat of Soviet economic and military supremacy prompted a rare national outcry for gifted education.<sup>10</sup> Consequently, Congress enacted the National Defense Education Act of 1958<sup>11</sup> to provide funding for gifted and talented student services. Though the idea of the "Sputnik moment" resonates in American lore, the financial and political support it engendered lasted for only a few years.<sup>12</sup> During the 1960s, President Johnson's "War on Poverty,"

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7. Eckes & Plucker, *supra* note 4, at 429.
  8. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).
  9. See Kristen R. Stephens, *Gifted Education and the Law*, GIFTED CHILD TODAY, Jan.–Feb. 2000, at 30, 31 (“There are few federal initiatives relating to the education of gifted and talented students.”).
  10. Mary Ruth Coleman, *Back to the Future: The Top 10 Events That Have Shaped Gifted Education in the Last Century*, GIFTED CHILD TODAY, Nov.–Dec. 1999, at 16, 17.
  11. Pub. L. No. 85-864, 72 Stat. 1580.
  12. See Coleman, *supra* note 10 (describing the changing federal emphasis from international competitiveness to equal access in education).

including the historic ESEA, instead concentrated attention on the educational needs of economically disadvantaged students.<sup>13</sup>

The efforts of Sidney Marland, the Commissioner of Education under President Nixon, later yielded more short-lived progress. In a 1972 report to Congress, which later became known as the Marland Report, he highlighted the educational needs of gifted children and asserted a still-influential definition of gifted and talented.<sup>14</sup> The 1974 amendments to the ESEA incorporated the Marland Report's recommendations.<sup>15</sup> Notably, the amendments created the Office of Gifted and Talented within the Department of Education and authorized annual federal appropriations for gifted programming, albeit at regrettably low levels.<sup>16</sup>

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13. See CHRISTOPHER CROSS ET AL., INDEPENDENT REVIEW PANEL, *IMPROVING THE ODDS: A REPORT ON TITLE I FROM THE INDEPENDENT REVIEW PANEL 2* (2001), available at <http://web.archive.org/web/20030915185737/http://www.c-b-e.org/PDF/IRPReport.pdf> (“Title I of [the ESEA] provides funds to the nation’s schools that have high concentrations of children from low-income families in order to pay the extra costs of educating educationally disadvantaged students. Today, Title I remains the largest source of federal aid for pre-K-12 education, . . . representing 38 percent of all federal support for pre-collegiate education.”); *ESEA Reauthorization: The Importance of a World-Class K-12 Education for Our Economic Success: Hearing of the H. Comm. On Health, Educ., Labor, and Pensions*, 111th Cong. 21 (2010) (statement of Dennis Van Roekel) (describing ESEA as part of Johnson’s War on Poverty).
  14. STAFF OF S. SUBCOMM. ON EDUC., S. COMM. ON LABOR & PUB. WELFARE, 92D CONG., *EDUCATION OF THE GIFTED AND TALENTED: REPORT TO THE CONGRESS OF THE UNITED STATES BY THE U.S. COMMISSIONER OF EDUCATION 142* (Comm. Print 1972) (“Gifted and talented children are those identified by professional qualified persons, who by virtue of outstanding abilities, are capable of high performance. These are children who require differentiated educational programs and/or services beyond those normally provided by the regular school program in order to realize their contribution to self and society.”); Kim Millman, Comment, *An Argument for Cadillacs Instead of Chevrolets: How the Legal System Can Facilitate the Needs of the Twice-Exceptional Child*, 34 PEPP. L. REV. 455, 469–470 (2007).
  15. Millman, *supra* note 14, at 470.
  16. Education Amendments of 1974, Pub. L. No. 93-380, § 404(a), 88 Stat. 484, 547 (section repealed in 1979); see also Charles J. Russo, *Unequal Education Opportunities for Gifted Students: Robbing Peter to Pay Paul?*, 29 FORDHAM URB. L.J. 727, 740 (2001) (explaining advocates’ disappointment with the funding authorization, which amounted to roughly a dollar per year for each eligible student).

Momentum seemingly continued with the Gifted and Talented Children's Education Act of 1978.<sup>17</sup> The Act authorized increased appropriations and set forth Congress's recognition that:

(1) the Nation's greatest resource for solving critical national problems in areas of national concern is its gifted and talented children, (2) unless the special abilities of gifted and talented children are developed during their elementary and secondary school years, their special potentials for assisting the Nation may be lost, and (3) gifted and talented children from economically disadvantaged families and areas often are not afforded the opportunity to fulfill their special and valuable potentials, due to inadequate or inappropriate educational services.<sup>18</sup>

Despite the rhetoric, this effort too met a quick end with Congress's enactment of the Omnibus Reconciliation Act of 1981<sup>19</sup> (OBRA). OBRA repealed the Gifted and Talented Children's Education Act of 1978.<sup>20</sup> Additionally, OBRA eliminated the Office of Gifted and Talented and effectively wiped away categorical appropriations for gifted education by consolidating them into a block grant with numerous other programs.<sup>21</sup>

Another funding program—the Jacob K. Javits Gifted and Talented Students Education Act of 1988<sup>22</sup>—represents the most recent federal attempt at furthering gifted education. Despite constant threats to its funding, the program survived more than a decade before Congress pulled its appropriations as part of a 2011 budget deal.<sup>23</sup> Survival, however, did not equate to impact. At its peak in

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17. Pub. L. No. 95-561, §§ 901–08, 92 Stat. 2143, 2292–96 (amending ESEA as part of the Education Amendments of 1978) (repealed 1982).

18. § 901(b).

19. Pub. L. No. 97-35, 95 Stat. 357.

20. Russo, *supra* note 16, at 740.

21. *See id.*; see also Jeffrey J. Zettel, *The Education of Gifted and Talented Children from a Federal Perspective*, in JOSEPH BALLARD ET AL., SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS 51, 63 (1982) (discussing the consolidation educational programs into a block grant).

