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San Antonio Independent School District v. Rodriguez at Fifty: Contingencies, Consequences, and Calls to Action

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*San Antonio Independent School District v.
Rodriguez at Fifty: Contingencies, Consequences,
and Calls to Action*

*Martha Minow**

When the Supreme Court of the United States decided San Antonio Independent School District v. Rodriguez, the Court's five-to-four decision not only closed the door to federal courts to predominantly Mexican American low-income students seeking constitutional protection against unequal public education; it also rejected claims of federal constitutional right to equal educational opportunity, rebuffed calls for heightened judicial scrutiny of classifications drawn on the basis of wealth or poverty, and let stand unaltered school finance arrangements producing different per pupil expenditures depending solely on where students live. Setbacks though can inspire. Faced with the decision in Rodriguez, advocates pursued efforts in federal legislation reforms, expanded federal aid to schools with predominantly low-income students, and state-based litigation and reform efforts. And because the Rodriguez decision rejected stringent judicial scrutiny of wealth-based classifications, it opened the door to the use of socioeconomic status as a priority for admission to educational programs. Such creative responses are also legacies of Rodriguez. Current serious challenges can and should similarly elicit resilient and inventive approaches, including the uses of digital and technology resources as well as greater self-direction for students and their teachers in a world soon to be reshaped by readily available artificial intelligence resources. Although disappointment with public schooling has led families of different racial, ethnic, and income groups to pursue charter schools, vouchers or tax credits for use in private schools or family-funded private schooling, and homeschooling, new technologies and resources can strengthen equal educational opportunities for all children in the nation.

* 300th Anniversary University Professor, Harvard University. Thanks to Blessing Jee, Maya Mahajan, Barbara Tsao, and Alexandra (Mac) Taylor. Some of this work draws upon a key-note lecture sponsored by the American Bar Foundation and the University of South Carolina Law School in honor of William C. Hubbard. A.L.I., *The Inaugural Hubbard Conference on Law and Education*, <https://www.ali.org/news/articles/inaugural-hubbard-conference-law-and-education/> [<https://perma.cc/DT9R-HPAP>]. This Address is dedicated to the memory of Justice Sandra Day O'Connor in tribute to her devotion to ensuring civics education, civil discourse, and opportunity for each new generation.

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INTRODUCTION

Fifty years ago, advocates for educational opportunity and civil rights in the United States confronted a big loss—and began new strategies that continue to this day. The Supreme Court of the United States, in deciding *San Antonio Independent School District v. Rodriguez*, closed the door to federal courts to predominantly Mexican American, low-income students seeking constitutional protection against unequal public educational opportunities.¹ It was a sequel to *Brown v. Board of Education*, but the Court declined the arguments for educational equality and opportunity.² The Court rejected the claim of a federal constitutional right to equal educational opportunity, rebuffed calls for heightened judicial scrutiny of classifications drawn on the basis of wealth or poverty, and let stand unaltered school finance producing arrangements different per pupil expenditures based solely on where students live.³ That decision marked the beginning of the end of federal solicitude for the civil rights movement and the war on poverty. It stimulated a half-century of empirical and political debates over whether greater spending improves results of education. Some experts deem the case among the Court’s worst decisions.⁴

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

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

3. *Rodriguez*, 411 U.S. at 1.

4. See Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1074–75, 1095–96 (2019) (providing an originalist argument for a fundamental right to education and defining the scope of a right to education); see also Frank J. Macchiarola & Joseph G. Diaz, *Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez in the State Courts*, 30 VAL. U. L. REV. 551, 561 (1996) (examining the changes made by education advocates in response to *Rodriguez*). Some have called it one of the worst decisions by the Supreme Court. See Andrea Sachs, *The Worst Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015,

Setbacks, though, can inspire. Faced with the decision in *Rodriguez*, advocates pursued federal legislation—including the Equal Educational Opportunities Act of 1974, the Education for All Handicapped Children Act of 1975 (now the Individuals with Disabilities Education Act), and expanded federal aid to schools with predominantly low-income students.⁵ Over the second half of the twentieth century, Congress overcame claims of exclusive state control over schooling and authorized and renewed statutory programs providing funding and standards for education.⁶ Congress remains a crucial arena for further educational opportunity work, as Professor Kimberly Robinson has sketched.⁷ Professor Robinson advocates for congressional action to work with interested states to experiment, then implement new strategies, such as federal technical assistance based on evidence of most effective methods for closing achievement gaps, collaborations between states and localities, and

11:36 AM), <https://time.com/4056051/worst-supreme-court-decisions/> [<https://perma.cc/3YDG-XNXE>] (documenting Erwin Chemerinsky's disapproval of the *Rodriguez* decision); see also David G. Savage, *How Did They Get It So Wrong?*, 95 A.B.A. J. 20 (2009) (considering *Rodriguez* one of the worst Supreme Court decisions).

5. Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, tit. II, 88 Stat. 484, 515 (codified as amended in scattered sections of 20 U.S.C.); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended in scattered sections of 20 U.S.C.); the Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1142 (1990) (codified as amended at 20 U.S.C. §§ 1400–1411). See also MARTHA MINOW, IN *BROWN'S WAKE: LEGACIES OF AMERICA'S CONSTITUTIONAL EDUCATIONAL LANDMARK 93* (2010) (explaining the positive legislation that resulted from the *San Antonio Independent School District* opinion); but see Morgan Polikoff, 'A Nation at Risk': 4 Decades of Ambitious Education Reforms Have Had Mixed Results, HONOLULU CIV. BEAT (Mar. 28, 2023), <https://www.civilbeat.org/2023/03/a-nation-at-risk-4-decades-of-ambitious-education-reforms-have-had-mixed-results/> [<https://perma.cc/3YDG-XNXE>] (explaining the negative results of education reform).

6. For an overview of federal laws governing education from kindergarten through high school, see Betheny Gross & Paul T. Hill, *The State Role in K–12 Education: From Issuing Mandates to Experimentation*, 10 HARV. L. & POL'Y REV. 299 (2016).

7. See Kimberly Jenkins Robinson, *A Congressional Right to Education: Promises, Pitfalls, and Politics*, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 186–87 (Kimberly Jenkins Robinson ed., 2019) [hereinafter *A Congressional Right to Education*] (elaborating on the important role Congress plays in furthering educational opportunities). For examples of congressional action shaping educational opportunity, see, for example, the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965), reauthorized by the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 15, 20, 42, and 47 U.S.C.), and amended by the Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified in scattered sections of 20 U.S.C.); and Kimberly Jenkins Robinson, *Restructuring the Elementary and Secondary Education Act's Approach to Equity*, 103 MINN. L. REV. 915 (2018), which examines the objectives versus the actual impact of the Every Student Succeeds Act in promoting equity, reveals its shortcomings. For congressional action covering education and youth programs for homeless children, see the Stewart B. McKinney-Vento Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987) (codified as amended in 42 U.S.C. §§ 11431–11435, 11431(B)(2)).

pursuit of economics of scale.⁸ She argues that this incremental approach would allow the federal government to fix legislative shortcomings before expanding efforts to realize a constitutional right to education; she also suggests that this cooperative approach joining federal, state, and local governments could reduce fears of federal intrusion on state autonomy.⁹ And *Rodriguez* has prompted the Southern Education Foundation to propose an amendment to the United States Constitution to ensure equitable education for all Americans.¹⁰

Directly spurred by the *Rodriguez* decision are decades of litigation and other reform initiatives within individual states. And because the *Rodriguez* decision rejected stringent judicial scrutiny of wealth-based classifications, it opened the door to the use of socioeconomic status as a priority for admission to educational programs.¹¹ Such creative responses are also legacies of *Rodriguez*. Current serious challenges can and should similarly elicit resilient and inventive approaches to address the continuing and, in many ways worsening failures of the United States to ensure fair and meaningful educational opportunities for all the young people in the country.

Meanwhile, disparities in educational opportunities along the lines of race, ethnicity, family income, and geography continue. A student's low socioeconomic status remains highly correlated with health outcomes, life expectancy, lifetime earnings, and low academic achievement.¹² School choice programs—including vouchers assisting access to private schools and public school offerings—offer some enhanced opportunities

8. Robinson, *A Congressional Right to Education*, *supra* note 7, at 186–202.

9. *Id.*

10. Southern Education Foundation, *No Time to Lose: Why the United States Needs an Education Amendment to the US Constitution*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY*, *supra* note 7, at 208–32 (arguing that the process for securing such an amendment would strengthen national commitment and investments in education); *cf.* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 975 (2002) (assessing effects of constitutional advocacy on culture and public consciousness).

11. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 38 (1973); *see also* Angela Ciolfi & James E. Ryan, Opinion, *Socioeconomic Integration: It's Legal, and It Makes Sense*, EDUC. WK. (June 15, 2008), <https://www.edweek.org/policy-politics/opinion-socioeconomic-integration-its-legal-and-it-makes-sense/2008/06> [<https://perma.cc/MPL8-DZTL>] (discussing the benefits of socioeconomic integration in schools); Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1558 (2007) (advocating for socioeconomic integration in schools); Carole Learned-Miller, *Cambridge Public Schools: Pioneers of Equitable Choice*, CENTURY FOUND. (Oct. 14, 2016), <https://tcf.org/content/report/cambridge-public-schools/> [<https://perma.cc/3D23-AQ6U>] (providing an example of socioeconomic integration).