22. Pub. L. No. 100-297, §§ 4101–08, 102 Stat. 130, 237–40 (codified as amended at 20 U.S.C. §§ 7253–7253e (2006)) (amending ESEA as part of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988).

23. *See* Joann DiGennaro, *DiGennaro: The Forgotten Gifted Child*, RICHMOND TIMES-DISPATCH (July 31, 2013, 12:00 AM), [http://www.timesdispatch.com/opinion/their-opinion/columnists-blogs/guest-columnists/digennaro-the-forgotten-gifted-child/article\\_0f325af2-](http://www.timesdispatch.com/opinion/their-opinion/columnists-blogs/guest-columnists/digennaro-the-forgotten-gifted-child/article_0f325af2-)

2002, the program had less than \$12 million at its disposal.<sup>24</sup> Moreover, the need to constantly defend the Act's funding prevented any other progress toward expanding gifted education.<sup>25</sup> After the Javits Act's decline, no other federal initiative dedicated to gifted education remains in force.

Congress further hamstrung gifted education through the No Child Left Behind Act of 2001<sup>26</sup> (NCLB), coercing states into diverting limited educational resources toward achieving basic academic proficiency.<sup>27</sup> In particular, NCLB's pursuit of grade-level performance frustrates gifted students' pursuit of a meaningful education by restricting teachers' focus to standardized-test concepts with borderline passing students.<sup>28</sup>

Nonetheless, against this backdrop the Obama administration published a set of proposed reforms in *A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act*.<sup>29</sup> The report advocated for awarding competitive grants to "states, districts, and nonprofit partners to increase access to accelerated

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b09a-5384-941b-91366446d914.html (lamenting the Javits Act's small funding allocations prior to its complete defunding).

24. Christina Samuels, *Federal Funding for Gifted Education Verges on Elimination*, EDUC. WK. (Aug. 31, 2010, 6:48 PM), [http://blogs.edweek.org/edweek/speced/2010/08/federal\\_funding\\_for\\_gifted\\_edu\\_1.html](http://blogs.edweek.org/edweek/speced/2010/08/federal_funding_for_gifted_edu_1.html).
25. Eckes & Plucker, *supra* note 4, at 429.
26. Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.) (amending ESEA).
27. See Cynthia V. Ward, *Giftedness, Disadvantage, and Law*, 31 J. EDUC. FIN. 45, 46-47 (2005) ("[T]he act creates powerful incentives for schools to focus on raising the test scores of their lowest-performing students, and some schools are doing this by cutting elective programs for gifted children and spending the money from these programs on the effort to comply with NCLB Act requirements."); see also Eckes & Plucker, *supra* note 4, at 434 (explaining how many states have now implemented accountability systems that emphasize meeting a minimum threshold performance level on standardized assessments); Daniel Golden, *Brain Drain: Initiative to Leave No Child Behind Leaves Out Gifted*, WALL ST. J., Dec. 29, 2003, at A1 (noting the reallocation of resources away from gifted students to comply with NCLB's conditions).
28. See Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 497-99 (2005) ("'Grade level' performance and basic skills do not equate to 'high-quality education' for gifted students. . . . For many gifted students, a high-quality education involves learning the material of a grade level or more *above* their current grade level.").
29. U.S. DEP'T OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010), available at <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>.

learning opportunities for students.”<sup>30</sup> Yet the report to date has sparked little legislative action.<sup>31</sup>

Looking forward, Congress’s wishy-washiness over the past half-century inspires no hope for meaningful federal reform. Each action taken to advance gifted education lost support after only a few years. The transient support thus left gifted education programs vulnerable to budget cuts. Even mild initiatives like the Javits Act fell victim to budget negotiations. Barring an unforeseeable change in popular support for gifted education, there is no reason to expect a break in the cycle.

The contrast between gifted education and education of students with disabilities more fully demonstrates gifted education’s dilemma.<sup>32</sup> What is known as the Individuals with Disabilities Education Act<sup>33</sup> (IDEA)—which has undergone several reauthorizations since its enactment as the Education of the Handicapped Act<sup>34</sup> in 1970—best embodies the federal government’s push to fulfill the education needs of students with disabilities. For states to maintain federal funding under IDEA, they must provide students with disabilities a “free appropriate public education” (FAPE).<sup>35</sup>

A comparison of federal government spending on FAPE relative to gifted education highlights an enormous funding disparity. In 2010, while the now-defunded Javits Act received an allocation of \$7.5 million, Congress supplied states with more than \$11 *billion* for

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30. *Id.* at 29.

31. A Senate reauthorization bill proposing many of the report’s suggested reforms was soundly defeated, never making it to the Senate floor. Alyson Klein, *Top K-12 Leader in Congress Sets Departure Date*, EDUC. WK., Feb. 6, 2013, at 20 (mentioning that a key final-term Senator will likely prioritize IDEA reauthorization over ESEA reauthorization).

32. Though the composition of these two student demographics largely differ, education of students with disabilities offers an apt comparison point for gifted education. Both groups comprise a small fraction of students who generally demand additional resources beyond those targeted to an average class. In fact, often both sets of students are discussed under the same umbrella of “exceptional students.” Certainly, the unique characteristics of these groups may call for different educational and regulatory approaches. But as explained in greater detail below, servicing both groups of students with the aim of maximizing their abilities serves both the students’ and the public’s interests. See discussion *infra* Part II.

33. Most recently passed as Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified at 20 U.S.C. §§ 1400–82 (2006 & Supp. V 2012)).

34. Pub. L. No. 91-230, § 601, 84 Stat. 175 (1970).

35. 20 U.S.C. § 1412(a)(1) (2006).

serving children with disabilities.<sup>36</sup> Due to the immense amount of funding at stake, this condition essentially amounts to a federal mandate for servicing the educational needs of these students. Gifted students, in contrast, do not benefit from IDEA or any major federal education program.<sup>37</sup> Taken together, the relative nonexistence of federal funding and regulation illustrates the lackluster treatment consistently extended to gifted students.

*B. State Support of Gifted Education*

As Congress dithers on the matter, the responsibility to provide gifted education falls to the states. The states, accordingly, enjoy a wide degree of latitude in deciding and executing gifted education policy. However, gifted education's unpopularity remains a significant obstacle at the state level.

It is important to acknowledge that state laws, regulations, and funding schemes vary significantly by state.<sup>38</sup> Policymakers have promoted gifted education through a range of mechanisms, including mandated services, individualized education programs (IEPs), child-find provisions,<sup>39</sup> extension of IDEA's FAPE protections, mediation, and due process.<sup>40</sup> In SY 2003–04, the percentage of public schools within a state offering a gifted program or honors courses ranged from a high of 98.4% in Iowa to a low of 27.3% in Massachusetts.<sup>41</sup>

States even diverge on whether to mandate gifted services. Twenty-eight states require identification of gifted students, and twenty-six states mandate that schools offer some service to gifted

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36. Samuels, *supra* note 24.

37. Elizabeth Shaunessy, *State Policies Regarding Gifted Education*, GIFTED CHILD TODAY, Summer 2003, at 16.

38. See Eckes & Plucker, *supra* note 4, at 430 (discussing various litigation issues that have emerged from differing state gifted education systems). For purposes of brevity, this Comment skips a state-by-state analysis of gifted education systems and instead highlights key similarities and differences in state approaches.

39. IDEA's child-find provision orders that "[a]ll children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated . . ." 20 U.S.C. § 1412(a)(3)(A) (2006).

40. See generally Shaunessy, *supra* note 37 (explaining the prevalence of these measures as of 2003).

41. *School and Staffing Survey: Table 10. Percentage of Public Schools that Offered Various Programs, by State: 2003–04*, *Schools and Staffing Survey 2003–2004* tbl.10, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., [http://nces.ed.gov/surveys/sass/tables/state\\_2004\\_10.asp](http://nces.ed.gov/surveys/sass/tables/state_2004_10.asp) (last visited Oct. 22, 2013).

children.<sup>42</sup> Meanwhile, fourteen states promulgate no gifted education mandates whatsoever.<sup>43</sup> The nature of mandated services varies dramatically among states as well.<sup>44</sup> Because state laws on gifted education fall along such a wide spectrum, interstate disparities in services are prevalent.

Inadequate oversight and reporting create similar disparities in programming within states. Only seventeen states dedicate at least one full-time, state-level employee to gifted education.<sup>45</sup> Twenty states neither monitor nor audit local gifted education programs.<sup>46</sup> These figures indicate that many states decline to hold localities accountable for executing gifted education policies.

States likewise vary in the extent to which they fund gifted education. Of the states with a gifted service mandate, only four fully fund the mandate at the state level.<sup>47</sup> However, in SY 2010–11, the same number of states spent less than \$1 million on gifted education and an additional ten states allocated no state funds to the cause.<sup>48</sup> For that same year, state funding per identified gifted student ranged from an alarming \$8 to more than \$2,500.<sup>49</sup>

Viewed in the aggregate, states' funding of gifted education raises considerable concern. In SY 2008–09, states extended to public

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42. NAT'L ASS'N OF GIFTED CHILDREN, 2010–2011 STATE OF THE STATES IN GIFTED EDUCATION 25 (2011), *available at* <http://www.nagc.org/stateofthestatesreport.aspx>.

43. *Id.* at 10.

44. *See id.* at 11. According to the National Association of Gifted Children, twenty-three states compel the provision of a “free appropriate public education,” twenty-four states require “non-discriminatory testing,” fourteen states call for due process, thirteen states demand dispute resolution, thirteen states mandate individual education plans, and thirteen states include child-find provisions. *Id.*

45. *Id.*

46. *Id.* Inadequate data collection and reporting further diminish accountability in gifted education. Some states do not collect detailed information regarding gifted services. *Id.* Only fifteen states annually publish information on gifted education, and only sixteen feature gifted and talented indicators on school-district report cards or similar evaluation mechanisms. *Id.*

47. *Id.* at 14. According to one study, in 2000 only one state sufficiently and equitably supported gifted education. *See* Bruce D. Baker & Jay McIntire, *Evaluating State Funding for Gifted Education Programs*, 25 ROEPER REV. 173, 179 (2003) (finding that only Florida “provided both sufficient and equitable support for gifted education” in 2000 when considering adequate state funding to gifted programs and distribution of that funding among poverty-stricken schools).

48. NAT'L ASS'N OF GIFTED CHILDREN, *supra* note 42, at 14.

49. *Id.*

schools a combined \$468 million for educating gifted students—less than 0.17% of the \$277 billion state-sourced education revenues.<sup>50</sup> The low levels of gifted education funding existed well before the recent recession strained state budgets.<sup>51</sup> Like federal gifted education policy, discretionary state initiatives often serve as easy targets for budget cuts. As states decline to fund gifted education, financially supporting gifted services becomes a local prerogative with success hinged largely on local wealth. Consequently, increased localization of gifted education funding unfairly limits the opportunities available to gifted students from poorer areas relative to those from more affluent areas.

*C. Judicial Treatment of Gifted Education*

A corollary to America's weak gifted education system is the lack of judicial interpretive involvement in the area. Because gifted students do not enjoy protections on par with students with disabilities, challenges by gifted students rarely reach the courts.<sup>52</sup> Without a deep body of gifted education case law, courts hearing disputes readily defer to legislatures and tread lightly in crafting remedies.