12. *See* FACT SHEET: EDUCATION & SOCIOECONOMIC STATUS, AM. PSYCH. ASS'N (2017) (summarizing studies that quantify the effects of socioeconomic status).

for low-income students, though apparently not necessarily for the most disadvantaged students.¹³

The COVID-19 pandemic exposed stunning contrasts in access to resources as well as in educational outcomes.¹⁴ When public health concerns prompted the nation to pivot schooling and work to a remote, digital form, “64% of American teachers and administrators in schools with a large number of low-income students said their pupils faced technology limitations, compared to only 21% of students in schools with a small number of low-income students.”¹⁵ And in recent years, disappointment with public schooling has led families of different racial, ethnic, and income groups to seek alternatives—including charter schools, vouchers or tax credits for use in private schools or family-funded private schooling, and homeschooling—trends that put in jeopardy to universal public schooling aiming at shared, integrated educational experiences.¹⁶ Such developments amplify the treatment of education as a private

13. See Albert Cheng & Paul E. Peterson, *School Choice and “The Truly Disadvantaged”*, 21 *EDUC. NEXT* 52–58 (2021) (explaining the effect voucher programs have on disadvantaged students).

14. See Lorena Maysonet Smith et al., *Community Schools and a Critical Moment in the Fight Against Educational Inequality*, BROOKINGS INST. (Mar. 8, 2022), <https://www.brookings.edu/blog/education-plus-development/2022/03/08/community-schools-and-a-critical-moment-in-the-fight-against-education-inequality/> [<https://perma.cc/ZAG6-SYQE>] (“[R]ecent estimates showing students that attend majority-Black schools are a full 12 months behind their peers in majority-white schools, further highlighting persistent structural racial disparities in access to high quality learning, supports, and enrichment.”); NAT’L CTR. FOR EDUC. STAT., NCES NO. 2022-144, *CONDITION OF EDUCATION 2022: HIGH SCHOOL COURSETAKING, PERSISTENCE, AND COMPLETION 19–22* (2022), <https://nces.ed.gov/pubs2022/2022144.pdf> [<https://perma.cc/B9BS-ABGT>] (finding racial disadvantage in high school graduation rates).

15. John R. Allen & Darrell M. West, *How to Address Inequality Exposed by the COVID-19 Pandemic*, BROOKINGS INST. (Nov. 4, 2020), <https://www.brookings.edu/opinions/how-to-address-inequality-exposed-by-the-covid-19-pandemic/> [<https://perma.cc/7R37-67LU>].

16. See Steven Mintz, *Opinion, 30 Years of K–12 School Reform Have Barely Moved the Needle on Improving Learning or Reducing Equity Gaps*, INSIDE HIGHER EDUC. (Nov. 14, 2022), <https://www.insidehighered.com/opinion/blogs/higher-ed-gamma/30-years-k-12-school-reform-have-barely-moved-needle-improving> [<https://perma.cc/6PW3-BGMV>] (explaining the little impact school reform has had on reducing equity gaps). Many low-income families and Black families turned to homeschooling during the pandemic and in the wake of racial violence. See Casey Parks, *The Rise of Black Home Schooling*, NEW YORKER (June 14, 2021), <https://www.newyorker.com/magazine/2021/06/21/the-rise-of-black-homeschooling> [<https://perma.cc/4Y9E-XCDT>] (noting a rising trend in Black families homeschooling their children). Increasingly, “home schooling” takes place on “a continuum between school and home, in person and online, professional and amateur,” with communal or corporate intermediaries. Laura Meckler, *For Many Home-Schoolers Parents Are No Longer Doing the Teaching*, WASH. POST (Aug. 17, 2023), <https://www.washingtonpost.com/education/interactive/2023/homeschooling-microschools-pods-esa-vouchers/> [<https://perma.cc/LE92-7XGA>] (describing online homeschooling with virtual instruction).

consumption good—left largely to the resources of individual families—rather than as a crucial commitment of society and predicate for a shared future.

The ideals of equal educational opportunity, nonetheless, can inspire new reforms that were not entirely imaginable fifty years ago. These include new approaches, such as the use of digital and technological resources. Digital technologies, classroom and library design, and supportive environments can promote greater self-direction for students and their teachers in a world soon to be reshaped by readily available artificial intelligence resources.¹⁷ Before turning to these new developments, Part I considers the contingencies of the *Rodriguez* decision; Part II turns to its consequences; and Part III examines current and future possibilities for educational reforms and opportunities.

I. THE DECISION AND ITS CONTINGENCIES

When Alex Rodriguez attended a public school in San Antonio, Texas, in a building condemned as unsafe and with so few resources that three or four students would share one textbook, his father, Demetrio, sued Texas for underfunding the schools.¹⁸ Lawyers framed the suit as a class action on behalf of students in the state who were Mexican American or poor and who lived in school districts having a low property tax base.¹⁹ The complex funding scheme at issue included local, state, and federal funds in a pattern yielding chronic interdistrict disparities.²⁰ A poor

17. For a discussion of socioeconomic status and student assignment, see Deven Carlson et al., *Socioeconomic-Based School Assignment Policy and Racial Segregation Levels: Evidence From the Wake County Public School System*, 57 AM. EDUC. RSCH. J. 258, 261–67 (2019) (explaining the effects socioeconomic integration initiatives had on creating racial equity in Wake County Public Schools). For digital collaborations to reduce the poverty gap in schools, see Anne Sawyer, *How Digital Collaborations Can Close the Learning Poverty Gap*, ERNST & YOUNG, https://www.ey.com/en_no/corporate-responsibility/how-digital-collaborations-can-help-close-the-learning-poverty-gap [<https://perma.cc/B7S5-CWBZ>] (last visited Oct. 29, 2023) (explaining the effect technology has on aiding students in poverty). For lessons about self-direction for students and teachers, see Vanessa Wilkins & Emily Corrigan, *What US Schools Can Learn from Finland's Approach to Education*, STAN. SOC. INNOVATION REV. (Nov. 6, 2019), https://ssir.org/articles/entry/what_us_schools_can_learn_from_finlands_approach_to_education [<https://perma.cc/E7RM-AX7P>] (explaining Finland's approach to self-directed education). On tech, see Alexandra Frost, *4 K–12 Tech Trends to Follow in 2023*, EDUC. TECH. (Dec. 19, 2022), <https://edtechmagazine.com/k12/article/2022/12/4-k-12-tech-trends-follow-2023> [<https://perma.cc/ZD9M-MR5A>] (highlighting the benefits of technological advancements in creating a safer and more efficient classroom).

18. See Matt Barnum, *The Racist Idea that Changed American Education*, VOX NEWS (Feb. 22, 2023, 6:07 AM), <https://www.vox.com/the-highlight/23584874/public-school-funding-suprem-e-court> [<https://perma.cc/GRV9-Y3UA>] (recounting the facts of *Rodriguez*).

19. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 3 (1973).

20. *Id.* at 7.

district at that time could spend barely more than half of what a wealthy district did, despite taxing its residents at a higher rate.²¹

Although influenced by the struggles against racial and ethnic segregation in public schools, the lawyers for the plaintiffs in *Rodriguez* had not predicated the case on racial or ethnic disparities in school expenditures and opportunities. Instead, they pressed the Court to confront how the children of poor people received an education that relied on fewer resources than the education provided to children of wealthier people.²² And they marshaled data showing that the “poorest districts” typically adopted the highest tax rates while the “richest districts” could proceed with the lowest tax rates; even with these efforts supplemented by contributions from the state, the “poorest districts” could not generate the level of expenditure provided by the wealthier districts (which received even more state aid).²³

The federal district court accepted the equal protection challenge to the educational funding system because of its reliance on distinctions by school districts with disparate wealth and tax bases and its resulting differences in resources available to students based on the wealth of their school districts.²⁴ According to the facts found by the district court, a Texas school district composed of 90 percent Mexican American and 6 percent African American students spent \$356 per student, while another district with a majority of white students spent \$596 per pupil.²⁵ Finding both a fundamental interest in education and wealth classifications warranting judicial scrutiny, the district court pointed to the absence of even

21. *Id.* at 13–14.

22. A further complexity involves whether the differences in resources pertain to family units or to geographic neighborhoods. Because most states rely heavily on local property taxes to fund local schools, the valuation of property in a district influences the resources available through taxation. A typical state funds public schools with 45 percent coming from local property taxes, 45 percent from state tax revenues, and 10 percent from federal funding sources. See Cory Turner et al., *Why America’s Schools Have A Money Problem*, NAT’L PUB. RADIO (Apr. 18, 2016, 5:00 AM), <https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem> [https://perma.cc/GN2C-HFPX] (explaining the reason schools in poorer districts struggle to pay for education).

23. *Rodriguez*, 411 U.S. at 76 (Marshall, J., dissenting).

24. *Rodriguez v. San Antonio Indep. Sch. Dist. (SAISD)*, 337 F. Supp. 280, 286 (W.D. Tex. 1971).