Since handing down *Brown v. Board of Education*<sup>53</sup> and its progeny, the Supreme Court has effectively foreclosed federal courts from deciding matters involving education policy. When faced with an equal protection class action claim by poor school districts attacking Texas's education funding system in *San Antonio Independent School District v. Rodriguez*,<sup>54</sup> the Court declined to recognize education as a fundamental right protected by the U.S. Constitution.<sup>55</sup> In making this choice, the Court labeled itself incompetent to meaningfully second-guess education policy and advocated for constitutional leniency.<sup>56</sup> By not applying strict scrutiny, the Court deflected future education funding challenges to state courts.

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50. See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *supra* note 1, at 271 tbl.190.

51. See Eckes and Plucker, *supra* note 4, at 424 (noting that in 1990, states dedicated less than \$0.02 to gifted education programs for every \$100 of education spending).

52. For example, in the casebook *Law and Public Education: Cases and Materials*, of the ninety-three pages dedicated to the general topic of educating exceptional children, only three pertained to gifted and talented students. E. GORDON GEE & PHILIP T.K. DANIEL, *LAW AND PUBLIC EDUCATION: CASES AND MATERIALS*, at xii–xiii (4th ed. 2008).

53. 347 U.S. 483 (1954).

54. 411 U.S. 1 (1973).

55. *Id.* at 35.

56. *Id.* at 43 (“The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible

The Justices' disinclination to address education policy in litigation is exhibited by state-level judges as well, especially where regulatory or statutory standards are vague or nonexistent.<sup>57</sup> A state high court did not decide a case involving gifted education until *Centennial School District v. Commonwealth Department of Education*<sup>58</sup> in 1988.<sup>59</sup> Of the state court systems, Pennsylvania has considered most of the litigation involving gifted students.<sup>60</sup> This concentration is largely due to Pennsylvania's statutes and regulations that provide gifted students with rights and entitlements similar to those extended to children with disabilities.<sup>61</sup>

Nonetheless, Pennsylvania courts have not imposed strong remedies for statutory violations. In *Brownsville Area School District v. Student X*,<sup>62</sup> the court overturned a FAPE violation remedy that had required instruction beyond the school district's typical enrichment-level offerings; the special instruction included college courses and private tutoring.<sup>63</sup> The court refused to require the district to expand its services beyond its established curriculum, emphasizing the burden of providing specialized services to more capable students.<sup>64</sup>

In addressing a state constitutional challenge, the Connecticut Supreme Court in *Broadley v. Board of Education of Meriden*<sup>65</sup> displayed particular indifference to gifted education by deferring

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constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.”).

57. See Ronald G. Marquardt & Frances A. Karnes, *The Courts and Gifted Education*, 50 WEST'S EDUC. L. REP. 9 (1989) (“Judges, however, have been reluctant to intervene in state educational policy where there was a lack of regulatory or statutorily imposed guidelines.”).
58. 539 A.2d 785 (Pa. 1988).
59. Stephens, *supra* note 9, at 33. Before *Centennial*, a lower Pennsylvania court had held that Pennsylvania's state constitution did not confer a fundamental right to a certain education program. *Lisa H. v. State Bd. of Educ.*, 447 A.2d 669, 672–73 (Pa. Commw. Ct. 1982).
60. Stephens, *supra* note 9, at 35.
61. See Marquardt & Karnes, *supra* note 57, at 10–11 (describing Pennsylvania's statutory treatment of gifted students at the time of the *Centennial* decision in 1988).
62. 729 A.2d 198 (Pa. Commw. Ct. 1999).
63. *Id.* at 200–01.
64. *Id.* at 200 (“[A] school district may not be required to become a Harvard or a Princeton to all who have IQ's over 130.”) (quoting *Centennial Sch. Dist. v. Commw. Dep't of Educ.*, 539 A.2d 785, 791 (Pa. 1988)).
65. 639 A.2d 502 (Conn. 1994).

entirely to the state legislature. In *Broadley*, a student alleged that the school's refusal to provide him an IEP violated his fundamental right to education and to equal protection under Connecticut's state constitution.<sup>66</sup> The court held that gifted students had no right to a special education—IEP included—under the “free public education” provision of the state's constitution.<sup>67</sup>

Further, the court noted that the lack of a legislative mandate for specialized education of gifted children did not violate gifted children's equal protection rights.<sup>68</sup> The court achieved this result by engaging in a flawed fundamental-right analysis that relied wholly on statutory interpretation, not the disputed constitutional provision.<sup>69</sup> By completely deferring to the legislature to define the scope of a state constitutional right, the decision eliminated the judiciary as a check on legislative power and thus inappropriately transgressed separation of powers. *Broadley's* blanket deference is indicative of broad judicial timidity in disputes involving gifted education.

Judicial timidity is highly problematic in constitutional cases like *Broadley* that involve fundamental rights. Understandably, judges lose credibility when viewed as undemocratic judicial activists legislating from the bench. However, judicial avoidance in fundamental-rights cases endangers political minorities.<sup>70</sup> When courts withdraw as a check on legislative power, political processes proceed unrestrained and leave minorities' rights unprotected.<sup>71</sup> Children are particularly vulnerable to these processes. When courts shy away from analyzing fundamental rights, the educational rights of children suffer.

## II. THE UNREALIZED VALUE OF GIFTED EDUCATION

Though operating thus far on the general premise that gifted education is important, this Comment has not detailed its importance to both the individual students and to society. This Part touches

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66. *Id.* at 504–05.

67. *Id.* at 506.

68. *Id.* at 506–07.

69. See Gwen E. Murray, Note, *Special Education for Gifted Children: Answering the “Right” Question*, 15 QUINNIPIAC L. REV. 103, 136–37 (1995) (providing a detailed analysis of the *Broadley* decision and stating that “[t]he court cannot limit its review only to what the legislature intended to do, but also must seek determine whether the legislature could legally (constitutionally) do what it did.”).