25. *Rodriguez*, 411 U.S. at 12–13. The poorest district itself contributed \$26 per pupil above the amount set by a state formula designed to reflect each district’s relative taxpaying ability for the 1967–68 school year, while the state contributed \$222 per pupil and with an additional federal funds, the district spent \$356 per pupil. A wealthier district added \$333 per pupil above its contribution to the state’s program (based on the formula reflecting its relative tax payment ability) and supplemented by a \$36 per pupil grant from federal sources, this wealthier district spent \$594 per pupil. *Id.*

a mere rational basis for the approach; the court directed the state to devise a plan that did not make “the quality of public education . . . a function of wealth” beyond the state’s wealth as a whole.²⁶

The Supreme Court disagreed but in a closely divided vote. Four of the nine Supreme Court Justices agreed with the district court judge’s finding that the scheme violated the Fourteenth Amendment.²⁷ The reversal of the district court’s decision, in fact, occurred by one vote.²⁸ And the votes and result in the case reflected the changes in the Court due to President Richard Nixon’s ability to appoint four Justices amid the unfolding of unpredictable historical events.²⁹ A Senate filibuster had blocked President Lyndon Johnson’s proposal for Homer Thornberry to join the Court as Chief Justice before the successful nomination and appointment of the conservative Warren Burger.³⁰ President Nixon, then, had the chance to nominate someone for that post and soon gained the opportunity for a second appointment to the Court.³¹ Justice Abe Fortas—previously President Johnson’s pick for Chief Justice—had to resign in the face of controversy generated by that nomination and then charges of undisclosed conflicts of interests.³² Nixon’s first two proposed candidates failed to secure Senate approval.³³ The third try to fill

26. *SAISD*, 337 F. Supp. at 284.

27. *Rodriguez*, 411 U.S. at 59–70.

28. *Id.*

29. See Eric M. Maltz, *The Road to Rodriguez: Presidential Politics, Judicial Appointments, and the Contingent Nature of Constitutional Law*, 109 VA. L. REV. ONLINE 17, 25, 33 (2023) (concluding that the decision in the case “was in essence a by-product of the combination of Earl Warren’s decision to leave the Court, the failure of the Senate to confirm the successor nominated by Lyndon Johnson, the victory of Richard Nixon in the presidential election of 1968, and the circumstances that forced Abe Fortas to resign the subsequent year”).

30. See KEVIN J. MCMAHON, *NIXON’S COURT 1–16* (2011) (explaining the composition of the U.S. Supreme Court during the Nixon administration). Sitting Justice Potter Stewart seemed the front-runner to be Chief Justice, but he asked President Nixon not to nominate him as he wished to spare his family the public scrutiny and did not want the role’s administrative duties. See BOB WOODWARD, *THE BROTHERS 9* (1979) (explaining the composition of the Warren Court and Justice Potter’s motivations). Former New York Governor Thomas E. Dewey also declined the nomination to be Chief Justice. See SCOTT FARRIS, *ALMOST PRESIDENT: THE MEN WHO LOST THE RACE BUT CHANGED THE NATION 146* (2013) (recounting the life and career of Dewey).

31. See MCMAHON, *supra* note 30, at 5–6 (discussing President Nixon’s Supreme Court nomination strategy).

32. See Maltz, *supra* note 29, at 25–26 (discussing Fortas’s role in the nomination process). For further details, see LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY 395* (1990) (noting Fortas’ personal motivations for resigning and hopes that Nixon would follow his example).

33. Maltz, *supra* note 29, at 27–28; KALMAN, *supra* note 32, at 399. Senator Roman Hruska probably hurt the nomination of G. Harold Carswell by saying, “[t]here are a lot of mediocre judges and people and lawyers . . . They are entitled to a little representation, aren’t they?” *A Seat for Mediocrity?*, TIME MAG. (Mar. 30, 1970) (quoting Roman L. Hruska, Republican U.S. Senator

the seat of Justice Fortas proved successful, and Harry Blackmun joined the Supreme Court.³⁴

A further stroke of fate gave President Nixon the occasion to make two more appointments to the Court. Senate confirmations of his nominations of Lewis Powell and William Rehnquist meant that President Nixon shaped the Court with four new Justices—who, in turn, formed the majority that decided *San Antonio Independent School District v. Rodriguez*.³⁵ In short, the result could have been different, but for continent historical events.

This period of shifting membership of the Supreme Court spelled important changes in the treatment of inequality in public schools. Initially, the Court authorized comprehensive school desegregation plans—including busing.³⁶ In 1971, the Court decided *Swann v. Charlotte-Mecklenburg Board of Education*.³⁷ This decision stands as the high-water mark of federal enforcement. Between 1968 and 1972, enforcement of school desegregation proceeded with federal governmental support in other locales.³⁸ By 1972, previously segregated southern schools became the least racially segregated public schools in the whole nation.³⁹ School desegregation tackled disparities in educational resources and opportunities with notable results. School graduation rates and performance on standardized tests for Black students improved between 1964–1980.⁴⁰ Opposition to “forced busing” grew.⁴¹ The Court, shaped by President Nixon,

from the State of Nebraska), <https://web.archive.org/web/20080214132051/http://www.time.com/time/magazine/article/0,9171,942208,00.html> [<https://perma.cc/PVK6-4K88>].

34. See MCMAHON, *supra* note 30, at 80.

35. *Id.*

36. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

37. *Id.*

38. See Harrell R. Rodgers, *The Supreme Court and School Desegregation: Twenty Years Later*, 89 POL. SCI. Q. 751, 757–58 (1974) (explaining the federal government’s role in enforcing desegregation).

39. See CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 179 (2004) (“Measured segregation in the South and Border regions declined from its maximum value to rates that by 1972 made schools in those regions the least segregated in the country.”).

40. See MINOW, *supra* note 5, at 23 (“Between 1964 and the early 1980s, high school graduation rates for black students escalated, and their performance on standardized tests moved closer to the performance of white students.”).

41. See Laura Meckler, *Effective but Never Popular, Court-Ordered Busing is a Relic Few Would Revive*, WASH. POST (July 7, 2019), https://www.washingtonpost.com/2019/07/07/dce439c8-9d40-11e9-b27f-ed2942f73d70_story.html [<https://perma.cc/ASZ7-H99E>] (“That year, Richard Nixon won the White House after pursuing a ‘Southern strategy,’ stoking white resentment toward African Americans and promising to prevent ‘forced busing’ of children.”).

forbade the inclusion of suburbs to rectify inequities in urban education.⁴² It is in this context that the Supreme Court rejected the challenge to unequal per pupil school expenditures in *Rodriguez* and left in place the reliance on property taxes to fund public schooling. Ruling that distinctions drawn on the basis of wealth do not call for heightened judicial scrutiny, the Court laid the ground, ironically, for some current uses of socioeconomic classifications to address educational inequality.⁴³ But this was not on the mind of the *Rodriguez* majority, which reasoned that the Constitution does not require “absolute equality or precisely equal advantages” and concluded, “some inequality in the manner in which the State’s rationale is achieved is not alone a sufficient basis for striking down the entire system.”⁴⁴

Justice Thurgood Marshall, in dissent, connected the undeniable disparities in educational funding produced by the system in place in Texas to disparate treatment of people with different racial identities: echoing the majority’s acknowledgment, the dissent stressed that members of racial minorities composed disproportionately high numbers of the students in the poorer districts.⁴⁵ Before he became a judge, Marshall led the National Association for the Advancement of Colored People and documented disparities in public school funding on the road to challenging state-imposed racial segregation in schools as allowed by the Court’s approval of “separate-but-equal” treatment.⁴⁶ The NAACP scored judicial victories predicated on such demonstrations of unequal school expenditures before persuading the Court that racially separate schools are inherently unequal.⁴⁷ The decision in *Rodriguez* would most likely have come out differently if it had reached the Court just a year or two earlier.⁴⁸ No one can count on any particular contingent factors that can be so significant to legal decisions, but it is helpful to remember that just as is true for future cases, nothing about the *Rodriguez* decision was inevitable.

42. See MINOW, *supra* note 5, at 23 (“In *Milliken v. Bradley* in 1974, the Court confined desegregation orders to district lines and forbade the inclusion of suburbs to rectify urban segregation . . .”).

43. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) (“It should be clear . . . that this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.”).

44. *Id.* at 24, 50–51.

45. *Id.* at 72, 94.

46. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE* 331 (2004) (discussing the NAACP’s investigation of Clarendon County’s segregated public elementary schools).

47. *Id.* at 283.

48. Maltz, *supra* note 29, at 18.

II. THE DECISION AND ITS CONSEQUENCES

However contingent its outcome, the Court's decision in *Rodriguez* has been deeply consequential. It has essentially foreclosed federal courts from addressing disparities in school expenditures within and between states and discerning a guarantee of education as a fundamental federal constitutional right.⁴⁹ The Court's decision spurred decades of debate over whether money matters in education; it sparked litigation in state courts under state constitutions to advance educational equity; and it has contributed to federal investments in educational equity and improvements amid ongoing and, in some ways, worsening inequities.