70. See *id.* at 144 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938)) (noting that “when the political process fails” courts play a crucial role in checking that political process, “especially where there is ‘prejudice against discrete and insular minorities’”).

71. *Id.*

briefly on the value of gifted education to each student and more deeply considers its social value. From a strategic level, this Part explains why gifted education is an essential component to the long-term viability of public education as a social enterprise.

Individual perceptions of gifted education largely depend on one's perspective. Stakeholders of gifted students more likely view gifted education as offering the same thing provided to most other students: a suitably challenging education. Others may see gifted education as extending special opportunities to only a fraction of students. These competing viewpoints illuminate the philosophical tensions regarding education's function in society.<sup>72</sup>

Education policy should aim to maximize each student's abilities. A student's right to a public education should not depend on how much their abilities deviate from an "average student," whether negatively or positively. Educating a gifted student in the same manner as other students imposes a cost on the student in the form of a squandered opportunity to realize his or her potential.<sup>73</sup> Society accordingly incurs related economic costs from gifted students' diminished performance as they enter and drive the nation's labor force.<sup>74</sup> Deviating from the ability-maximizing goal toward a more outcome-equalizing goal unfairly forces talented individuals to sacrifice their potential. Pursuing outcome equalization within the confines of the global economy harms long-term economic

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72. See generally Abraham J. Tannenbaum, *Programs for the Gifted: To Be or Not to Be*, 22 J. EDUC. GIFTED 3 (1998) (addressing the tension between egalitarianism and excellence, in addition to defending gifted education against claims of elitism).

73. See Viggiano, *supra* note 28, at 501 ("By emphasizing and funding proficiency and uniformity, we are bound to sacrifice excellence and become even more incapable of competing with the rest of the world."). Compulsory schooling laws require children to spend more than a decade of their lives in our education system. Students incur opportunity costs while in school, meaning that the child may much rather be working, practicing baseball, participating in theatre productions, or, more realistically, playing video games. All students bear these costs, but gifted students do not in exchange receive the value of a properly challenging academic program unless the school offers gifted services.

74. Cf. KURT VONNEGUT, JR., *Harrison Bergeron*, in WELCOME TO THE MONKEY HOUSE 7, 7 (1968) (satirizing the notion of outcome equalization). "Nobody was smarter than anybody else. Nobody was better looking than anybody else. Nobody was stronger or quicker than anybody else. All this equality was due to the 211th, 212th, and 213th Amendments to the Constitution, and to the unceasing vigilance of agents of the United States Handicapper General." *Id.*

competitiveness by hampering research, innovation, and entrepreneurship.<sup>75</sup>

By contrast, providing special services to gifted students advances the ideal of ability maximization. When gifted students sit in non-stimulating classrooms, they develop a disinterest toward education and risk becoming discipline problems or dropouts.<sup>76</sup> For this reason, gifted students drop out of high school at nearly the same rate as other students, often due to poor grades.<sup>77</sup> Gifted students commonly underachieve as well.<sup>78</sup> But these problems are preventable. If gifted students receive educational services that challenge them according to their potential, they will develop the skills and knowledge that result in success after graduation.

The success of gifted students then benefits society as a whole, meaning that investments in gifted education should yield returns over the long run. In fact, gifted education produces a number of positive social benefits. First, as hinted earlier, students receiving gifted services become more valuable members of the domestic labor force, promoting productivity and innovation. The U.S. Department of Education has recognized that “[s]atisfying the demand for highly

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75. The element of competition is highly influential. In other competitive contexts, participants almost ubiquitously understand and accept the goal of maximizing one’s potential. Within the global economy, any success in equalizing outcomes on a national or state level would not slow down the progress of other countries.
76. John Cloud, *Saving the Smart Kids: Are Schools Leaving the Most Gifted Children Behind If They Don’t Allow Them to Skip Ahead?*, TIME, Sept. 27, 2004, at 56, 56; see also Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119, 125–29 (1995) (explaining why traditional classroom teaching techniques shun gifted students for the sake of moving the remainder of the class forward).
77. See Joseph S. Renzulli & Sunghee Park, *Gifted Dropouts: The Who and the Why*, 44 GIFTED CHILD Q. 261, 261–63, 266 tbl. 3 (2000) (reporting that 177 of 3,520 (5.0%) gifted students studied dropped out, while 477 of 9,105 (5.2%) nongifted students studied dropped out).
78. See NAT’L COMM’N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 11 (1983), available at [http://datacenter.spps.org/uploads/SOTW\\_A\\_Nation\\_at\\_Risk\\_1983.pdf](http://datacenter.spps.org/uploads/SOTW_A_Nation_at_Risk_1983.pdf) (“Over half the population of gifted students do not match their tested ability with comparable achievement in school.”); Jean Sunde Peterson & Nicholas Colangelo, *Gifted Achievers and Underachievers: A Comparison of Patterns Found in School Files*, 74 J. COUNS. & DEV. 399, 404–05 (1996) (calling attention to gifted children’s tendency to fit within adolescent social norms to the detriment of their education, but noting that underachievement may be remedied); Sally M. Reis & D. Betsy McCoach, *The Underachievement of Gifted Students: What Do We Know and Where Do We Go?*, 44 GIFTED CHILD Q. 152, 152 (2000) (focusing on the difficulties involved with identifying underachieving gifted students).

skilled workers is the key to maintaining competitiveness and prosperity in the global economy.<sup>79</sup> Second, widespread access to gifted services inspires meritocratic values by rewarding people less for where they were raised.<sup>80</sup> If gifted services are not widely available, students from wealthier communities that can independently support quality gifted education stand a better chance at success. Third, challenging gifted students to read and think critically may lead to a more informed and active democracy capable of meaningful electoral accountability.<sup>81</sup> Fourth, mandating gifted services impresses upon citizens the value of academic excellence and influences teachers to specialize in the area.<sup>82</sup>

More important than its numerous benefits, gifted education is essential to the long-term viability of American public education. Increased marketization of education, especially at elementary and secondary levels, has made the competitive attractiveness of public schools far more important.