A. Does Money Matter?

The *Rodriguez* Court relied in part on studies submitted by Texas—challenging the idea that school expenditures mattered to student learning and achievement.⁵⁰ Many studies cited there and others conducted since the decision pose questions implying that children in poverty would not benefit from enlarged educational resources.⁵¹ The disparities in expenditures largely track the wealth of the local communities, with greater disparities within some states than the differences between states.⁵² There

49. For a further discussion of this issue, see, for example, *infra* text accompanying note 55, which examines studies that have addressed disparities in school expenditures regarding demographics that relate to a student's genetic inheritance; and *infra* text accompanying notes 102–29, which illustrates the major efforts taken, in recent years, to challenge educational disparities after the *Rodriguez* decision.

50. *Rodriguez*, 411 U.S. at 55.

51. *Id.* at 24 (“Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees’ argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.” (footnote omitted)); *id.* at 43 n.86 (“The quality-cost controversy has received considerable attention. Among the notable authorities on both sides are the following: C. JENCKS, *INEQUALITY* (1972); C. SILBERMAN, *CRISIS IN THE CLASSROOM* (1970); U.S. OFFICE OF EDUCATION, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966) (the Coleman Report); ON EQUALITY OF EDUCATIONAL OPPORTUNITY (F. Mosteller & D. Moynihan eds. 1972); J. GUTHRIE, G. KLEINDORFER, H. LEVIN & R. STOUT, *SCHOOLS AND INEQUALITY*; PRESIDENT’S COMMISSION ON SCHOOL FINANCE, [SCHOOLS, PEOPLE & MONEY 32–33 (1972)]; Swanson, *The Cost-Quality Relationship, in THE CHALLENGE OF CHANGE IN SCHOOL FINANCE, 10TH NAT. EDUCATIONAL ASSN. CONF. ON SCHOOL FINANCE 151 (1967).*” (citation omitted)); *id.* at 46 n.101 (“Texas, in this regard, is not unlike most other States.”). For an effort to reject the question of whether financial investments matter in educational opportunity, see Martha Minow, *School Finance: Does Money Matter?*, 28 HARV. J. ON LEGIS. 395 (1991).

52. See Mike Maciag, *Why School Spending Is So Unequal*, GOVERNING (July 27, 2018), <https://www.governing.com/archive/gov-education-spending-states.html> [<https://perma.cc/RZD8-5GGC>] (“One of the biggest [factors] is property taxes, which typically provide much of a school district’s budget. Wealthy enclaves with million-dollar homes tend to contribute tax revenues not available in poorer parts of a state.”).

is emerging evidence of disparities even within a single district—greater investments are made in some schools than in others.⁵³ Such results can reflect deliberate decisions, unintended consequences of policies, locale of special programs, and the impact of private outside spending.⁵⁴

Since the decision in *Rodriguez*, large amounts of time and money have been spent on addressing the question of whether the quality of schooling influences student achievement. The case may even have fueled debates over whether poor students and students of color have a lower capacity to learn as a matter of genetic inheritance.⁵⁵ Media outlets amplified debates and research and spread the notion that the problem of educating poor children is in the children, not their schooling.⁵⁶

For years following the *Rodriguez* decision, it apparently became respectable to question whether spending any more for the education of low-income students or students of color was worthwhile.⁵⁷ Questions about greater financial investment in education for children in poverty persisted even as parents with wealth could and have spent ever more for their children's education—whether choosing to move to higher-resourced schools district or selecting select private schools with private tuition. Justice Marshall noted in his *Rodriguez* dissent, “If financing variations are so insignificant to educational quality, it is difficult to understand why a number of our country's wealthiest school districts, which have no legal obligation to argue in support of the constitutionality of the Texas legislation, have nevertheless zealously pursued its cause before

53. See Tara García Mathewson, *New Data: Even Within the Same District Some Wealthy Schools get Millions More than Poor Ones*, HECHINGER REP. (Oct. 31, 2020), <https://hechingerreport.org/new-data-even-within-the-same-district-some-wealthy-schools-get-millions-more-than-poor-ones/> [<https://perma.cc/W9MA-ZP4>] (“Hechinger’s analysis found multimillion-dollar funding disparities between schools in the same communities.”).

54. *Id.*

55. See Barnum, *supra* note 18 (noting works of Daniel Patrick Moynihan and Arthur Jensen). Substantial research refutes the assertions that money does not matter in improving educational achievements for low-income students and students of color. See BRUCE D. BAKER, LEARNING POL’Y INST., *HOW MONEY MATTERS FOR SCHOOLS*, at vii (2017), <https://learningpolicyinstitute.org/media/384/download> [<https://perma.cc/4KRQ-KA2M>] (reviewing studies showing the impact of expenditures on student retention and achievement and documenting notably beneficial results of greater investment in teacher equality and in staffing per student). For a thorough review of evaluations concluding that increased school expenditures enhance student performance and graduation rates, see C. Kirabo Jackson & Claire L. Mackevicius, *What Impacts Can We Expect from School Spending Policy? Evidence from Evaluations in the U.S.*, AM. ECON. J. APPLIED ECON. (forthcoming 2023) (manuscript at 1, 10–11) (noting meta-analysis of studies shows that on average, a policy increasing spending per pupil for four years improves test scores and marginal effects notably on educational attainment are larger for less-economically-advantaged populations).

56. Barnum, *supra* note 18.

57. *Id.*

this Court.”⁵⁸ Echoing *Rodriguez*, in 2009, the Court (again by a five-to-four vote) rejected consideration of per pupil expenditures, this time in assessing compliance with federal statutory requirements of instruction for students learning English.⁵⁹

As recently as 2017, Secretary of Education Betsy DeVos asserted, “The notion that spending more money is going to bring about different results is ill-placed and ill-advised.”⁶⁰ An implication, hard to miss, was that the low-income student could not benefit from greater educational resources or was somehow not worthy of such investments. By now, multiple cohorts of scholars have devoted their time and effort to examining the underlying issues.⁶¹

The result: rigorous studies and meta-studies demonstrate the positive impact on educational achievement from greater spending on education for low-income students.⁶² Indeed, such studies demonstrate how increasing spending per pupil for four years yields notably larger gains for

58. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 85 (1973) (Marshall, J., dissenting) (“[I]f financing variations are so insignificant to educational quality, it is difficult to understand why a number of our country’s wealthiest school districts, which have no legal obligation to argue in support of the constitutionality of the Texas legislation, have nevertheless zealously pursued its cause before this Court.”).

59. See *Horne v. Flores*, 557 U.S. 433, 439 (2009) (reversing the lower court’s finding of failures under the English Language Learners Program of the Equal Educational Opportunities Act of 1974).

60. Kayla Lattimore, *DeVos Says More Money Won’t Help Schools; Research Says Otherwise*, NAT’L PUB. RADIO (June 9, 2017), <https://www.npr.org/sections/ed/2017/06/09/531908094/> [<https://perma.cc/LBY6-A5Y3>]; see also Matt Barnum, *Does Money Matter for Schools? Why One Researcher Says the Question is ‘Essentially Settled’*, CHALKBEAT (Dec. 17, 2018, 10:33 AM), <https://www.chalkbeat.org/2018/12/17/21107775/does-money-matter-for-schools-why-one-researcher-says-the-question-is-essentially-settled> [<https://perma.cc/534G-93BD>] (explaining that research shows that increased funding helps schools).

61. See generally JAMES S. COLEMAN ET AL., U.S. DEP’T OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 1 (1966); see also C. Kirabo Jackson, *Does School Spending Matter? The New Literature on an Old Question*, in AN EQUAL START: POLICY AND PRACTICE TO PROMOTE EQUALITY OF OPPORTUNITY FOR CHILDREN 1, 3 (2020) (reporting on recent studies regarding how increased funding affects student performance); Julien Lafortune et al., *School Finance Reform and the Distribution of Student Achievement*, 10 AM. ECON. J. APPLIED ECON. 1, 1 (2018) (“[Assessing] the impact of post-1990 school finance reforms . . .”); Mark Dynarski, *It’s Not Nothing: The Role of Money in Improving Education*, BROOKINGS INST. (Mar. 2, 2017), <https://www.brookings.edu/articles/its-not-nothing-the-role-of-money-in-improving-education/> [<https://perma.cc/PS7B-L79G>] (reviewing studies).

62. Substantial research refutes the assertions that money does not matter in improving educational achievements for low-income students and students of color. See BAKER, *supra* note 55, at vii (reviewing studies showing the impact of expenditures on student retention and achievement and documenting notably beneficial results of greater investment in teacher equality and in staffing per student). For a thorough review of evaluations concluding that increased school expenditures enhance student performance and graduation rates, see Jackson & Mackevicius, *supra* note 55, at 10–11.

students with less economic advantage than other students.⁶³ And students who are learning English, who have disabilities, and whose parents lack the time or background to enrich their studies need more, not fewer, resources than their peers in order to ensure access to well-equipped teachers and tailored opportunities. How money is spent matters, of course, and differences in socioeconomic makeup of the student body, parental resources, and educational backgrounds, social networks, and other resources do not disappear with increased spending.⁶⁴ Reliance on local property taxes and other defects in school finance systems perpetuates stark differences between well-resourced suburban—largely white—school districts compared with urban and rural communities even within the same state.⁶⁵ Compare two schools a few miles apart in Illinois: one pays its teachers on average \$28,639 yearly, and the other pays its teachers on average \$90,000.⁶⁶ Rigorous national research shows that school districts that pay their teachers more also generate higher student achievement.⁶⁷ Now, fifty years after the *Rodriguez* decision, policymakers, voters, and researchers should reject a distracting and nonsensical claim that

63. See Jackson & Mackevicius, *supra* note 55, at 10–11 (stating that meta-analysis of studies shows that on average, a policy increasing spending per pupil for four years improves test scores and marginal effects notably on educational attainment are larger for less-economically-advantaged populations).