With the advent of alternative schooling options—a trend likely to continue in line with Americans' affinity for free choice and autonomy—parents dissatisfied with their public school's inadequate gifted program will transfer their child to a different school, likely a private or charter school, to avoid moving to a different school district. If public schools do not supply an appropriately challenging education, gifted students will steadily gravitate away from the public education system. Over time, this exodus of talented students is dangerous.

First, schools rated and funded based on test scores will suffer financially from losing these students, even if the quality of education offered remains constant or improves. For the same reason, teachers whose pay depends on test scores will see their paychecks reduced. These financial consequences may deter quality teachers and

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79. U.S. DEP'T OF ED., A GUIDE TO EDUCATION AND NO CHILD LEFT BEHIND 1 (2004), *available at* <http://www2.ed.gov/nclb/overview/intro/guide/guide.pdf>.

80. Engendering meritocratic values improves the moral legitimacy of a capitalist economy by more closely matching a person's compensation to what they have earned. Though much argument may surround determining what someone has earned, widespread availability of gifted services diminishes a person's hometown, or rather the educational system in a person's hometown, as a factor in ultimate educational achievement.

81. Beyond enhancing electoral competence, the education of gifted students in public schools would produce leaders who sympathize and relate more to the interests of average citizens. Elected government officials would better represent their constituencies. Business managers would better understand employees.

82. Shaunessy, *supra* note 37, at 17.

administrators from working in public schools. And when public schools cannot attract quality personnel, the education of all students suffers.

Second, a gifted-student exodus will diminish political support for public education as a civic institution because more gifted students who later establish an influential presence in society will no longer attribute their success to public schooling. The loss of political support will prove devastating to poorer school districts that rely heavily on property taxes for funding.<sup>83</sup> Public schools may lose support on a statewide basis as well. As public schools lose funding and support, charter and private schools will strengthen. Gradually, the rise of these alternative schools and the demise of public schools will relegate the latter to second-tier status.

### III. GIFTED EDUCATION IN “THOROUGH AND EFFICIENT” EDUCATION SYSTEMS

Expanding and improving American gifted education in public schools should be viewed as a pressing responsibility. After decades of legislatures dodging this responsibility, scant legal grounds appear to exist for obtaining gifted education services in locations where they are not provided. But not all legal avenues have been closed. Though the Supreme Court prevented constitutional challenges of this sort in *San Antonio Independent School District v. Rodriguez*,<sup>84</sup> claims based on state constitutions remain viable. This Part explains why these claims have a plausible chance for success. The first section highlights the appeal of state constitutional challenges for gifted education. The next section contends that gifted services are a necessary piece of a “thorough and efficient” public school system, which is common language in many states’ constitutional education clauses. This final section extends the “thorough and efficient” contention to other states’ constitutional education clauses, making the case for these challenges across the country.

#### A. *Advantages of State Constitutional Challenges*

All states feature some reference to their public education systems in their respective constitutions.<sup>85</sup> The constitutional provisions call

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83. Cf. Sarah Lichtenwalter, *The Necessity of Increased Funding for Gifted Education and More Training for Teachers in Charge of Identifying Gifted Students*, 8 ESSAI 91, 91 (2010), available at <http://dc.cod.edu/cgi/viewcontent.cgi?article=1319&context=essai> (noting that the majority of schools without gifted education serve low-income or non-English-speaking students).

84. 411 U.S. 1 (1973); see also *supra* notes 53–55 and accompanying text.

85. See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 105 (1995) (remarking that each state, except arguably Mississippi, includes an “education clause”

for a state public education system and express expectations for that system. However, not all of these provisions are the same,<sup>86</sup> and their subsequent treatments by courts have varied as well. Upon recent recognition that these clauses have substantive meaning, they have served as a foundation for challenging states' methods for funding education. These challenges have achieved differing degrees of success,<sup>87</sup> but courts have interpreted these provisions as asserting a minimum standard of education.<sup>88</sup> In contesting inadequate gifted services, claims based on these education clauses present a number of advantages.

First, successful claims will lead to state-driven solutions that are better suited for developing the field of gifted education. National education initiatives do offer economies of scale and uniformity, but those traits are not desirable without the identification of a single best approach. Given the multitude of recognized gifted education strategies,<sup>89</sup> no single best approach presently defines gifted education. Federal efforts to reform gifted education risk spreading and entrenching policies of disputed value. Limiting the scale of gifted initiatives to the states will allow flexibility to test new approaches and to adapt to changing research and practices. This idea of

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in its constitution mandating public primary education). A previous amendment to Mississippi's constitution, enacted in 1960 in response to the desegregation movement, provided for public school funding by the legislature "in its discretion." *See id.* at 105–06 n.16. Mississippi's constitution currently reads "[t]he Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitation as the Legislature may prescribe." MISS. CONST. art. VIII, § 201.

86. William E. Thro, *An Essay: The School Finance Paradox: How the Constitutional Values of Decentralization and Judicial Restraint Inhibit the Achievement of Quality Education*, 197 WEST'S EDUC. L. REP. 477, 482 (2005) (reviewing the types of education provisions included in state constitutions, from single clauses promising free education to detailed descriptions of the state's education system).
87. *Compare, e.g.,* Coal. for Equitable Sch. Funding, Inc. v. State, 811 P.2d 116, 127 (Or. 1991) (rejecting an education clause challenge to Oregon's school funding scheme), *with, e.g.,* Robinson v. Cahill, 303 A.2d 273, 295–97 (N.J. 1973) (relying exclusively on an education clause to find the New Jersey's school finance system unconstitutional).
88. *See, e.g.,* Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979) (stating that inequalities in education funding among different counties could represent a discriminatory classification that fails to meet the thorough and efficient standard); Abbott v. Burke, 575 A.2d 359, 363 (N.J. 1990) (holding that students from poorer urban districts "have the right to the same educational opportunity that money buys for others").
89. *See* Viggiano, *supra* note 28, at 507–11 (reviewing a range of gifted education strategies such as pull-out programs, tracking, cooperative learning, enrichment, and acceleration).