64. C. Kirabo Jackson et al., *Money Does Matter After All*, EDUC. NEXT (July 17, 2015), <https://www.educationnext.org/money-matter/> [<https://perma.cc/37JT-HPNF>] (“[N]one of what we show suggests that money always matters. We show that money did matter and that it mattered quite a lot. What our study does is dispels the notion that school spending does not matter, so that one must look only at how it is spent. We find that money does matter and how it is spent matters.”).

65. For efforts to produce change, see CATHERINE E. LHAMON, U.S. COMM’N ON C.R., PUBLIC EDUCATION FUNDING INEQUITY IN AN ERA OF INCREASING CONCENTRATION OF POVERTY AND RESEGREGATION 5, 9 (Jan. 2018), <https://www.usccr.gov/files/pubs/2018/2018-01-10-Education-Inequity.pdf> [<https://perma.cc/WZ44-CNRU>] (reporting on the continued inequity of schools in the United States and suggesting how to remedy this). Southern states did not only resist racial integration but also undermined state constitutional educational commitments during the Jim Crow era through fiscal inequality predicated on local finance schemes. See Derek W. Black, *Localism, Pretext, and the Color of School Dollars*, 107 MINN. L. REV. 1415, 1460 (2023) (noting the original intentions for public education and highlighting potential solutions to current inequality).

66. Turner et al., *supra* note 22.

67. See Ross Pomeroy, *When Public School Teachers Are Paid More, Students Perform Better*, REALCLEAR SCI. (Mar. 22, 2022), https://www.realclearscience.com/articles/2022/03/22/when_public_school_teachers_are_paid_more_students_perform_better_822893.html# [<https://perma.cc/TQK6-ZMYG>] (reporting on study by Emma García and Eunice Sookyung Han); see also RON F. FERGUSON, TOWARD EXCELLENCE WITH EQUITY: AN EMERGING VISION FOR CLOSING THE ACHIEVEMENT GAP 4 (2007) (examining factors affecting student achievement gaps). Although some studies show only modest connection between teacher pay and student achievement, higher teacher pay can affect teacher turn-over and other factors influences the quality of schooling. Denise-Marie Ordway, *Raising Public School Teacher Pay: What the Research Says*, JOURNALIST’S RES. (Jan. 2, 2020), <https://journalistsresource.org/education/school-teacher-pay-research/> [<https://perma.cc/4YLL-YG9L>].

spending more to improve education for disadvantaged students is not worthwhile.⁶⁸

B. Turning to the States: Lessons from Litigation and Legislation

A central consequence of the decision was to chill any federal litigation seeking to improve educational opportunities for low-income students.⁶⁹ With resolution and creativity ever since the Supreme Court's decision in *Rodriguez*, parents and advocates for low-income children consigned to low-resourced schools turned to state courts, state legislatures, and Congress in struggles for greater educational opportunity and resources. Advocates responded to *Rodriguez* by launching litigation in state courts to challenge school finance schemes by focusing on the equal protection and education clauses found in *state* constitutions. Such litigation in over forty-five states produced instructive analyses and remedies.⁷⁰

What can be learned from this turn to the states, with challenges to school finance regimes? An early round of cases claimed that disparities in per pupil expenditures within a state violated the state constitutional guarantees to an efficient or efficient and thorough education.⁷¹ Recent efforts asserted that the state constitutions created duties to make minimal levels of investment as well as accountability for the results in order to support adequate educational opportunities for each child.⁷²

68. Even those who have cast doubt on relationship between school expenditures and results may be moving on. See Jackson et al., *supra* note 64 (“As [Edward] Hanushek himself concedes ‘none of this discussion suggests that money never matters. Or that money cannot matter.’”).

69. See Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 39 (Helen F. Ladd, Rosemary Chalk & Janet S. Hansen eds., 1999) (“This decision dashed the advocates’ hopes for a federal remedy to school finance inequities.” (citation omitted)).

70. See William S. Koski, *Beyond Dollars?: The Promise and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 *COLUM. L. REV.* 1897, 1915–23 (2017) (reporting on an influx of new litigation advocating for equality of educational opportunity); see also James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 *N.Y.U. L. REV.* 529, 530 (1999) (analyzing the *Sheff v. O’Neill* litigation following *Rodriguez*); cf. EMILY PARKER, *EDUC. COMM’N STATES*, 50 *STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION* 1 (2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [<https://perma.cc/2VX7-FJ5L>] (reporting on state constitution focused litigation); Adrienne Lu, *States Sued Over Education Funding*, *STATELINE* (Feb. 18, 2014, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/02/18/states-sued-over-education-funding/> [<https://perma.cc/4HUP-3LP6>] (discussing litigation over school funding in eleven different states).

71. Koski, *supra* note 70, at 1901.

72. *Id.* at 1903; see *Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109 (Del. Ch., 2018) (finding legally cognizable claims that the State failed to provide sufficient financial and educational inputs and its obligation to disadvantaged students); see also *Maisto v. State*, 149

Initial claims focused on securing the same or similar expenditures for each child; later claims urged greater expenditures for children who face chronic disadvantages while also pressing for increases in the levels of funding and quality of teachers.⁷³ There the New Jersey Supreme Court relied on the state constitution's education clause to affirm the invalidation of the New Jersey school finance system.⁷⁴ Rather than frame the suits in terms of differences in per pupil spending, the advocates there, and in similar cases, argued that the funds provided by the state for educating children and youth were insufficient—inadequate—to satisfy state education clauses.⁷⁵ This notion of adequacy centered on a minimal level of entitlement and specifying substantive elements of education along with duties to provide the resources necessary to achieve them.⁷⁶

N.Y.S.3d 599, 601 (2021) (noting that the state filed to satisfy its state constitutional obligations due to underfunding of public schools where funding would address deficiencies in staff, programs, and facilities). The Delaware case resulted in a settlement. *See* INST. FOR PUB. ADMIN. U. DEL., DELAWARE EDUCATION FUNDING LAWSUIT SETTLEMENT (2021), <https://cpb-us-w2.wpmu.cdn.com/sites.udel.edu/dist/7/3504/files/2021/03/education-settlement-timeline-020921.pdf> [<https://perma.cc/S62V-3U73>].

73. *See* Koski, *supra* note 70, at 1897; William N. Evans et al., *The Impact of Court-Mandated School Finance Reform*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES, *supra* note 69, at 93.

74. *See* Abbott v. Burke, 495 A.2d 376 (N.J. 1985) (holding that violations needed to first be seen by an administrative agency). For developments in this litigation over time, see *The History of Abbott v. Burke*, EDUC. L. CTR. (last visited Oct. 29, 2023), <https://edlawcenter.org/litigation/abbott-v-burke/abbott-history.html> [<https://perma.cc/G897-7BEV>].

75. *See* Koski, *supra* note 70, at 1903.

76. *See, e.g.,* Rose v. Council for Better Educ. Inc., 790 S.W.2d 186 (Ky. 1989). The Kentucky Supreme Court emphasized that “[t]he federal cases and situations referred to are clearly not even persuasive here.” *Id.* at 214. The Kentucky Supreme Court specified capacities children should develop through schooling in terms that remain powerfully resonant:

- (i) [S]ufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (ii) [S]ufficient knowledge of economic, social and political systems to enable them to make informed choices;
- (iii) [S]ufficient knowledge of governmental processes to enable the student to understand the issues that affect his or her community, state and nation;
- (iv) [S]ufficient self-knowledge and knowledge of his or her mental and physical well-being;
- (v) [S]ufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- (vi) [S]ufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and,
- (vii) [S]ufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id. at 212. *See also* David K. Karem & Debbie Wesslund, *Rose Decision Defines Ky. Education Goals*, COURIER J., <https://www.courier-journal.com/story/opinion/contributors/2017/02/16/rose->

Looking back at litigation efforts undertaken in nearly all states resulting in success for plaintiffs in a large proportion of the suits, social science researchers largely find that the litigation has produced a more equitable allocation of resources within the relevant states.⁷⁷ The studies produced a variety of conclusions about the effects of successful litigation efforts on student achievement, but many studies show some positive effects.⁷⁸ For example, a recent review of the impact of the Kentucky decision shows progress in improving the graduation rates and reading levels of students in the state's public schools, but it also points to declines in achievement in math scores and recent reductions in school expenditures.⁷⁹ Other studies indicate that litigation to close school funding gaps have contributed to improved results, but legislative and administrative efforts are also needed—as are outcomes-based accountability.⁸⁰

Stanford University professor and award-winning education expert Linda Darling-Hammond has concluded, based on the record of past efforts, that states should “focus funding on pupil needs and costs required to meet the state’s standards so that [] districts” have adequate resources to hire effective educators and provide “the materials needed to teach the standards” and also should “[e]nable districts to hire and retain well-prepared educators” and “ensure that they have the professional knowledge and skills to teach and lead schools successfully.”⁸¹

One more lesson from the state litigation efforts is to anticipate and prevent the creation of some improved schools for only a subset of

decision-defines-ky-education-goals/98012914/ [https://perma.cc/GG93-6STP] (last updated Apr. 5, 2017) (summarizing the Court’s findings in *Rose*); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977) (concluding that Connecticut’s allotted public school resources had not satisfied their State constitutional duty to provide elementary and secondary education as a fundamental right).