experimentation also extends to state funding schemes.<sup>90</sup> Because insubstantial research now guides gifted education policies, allowing states to implement divergent reforms will inform and thus improve future policy.<sup>91</sup>

Second, education clause claims produce legislative mandates capable of effecting change beyond the parties involved in a particular case. Instead of traditional litigation that pits students against each other for fixed school district resources, state legislation may more equitably and effectively allocate educational resources.<sup>92</sup> Furthermore, courts typically prefer to order legislatures to do something rather than step into the policy arena themselves. Especially in cases affecting education policy, courts warily impose strong remedies.<sup>93</sup> But in education clause cases, state courts may identify the constitutional violation—a task for which it is competent—and peg the remedial issue on the legislature by ordering it change the system to meet constitutional standards.

In doing so, courts should explain constitutional expectations in sufficient detail to guide the legislature. Courts struggle with this task because it requires walking a fine line. Too much guidance means the court itself is making legislative decisions. Too little guidance risks unsatisfying legislative action that may again necessitate a constitutional determination.<sup>94</sup> Appropriate guidance may vary based on the strength of an education clause, with stronger clauses allowing for more detailed constitutional requirements. In contrast to the wave of litigation attacking states' entire education-funding systems, prevailing gifted education claims demand a far less drastic remedy. At a minimum, any successful claim of this sort should compel the legislature to mandate the identification of gifted children and the provision of gifted services to all identified children.

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90. See Baker & McIntire, *supra* note 47, at 173–76. Not only is the amount of funding important, but also how states provide it, as certain state funding strategies entail significant weaknesses. For example, extending a fixed funding amount to districts on a per-student basis may inadequately reflect district disparate needs and fail to provide enough funding to start up gifted services.

91. Shaunessy, *supra* note 37, at 21.

92. See Bruce D. Baker & Reva Friedman-Nimz, *Advocating for the Gifted: Is a Federal Mandate the Answer? If So, What Was the Question?*, 25 ROEPER REV. 5, 7–10 (2002) (advocating for nonlitigious strategies like state legislation for a more efficient distribution of educational resources).

93. See discussion *supra* Part I.C.

94. History indicates that legislatures lack a strong political incentive for strongly supporting gifted education because it imposes costs in the short-term and only produces returns after children grow up and join the labor force. See *supra* discussion Parts I.A–B. Therefore, representatives will likely pursue the constitutional minimum when subject to a court-ordered legislative mandate.

B. “Thorough and Efficient” Demands for Gifted Education

Though each state has an education clause, this section examines a common education clause—the “thorough and efficient” clause.<sup>95</sup> More specifically, this section argues that this clause demands that states provide gifted education to all identified gifted students. One example of the “thorough and efficient” clause is located in Ohio’s constitution. “The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a *thorough and efficient* system of common schools throughout the state . . . .”<sup>96</sup> Many other state constitutions utilize the same or similar “thorough and efficient” language.<sup>97</sup> Besides Ohio, seven states use the exact same “thorough and efficient” phrase to describe their constitutionally mandated public education systems.<sup>98</sup> Eight others use either “thorough” or “efficient” in their education clauses.<sup>99</sup>

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95. This clause selection additionally supports an argument for further challenges under other education clauses. As will be detailed, “thorough and efficient” represents relatively weak education clause language, meaning that successful challenges under this clause hint that similar challenges will succeed under stronger clauses. *See infra* Part III.C.
96. OHIO CONST. art. VI, § 2 (emphasis added).
97. Shadya Yazback, Note, *School Financing in Ohio Yesterday, Today and Tomorrow: Searching for a “Thorough and Efficient” System of Public Schools*, 57 CASE W. RES. L. REV. 671, 686–96 (2007) (reviewing judicial treatment of similar education clauses).
98. These states include Maryland, Minnesota, New Jersey, Pennsylvania, South Dakota, West Virginia, and Wyoming. MD. CONST. art. VIII, § 1 (“The General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools . . . .”); MINN. CONST. art. XIII, § 1 (“The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.”); N.J. CONST. art. VIII, § IV, cl. 1 (“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools . . . .”); PA. CONST. art. III, § 14 (“The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education . . . .”); S.D. CONST. art. VIII, § 15 (“The Legislature . . . shall secure a thorough and efficient system of common schools throughout the state.”); W. VA. CONST. art. XII, § 1 (“The Legislature shall provide, by general law, for a thorough and efficient system of free schools.”); WYO. CONST. art. VII, § 9 (“The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a thorough and efficient system of public schools . . . .”).
99. Education clauses in Arkansas, Delaware, Florida, Illinois, Kentucky, and Texas contain the word “efficient,” while Colorado’s and Idaho’s education clauses call for a “thorough” education system. ARK. CONST. art. XIV, § 1 (“[T]he State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means

Going beyond established rationales for textual interpretation, this analysis builds on William Thro's plain language hypothesis particular to education clauses.<sup>100</sup> Thro advocates for focusing on the plain language in education clauses to determine the constitutionality of certain aspects of a state's education system.<sup>101</sup> Focusing on the text produces more consistent state-by-state interpretations and, thus, aides in establishing predictability through the promotion of an interstate body of persuasive authority.<sup>102</sup>

Looking at the "thorough and efficient" clause's first component, a state's education system cannot be thorough without providing some form of gifted education. "Thorough" is defined in the *American Heritage Dictionary* as "[e]xhaustively complete."<sup>103</sup> This definition intimates that a thorough education demands more than simply the adequate teaching of the average student. Rather, in a system described as exhaustively complete, *all* students must receive an adequate education. Yet states have generally deprived gifted students of that education by failing to require, oversee, and fund gifted services.<sup>104</sup> Creating a system that provides gifted children an

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to secure to the people the advantages and opportunities of education."); DEL. CONST. art. X, § 1 ("The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools . . ."); FL. CONST. art. IX, § 1 ("It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education . . ."); ILL. CONST. art. X, § 1 ("The State shall provide for an efficient system of high quality public educational institutions and services."); KY. CONST. § 183 ("The General Assembly shall . . . provide for an efficient system of common schools throughout the State."); TEX. CONST. art. VII, § 1 ("[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."); COLO. CONST. art. IX, § 2 ("The general assembly shall . . . provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state . . ."); IDAHO CONST. art. IX, § 1 ("[I]t shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.").

100. William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 WEST'S EDUC. L. REP. 19, 28–30 (1993).

101. *Id.*

102. *Id.* at 30.

103. AMERICAN HERITAGE COLLEGE DICTIONARY 1434 (4th ed. 2004). "Thorough" is additionally defined adjectivally as "[p]ainstakingly accurate or careful," but this usage does not fit as a description of any school system. *Id.*

104. See discussion *supra* Part I.A–B.

appropriate education may require a variety of changes. However, at a minimum, no state can meet the thorough standard without mandating some form of gifted education and extending funding to support the services.

Moreover, inadequate gifted education violates the notion that a thorough system contemplates its continuing viability. By pushing for alternative schooling options while failing to mandate gifted services, some states have compromised the long-term viability of their constitutionally required public education systems. These systems consequently fail to live up to the thorough standard and compel a legislative remedy.

The “efficient” standard likewise insists that states promote gifted education. Efficiency is often understood as maximizing output relative to input.<sup>105</sup> Allocating educational resources to support gifted students promotes efficiency because those students will create strong returns on the public’s investment. The vast disparity between states’ funding for the education of students with disabilities and their funding for gifted education belies that the system is efficient. In SY 2008–09, state funding of education for students with disabilities reached \$16.6 billion while gifted education managed only \$468 million.<sup>106</sup> While both groups deserve supplemental funding and services in a “thorough and efficient” system, funding dedicated to gifted students produces greater societal returns.<sup>107</sup> Admittedly, the idea of an efficient education system can take many forms. But the fact that states provide schools with thirty-five times more funding for the education of students with disabilities than for gifted education indicates that many states fail to achieve any level of efficiency. Therefore, legislatures must produce more funding for gifted education to satisfy the efficient standard.

Combining the two standards, the “thorough and efficient” clause demands at the very least that states mandate the identification of gifted students and provide them some form of gifted education. In

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105. AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 102, at 446 (defining efficient as “[e]xhibiting a high ratio of output to input”).

106. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., *supra* note 1, at 271 tbl.190.

107. States contribute impressive resources to ensure that students with disabilities can fall within socially accepted intellectual norms and can achieve a level of independence. While such contributions reflect a well-natured willingness to help the lesser among us who are perceived as being in need, it inherently entails the deprivation of resources from other areas of need that do not come with the same moral imperative as helping someone less fortunate. Yet moral implications arise for gifted education too, as underfunding it squanders students’ talents and opportunities.

addition, states must provide schools with sufficient gifted education funding to execute these services.

*C. Other Education Clauses*

Interpreting the plain language of states' education clauses facilitates a system of horizontal federalism.<sup>108</sup> In that system, courts may look to how other states have treated the same or similar education clauses. In his advocacy for this approach, Thro divides education clauses into four categories based on their relative strength.<sup>109</sup> On the weak end of the spectrum, Category I clauses do nothing more than call for a public school system. Clauses in the strongest category, Category IV, express that education is the state's paramount duty and set high standards for an education system.

These categories provide reference points for interpreting education clauses.<sup>110</sup> Things found to be constitutional under a Category IV clause should likewise be constitutional under other clauses. Alternatively, things found to be unconstitutional under a Category II clause should then be unconstitutional under all clauses in Categories II, III, and IV.

The "thorough and efficient" clause exemplifies a typical Category II clause.<sup>111</sup> Applying this categorical framework, all states with Category II, III, or IV education clauses must require schools to provide at least the same level of gifted services constitutionally required by the "thorough and efficient" clause. As concluded in Part III.B, this clause, at a minimum, obliges states to mandate the identification of gifted students and provision of gifted services for those students. By extension, any state with a Category II, III, or IV clause must do at least the same to comply. Therefore, not only is Ohio constitutionally required to provide for gifted education under its education clause, but also thirty-one other states with clauses falling within these categories.<sup>112</sup>

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108. Thro, *supra* note 100, at 30.

109. *Id.* at 23–25.

110. *Id.* at 30.

111. *Id.* at 23–24 (using Pennsylvania's "thorough and efficient" clause to illustrate a typical Category II clause).

112. Thro found that twenty-two states have Category II clauses, six have Category III clauses, and four have Category IV clauses. *Id.* at 23–25. However, it does not follow that the remaining nineteen states are not constitutionally required to provide gifted services. Other constitutional clauses, such as those providing for equal protection, offer plausible bases for requiring schools to provide gifted services.

## CONCLUSION

Regardless of their status in school, gifted students are an unpopular group in America. Though they hold tremendous potential, political processes have frustrated their ability to reach that potential. Legislatures have long neglected to promote gifted education despite the lasting benefits that it yields. To the detriment of American economic competitiveness, the failure to provide for gifted education encourages our most talented students to excel at being average. State education clauses furnish a constitutional basis for correcting this problem. Looking particularly at the “thorough and efficient” clause, the deficiencies in gifted education prove that state legislatures have not met their mark. Thus, this education clause and other stronger variations constitutionally compel states to do more for gifted students.

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