77. Evans et al., *supra* note 73, at 93 (“We believe the bulk of the evidence suggests that court-ordered reform has achieved its primary goal of fundamentally restructuring school finance and generating a more equitable distribution of resources. In most cases, this was achieved by states’ directing more resources to districts with low local revenues. This last result is however not uniform, as the experience in California points out. The California evidence suggests that greater equality was achieved by reducing spending at the top of the distribution.”).

78. *Id.* at 91.

79. S. Patrick Riley, *Revisiting Rose and its Effects: A Thirty-Year Retrospective*, 108 KY. L.J. 557, 569 (2020).

80. See Minorini & Sugarman, *supra* note 69, at 34–35 (providing a consensus study of the American Academies of Sciences, Medicine, and Engineering).

81. LINDA DARLING-HAMMOND, *INVESTING FOR STUDENT SUCCESS: LESSONS FROM STATE SCHOOL FINANCE REFORMS*, at viii (2019), <https://learningpolicyinstitute.org/product/investing-student-success-school-finance-reforms-report> [https://perma.cc/2NFS-WLG2]. She also recommends that states devise “a reliable base of funding with the flexibility to make appropriate, strategic decisions about how to spend resources based on local needs” and “[e]nsure high-quality preschool for children who may have fewer learning opportunities or greater learning needs before they enter school.” *Id.*

students. The distinctive language of the Connecticut Constitution supported the state supreme court's ruling in *Sheff v. O'Neill* that extreme racial and ethnic isolation in the Hartford public school system deprived schoolchildren of a substantially equal educational opportunity, violating the state constitution's anti-segregation provision.⁸² During decades of further litigation, much of the reform efforts and reallocated resources have focused on creating magnet schools within Hartford and the magnet schools elevated educational quality for those attending them, but large numbers of students remained unable to gain seats in those magnet schools or in high-quality suburban schools.⁸³ A 2020 settlement produced even more long waitlists for the magnet schools.⁸⁴ In the fall of 2022, Connecticut further promised to expand the seats available to students in magnet schools and to provide financial incentives for suburban schools to increase a program allowing urban students to select suburban schools.⁸⁵

C. Disparities Persist

Disparities persist within many states and also profoundly between states. In 2022, New York spent more than three times as much per pupil as did Utah and Idaho—with nearly three times as much as Arizona.⁸⁶ Students in Mississippi and Alabama receive 40–50 percent of the per

82. *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996); Conn. Const. art. I, § 20 (amended 1972) (providing for free public elementary and secondary schools and stating: “No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability”).

83. EAST HARTFORD PUBLIC SCHOOLS, UNINTENDED CONSEQUENCES: A REVIEW OF THE IMPACTS OF *SHEFF V. O'NEILL* ON EAST HARTFORD PUBLIC SCHOOLS 1 (2020), <https://cdnsms5-ss10.sharpschool.com/Impacts-of-Sheff-v.-ONeill-2019-20.pdf> [<https://perma.cc/N8BR-BGJY>]; Taylor Kennedy, *The Effects of Sheff v. O'Neill on Hartford Schools*, EDUC 300: EDUCATION REFORM, PAST & PRESENT 1 (May 5, 2017).

84. See Kristen Johnson, *Judge Approves Settlement in Sheff v. O'Neill, Hartford Public School Integration Case*, NBC NEWS (Jan. 10, 2020), <https://www.nbcconnecticut.com/news/local/attorney-general-to-present-settlement-in-sheff-v-oneill/2208249/> [<https://perma.cc/83MB-Z98F>].

85. Pat Eaton-Robb, *Settlement Reached in Historic Sheff v. O'Neill School Desegregation Case*, NBC NEWS (Jan. 27, 2022), <https://www.nbcconnecticut.com/news/local/officials-to-speak-after-hearing-on-historic-sheff-v-oneill-school-desegregation-case/2701784/> [<https://perma.cc/MW8U-NRDD>] (including funding, unlike prior plans to settle the case).

86. Chris Gilligan, *Which States Invest the Most in Their Students?*, U.S. NEWS & WORLD REP. (Aug. 26, 2022), <https://www.usnews.com/news/best-states/articles/2022-08-26/which-states-invest-the-most-in-their-students> [<https://perma.cc/D3ZU-RQT2>]; see Mark Lieberman, *State K-12 Spending Is Inequitable and Inadequate: See Where Yours Ranks*, EDUC. WK. (Oct. 28, 2021), <https://www.edweek.org/policy-politics/state-k-12-spending-is-inequitable-and-inadequate-see-where-yours-ranks/2021/10> [<https://perma.cc/648V-J8YV>] (ranking the funding each state contributes to education).

pupil expenditures in New Jersey and Connecticut—and New Jersey and Connecticut stand ahead of most states, while Mississippi and Alabama rest near the bottom of state rankings by student academic performance.⁸⁷ Underinvestment and stark disparities in educational opportunities persist across the nation.⁸⁸ When compared with results from other industrialized nations, the United States falls behind in student test results. Indeed, “[a]mong the 35 members of the Organization for Economic Cooperation and Development, which sponsors the [testing] initiative, the U.S. ranked 30th in math and 19th in science.”⁸⁹

Within the United States, inequities in educational resources follow zip code and students’ family income, correlate with race, and include strikingly different contexts in terms of effects of crime, family fragility,⁹⁰ internet culture, and access to educational opportunities outside of schooling.⁹¹ And these disparities persist despite state and federal

87. CARMEL MARTIN ET AL., *A QUALITY APPROACH TO SCHOOL FUNDING* 8 (2018); *see also* Kimberly Jenkins Robinson, *Introduction: The Essential Questions Regarding a Federal Right to Education*, *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY*, *supra* note 7, at 1 (discussing enduring opportunity disparities).

88. Before recent federal action, U.S. education investment declined while other developed nations boosted their allocations to education. *See* The Hechinger Report, *U.S. Spends Less as Other Nations Invest More in Education*, *U.S. NEWS* (Sept. 18, 2017), <https://www.usnews.com/news/national-news/articles/2017-09-18/while-rest-of-the-world-invests-more-in-education-the-us-spends-less> [<https://perma.cc/L9M6-GL7L>].

89. Drew DeSilver, *U.S. Students’ Academic Achievement Still Lags That of Their Peers in Many Other Countries*, *PEW RSCH. CTR.* (Feb. 15, 2017), <https://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science/> [<https://perma.cc/LX83-CH4F>].

90. Some use “family fragility” to refer to any family at risk of breaking up, *see* W. Bradford Wilcox & Wendy Wang, *The Marriage Divide: How and Why Working-Class Families Are More Fragile Today*, *AQUILA REP.* (Dec. 2, 2017), <https://theaquilareport.com/marriage-divide-working-class-families-fragile-today/> [<https://perma.cc/8BM4-FXYR>]. While others, including the federal government, label families with unmarried parents as “fragile families.” *NAT’L INSTIT. OF CHILD HEALTH & HUM. DEV., UNDERSTANDING FRAGILE FAMILIES* 1 (2010); *see also* Elisabeth H. Donahue et al., *Strengthening Fragile Families*, *BROOKINGS INST.* (Oct. 26, 2010), <https://brookings.edu/articles/strengthening-fragile-families/> [<https://perma.cc/LRW7-4THJ>] (suggesting that single parent families experience higher rates of poverty); Princeton-Brookings, *Fragile Families*, *20 FUTURE OF CHILD*. 2 (2010) (explaining the economic realities of “fragile families”). But “family fragility” could refer more broadly to any family having challenges in staying together—including marriages that may end in divorce, separation, or abandonment and parent-child relationships that may end in break-up or abandonment. Often, “family fragility” is associated with pressures from poverty. *See* Jane Waldfogel et al., *Fragile Families and Child Wellbeing*, *20 FUTURE OF CHILD*. 87, 88–112 (2010).

91. MARTIN, *supra* note 87, at 1; Sterling C. Lloyd & Alex Harwin, *Nation Earns a ‘C’ on School Finance, Reflecting Inconsistency in K-12 Funding and Equity*, *EDUC. WK.* (June 1, 2021), <https://www.edweek.org/policy-politics/nation-earns-a-c-on-school-finance-reflecting-inconsistency-in-k-12-funding-and-equity/2021/06> [<https://perma.cc/3GL9-33HZ>]; *see also* SCOTT SARGRAD ET AL., *CTR. FOR AM. PROGRESS, A QUALITY EDUCATION FOR EVERY CHILD: A NEW AGENDA FOR EDUCATION POLICY* 2, 4–5 (2019), <https://files.eric.ed.gov/fulltext/ED621908.pdf>

legislative efforts to improve resources available to those communities and students most in need. Investment of money and support for quality instruction are critical to student achievement—and additional investments are needed to address the social background differences that so deeply influence student progress.⁹²

As four scholars reflecting on the *Rodriguez* case wrote not long ago:

[N]ot much has changed. Demetrio Rodriguez's daughter now teaches in Edgewood Independent School District, and the district still gets less than its fair share of dollars. According to one recent analysis, Edgewood receives about \$5,000 less per pupil in education funding than does Alamo Heights, a neighboring, wealthier school district. The district continues to lag on academic measures, and many students in the district score below grade level.⁹³

Issues of equity persist after decades and multiple state litigation efforts to reform the Texas school finance system.⁹⁴

Greater spending is correlated with higher rates of high school graduation as well as higher adult earnings.⁹⁵ And different opportunities within states leave students in high-poverty areas worse off in terms not only of per pupil expenditure but also of access to rigorous courses, quality instruction, and continuity in staff.⁹⁶ Some communities are marked by rich varieties of afterschool programs, including enrichment opportunities in languages, technology, sports, and the arts; while others lack either these programs or the money needed for private tuition—or both. With skyrocketing reliance on the internet and other technologies occasioned by the COVID-19 pandemic and widening economic inequality, once again, disparities by family and community wealth deeply affect

[<https://perma.cc/BJZ9-HURU>] (documenting stagnation in math and science achievement for American children compared with others in similar nations and structural barriers to quality education correlated with race and income of American students).

92. See generally VALERIE E. LEE & DAVID T. BURKAM, *INEQUALITY AT THE STARTING GATE: SOCIAL BACKGROUND DIFFERENCES IN ACHIEVEMENT AS CHILDREN BEGIN SCHOOL 1* (2002).

93. Carmel Martin et al., *Lessons from State School Finance Inform a New Federal Right to Equal Access to a High-Quality Education*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY*, *supra* note 7, at 283.

94. See Albert H. Kauffman, *The Texas School Finance Litigation Saga: Great Progress, then Near Death by a Thousand Cuts*, 40 ST. MARY'S L.J. 511, 514 (2008) (analyzing the effect of changing precedent on school funding).

95. LHAMON, *supra* note 65, at 7.

96. *Id.* at 7–9, 15–16 (stating variations in state methods for funding education); see also Adrienne Fischer et al., *50-State Comparison: K-12 and Special Education Funding*, EDUC. COMM'N STATES, <https://www.ecs.org/50-state-comparison-k-12-and-special-education-funding/> [<https://perma.cc/M2RL-YB6Q>] (last visited Sept. 17, 2023) (comparing funding for special education in the states).

access to quality education and to adult guidance for youth.⁹⁷ These disparate trajectories are also associated with racial and ethnic differences.⁹⁸

Notice how the disparities in economic status converge with students' racial identities.⁹⁹ Despite court decisions forbidding state-mandated segregation of students by race, the percentage of Black students attending predominantly non-white schools have reached over 80 percent.¹⁰⁰

Following the COVID-19 pandemic, school districts and students, especially in low-income communities in the United States, missed important learning as measured by test scores and other indicators—in some instances representing a full-academic year or more.¹⁰¹

D. Federal Courts Rebuff Renewed Claims of Educational Equity

In recent years, several major efforts to renew federal litigation challenging educational disparities, but after *Rodriguez* remains a bar.¹⁰² The Court of Appeals for the Ninth Circuit relied on *Rodriguez* to foreclose

97. AFTERSCHOOL ALL., AMERICA AFTER 3PM: AFTERSCHOOL IN COMMUNITIES OF CONCENTRATED POVERTY 3 (2016); see also M. Margaret Dolcini et al., *National-Level Disparities in Internet Access Among Low-Income and Black and Hispanic Youth: Current Population Survey*, 23 J. MED INTERNET RSCH. 2 (2020) (determining that children without access to the internet do poorly in school); Dian Schaffhauser, *Poverty: Race Linked to Lack of Internet for Students*, JOURNAL (May 14, 2020), <https://thejournal.com/articles/2020/05/14/poverty-race-linked-to-lack-of-internet-for-students.aspx> [<https://perma.cc/3UQL-UVNV>] (contending that lack of internet contributes to poor educational outcomes).

98. Clea Simon, *How COVID Taught America About Inequity in Education*, HARV. GAZETTE (July 9, 2021), <https://news.harvard.edu/gazette/story/2021/07/how-covid-taught-america-about-inequity-in-education/> [<https://perma.cc/TZ8G-VPJB>].

99. CRISTOBAL DE BREY ET AL., U.S. DEP'T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2018, at iii (2019) (“In 2016, the percentage of children under the age of 18 in families living in poverty was higher for Black children than Hispanic children (31 and 26 percent, respectively), and the percentages for both of these groups were higher than for White and Asian children (10 percent each).”).

100. GARY ORFIELD & DANIELLE JARVIE, UCLA C.R. PROJECT, BLACK SEGREGATION MATTERS: SCHOOL RESEGREGATION AND BLACK EDUCATIONAL OPPORTUNITY 28 (2020); see also Kimberly Ayudant, Comment, *A Call for Desegregation in Education: Examining the Strength in Diversity Act*, 89 FORDHAM L. REV. ONLINE 60, 63 (2021) (analyzing the strengths and weaknesses of the Strength in Diversity Act).

101. Carrie Spector, *Digging Deeper on the Pandemic Learning Loss*, STAN. INSTIT. FOR ECON. POL'Y RSCH. (Oct. 28, 2022), <https://siepr.stanford.edu/news/digging-deeper-pandemic-learning-loss> [<https://perma.cc/G98R-JNPK>]; see also Cory Turner, *6 Things We've Learned About How the Pandemic Disrupted Learning*, NAT'L PUB. RADIO (June 22, 2022, 12:54 PM), <https://www.npr.org/2022/06/22/1105970186/pandemic-learning-loss-findings> [<https://perma.cc/WK4H-WZNS>].

102. See Martha Minow, *Education: Constitutional Democracy's Predicate and Product*, 73 S.C. L. REV. 537, 562 (2022) (explaining *Rodriguez*'s impact on education); see also Martha Minow, Inaugural William C. Hubbard Conference on Law and Education, Keynote Address at the University of South Carolina School of Law (Feb. 24, 2022) (unpublished manuscript) (on file with author) (speaking at the conference).

federal claims about education equity in the context of COVID-19.¹⁰³ Rejecting a challenge to pandemic-related restrictions on in-person learning, the judicial panel reiterated the Court's argument that there was no affirmative right to education; there would be "no logical stopping point" if education could not be meaningfully distinguished from other asserted rights-to-benefits that the Court had not recognized, like food and shelter.¹⁰⁴ Education, though, can be sharply distinguished from other kinds of affirmative claims because of its close connection to civic participation essential to our constitutional democracy. The Supreme Court has acknowledged these connections in its treatment of racial segregation in schools and subsequent cases—even in *Rodriguez*.¹⁰⁵

Since 2016, I have joined with many others in reasserting the argument for a federal constitutional right to education.¹⁰⁶ Despite the ultimate

103. *Brach v. Newsom*, 6 F.4th 904, 909 (9th Cir. 2021), *cert. denied*, 143 S. Ct. 854 (2023).

104. *Id.* at 922. Also construing *Rodriguez*, a district court in Alabama analyzed the fundamental right to education as it related to equal protection doctrine. The court argued that Plaintiffs do not have a fundamental right to "an education superior to the one they are afforded right now in their assigned schools," and

Even if they did, Plaintiffs' class is mismatched with their equal protection claim. The unfavorably treated class would be all students assigned to what the AAA defines as a failing school, which, in effect, would destroy the purported discrete class. Moreover, four decades after *Rodriguez*, neither the Supreme Court nor the Eleventh Circuit has defined what "identifiable quantum of education" is constitutionally required. That inquiry suggests a different case altogether, one in which education standards *per se* are at issue. This court will not presume to set that definition by allowing Plaintiffs' claim to proceed under the theory that they are receiving less than the "basic minimal skills" to which they are constitutionally entitled. For these reasons, Plaintiffs' equal protection challenge to the AAA is not entitled to a heightened level of scrutiny afforded by *Plyler* or alluded to by *Rodriguez*.

C.M. ex rel. Marshall v. Bentley, 13 F. Supp. 3d 1188, 1212 (M.D. Ala. 2014). Similarly, in *Petrella v. Brownback*, the Court of Appeals panel wrote that "[a]s in *Rodriguez*, we are loathe to disturb a matter better left to the states." 787 F.3d 1242, 1261 (10th Cir. 2015). In the *Petrella* case, the plaintiffs argued that *Rodriguez* "left open the possibility that a tax cap might be unconstitutional under some theory," but the court said, "there is nothing in *Rodriguez* that disturbs the remainder of the Supreme Court jurisprudence on point." *Id.* at 1263.

105. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (education is the "very foundation of good citizenship" cardinal "to our democratic society"); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("We have recognized 'the public schools as a most vital civic institution for the preservation of a democratic system of government . . .'" (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring))). The majority opinion in *Rodriguez* acknowledged the critical "importance" of public education but concluded that nonetheless that this importance of a government service does not supply the basis for an equal protection guarantee. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30–31 (1973).

106. This Section draws on briefs reflecting my work with a team of fine lawyers at Selendy & Gay. See Brief of Martha Minow as Amicus Curiae Supporting Plaintiffs-Appellants, *A.C. ex rel. Waithe v. McKee*, 23 F.4th 37 (2022) (No. 20-2082) (supporting reversal); Brief of Martha Minow as Amicus Curiae Supporting Plaintiffs-Appellants, *Gary B. v. Whitmer*, 957 F.3d 616 (2020), (Nos. 18-1855, 18-1871), 2018 WL 6330616 (same).

losses for the plaintiffs in the federal lawsuits brought in Detroit, Michigan and Rhode Island, I still believe that their arguments have merit.¹⁰⁷ It is striking that the case for a right to education can draw on originalist techniques and methods relying on historical practice, national ethos, and judge-made doctrines.¹⁰⁸ Also noteworthy is how these litigation efforts reflected and propelled larger movements aimed at public action, including by the political branches.¹⁰⁹ As illustrated by these cases, court filings and factfinding can deepen public knowledge and set changes in motion.

This has been the effect of the lawsuits known as *Gary B. v. Snyder* and *Cook v. Raimondo*.¹¹⁰ The cases showed how arguments for educational quality and equality draw upon the public meanings of the post-Civil War amendments, repeated statements of the nation's founders as well as later views of leaders about the crucial contributions of education

107. See Brief of Martha Minow as Amicus Curiae Supporting Plaintiffs-Appellants, *Gary B. v. Whitmer*, 957 F.3d 616, *supra* note 106, at 1 (supporting reversal).

108. See Derek W. Black, *Implying a Federal Constitutional Right to Education*, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY, *supra* note 7, at 135–36 (evaluating a federal right to education through originalism). For a fresh and powerful demonstration of contributions to a federal right to education from multiple sources in the constitution, see Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. L. REV. 1031 (2022) (tracing education in African-Americans' struggles and governmental responses in the Thirteenth and Fourteenth Amendments and the Guarantee Clause). Professor Black emphasizes how the post-Civil War constitutional responses to the restrictions on writing and education for enslaved persons strengthens a fundamental right to education as a predicate for free speech and other constitutional provisions. *Id.* at 1063, 1075–77. Professor Black also documents how Confederate states had to adopt guarantees of education in their new state constitutions before gaining re-entry to the Union. *Id.* at 1054; see also Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 725, 766 (2018) (arguing that a federal right to education is implied in the U.S. Constitution). For an argument predicating a federal right to education on individual property rights, see Mathew Patrick Shaw, *The Public Right to Education*, 89 U. CHI. L. REV. 1179 (2022).

109. See, e.g., JENNIFER WEISS-WOLF & JEANINE CHIRLIN, BRENNAN CTR. FOR JUST., LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS 1 (2015) (exploring social movements, impact of litigation on public attitudes, and impact of public attitudes on litigation); see also Stacy Teicher Khadaroo, *Rhode Island Lawsuit: Students Sue for the Right to Learn Civics*, CHRISTIAN SCI. MONITOR (Dec. 12, 2019), <https://www.csmonitor.com/USA/Education/2019/1212/Rhode-Island-lawsuit-Students-sue-for-the-right-to-learn-civics> [<https://perma.cc/WCX7-6LZL>]; Gregory Briker, *The Anatomy of Social Movement Litigation*, 132 YALE L.J. 2304, 2315–16 (2023) (discussing the relationship between social movements and litigation).

110. *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018), *aff'd and rev'd in part, remanded sub nom.* *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020), *reh'g en banc granted, opinion automatically vacated by circuit rule*, 958 F.3d 1216 (6th Cir. 2020); *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 174–75 (D.R.I. 2020), *aff'd sub nom.* *A.C. ex rel. Waithe v. McKee*, 23 F.4th 37 (1st Cir. 2022).

to democratic citizenship.¹¹¹ Claims in the two cases cite legal doctrines built up over time to interpret substantive due process fundamental rights and equal protection of the laws.¹¹² Two of the three judges who heard the arguments in the Federal Court of Appeals for the Sixth Circuit in *Gary B.* were persuaded by the arguments and issued a panel decision recognizing a federal constitutional right responsive to the district court's factual findings.¹¹³ Those findings listed disturbing conditions and poor education outcomes in five Detroit public schools; decrepit facilities not only falling below city health and safety codes but also with falling ceilings and infestations of rodents and insects, many classrooms staffed by individuals with little or no training; insufficient, out-of-date teaching materials, and proficiency rates on state tests falling below 10 percent of the student population.¹¹⁴

The appellate panel in *Gary B.* noted that even the *Rodriguez* opinion left open avenues for constitutional challenges to governmental policies, effectively depriving students of a minimum quantum of education necessary to exercise constitutional rights of speaking and voting.¹¹⁵ The majority of the three-judge panel underscored the necessity of schooling to maintain a democratic system and to equip individuals to succeed economically.¹¹⁶ The factual demonstration of decrepit facilities, inadequate

111. Brief of Martha Minow as Amicus Curiae Supporting Plaintiffs-Appellants, A.C. *ex rel.* Waithe v. McKee, 23 F.4th 37, *supra* note 106.

112. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 8, 51 (2008); *see also* Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457, 460 (1995) ("It must be understood that, at the time, the only conceivable source of congressional authority to pass the civil rights bill was the authority under Section five to enforce the substantive provisions of the Fourteenth Amendment."); Martha Minow, *Forward to A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY*, *supra* note 7, at vii–xvi ("The whole people must take upon themselves the education of the whole people . . ." (quoting JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, VOL. IX, 540 (Little, Brown ed. 1854))); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334 (2006) (stating that the Fourteenth Amendment affords "a meaningful floor of educational opportunity" enforcing citizenship rights).

113. *Gary B. v. Whitmer*, 957 F.3d 616, 648 (6th Cir. 2020), *reh'g en banc granted, opinion automatically vacated by circuit rule*, 958 F.3d 1216 (6th Cir. 2020).

114. *Gary B.*, 957 F.3d at 624–28.

115. *Id.* at 652 ("The Supreme Court has recognized that basic literacy is foundational to our political process and society."). The *Rodriguez* Court reserved judgment on the constitutionality of a state system that "occasioned an absolute denial of educational opportunities to any of its children." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

116. *Gary B.*, 957 F.3d at 662 ("[E]ducation . . . is essential to nearly every interaction between a citizen and her government. Education has long been viewed as a great equalizer, giving all children a chance to meet or outperform society's expectations, even when faced with substantial disparities in wealth and with past and ongoing racial inequality."); *id.* at 652 ("[I]ndividuals with low

teaching, and deficient educational materials, in the panel's view, fell below that requisite minimum.¹¹⁷ Relying on the Court's precedents elaborating substantive due process guarantees and the role of education in American society and polity, the panel articulated a narrow constitutional ruling.¹¹⁸ The panel did not question the rejection by the *Rodriguez* Court of a fundamental constitutional right to education and, instead, operated within that Court's recognition that an actual failure to afford a minimally adequate education to some students in contrast to the opportunities granted to others.¹¹⁹

Even though the en banc court vacated the *Gary B.* panel opinion, the suit enabled the plaintiffs' lawyers to negotiate with Michigan's Governor Gretchen Whitmer for a settlement that included: (1) her promise to propose legislation authorizing at least \$95.5 million for literacy programs in the Detroit schools; and (2) the end of a prohibition on Detroit's use of bonds to raise capital for its schools.¹²⁰

or no literacy are incomparably disadvantaged in their economic and social lives." (citing *Plyler v. Doe*, 457 U.S. 202, 222 (1982)).

117. *Id.* at 661 ("Plaintiffs allege significant teacher shortages, coupled with unqualified instructors when they do have someone in the classroom. . . . dangerous and significantly distracting conditions . . . including extreme temperatures, overcrowding, and a lack of hygiene. . . . a dearth of textbooks and other school supplies, with those they do have being in an abysmal or near unusable condition.").

118. *Id.* at 659–61. Here, the Sixth Circuit panel held that the Constitution guarantees a fundamental right to a basic minimum education. *Id.* at 644. While it acknowledged that in *Rodriguez*, the Court found no "broad, general right to education," it emphasized that the Supreme Court "never ruled on the right to such a basic minimum education." *Id.* at 646. The panel found that in *Papasan v. Allain*, 478 U.S. 265, 284 (1986), and *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988), the Court still did not answer this question. *Gary B.*, 957 F.3d at 647–48.

119. The Sixth Circuit in turn concluded that a basic minimum education—"one that plausibly provides access to literacy"—is a fundamental right. *Gary B.*, 957 F.3d at 648. While *Rodriguez* rejected a general right to education "on the grounds that no one is guaranteed the most effective or intelligent political participation," the right at issue in the case is "far more fundamental . . . [and] necessary for essentially any political participation." *Id.* at 652. The panel went on to give examples like voter registration forms, jury summons, and road signs to show how literacy is an innate part of a political life. *Id.* In response to *Rodriguez's* assertion that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental," the panel found that "this principle is stretched past its breaking point when the right in question is important because it is necessary to other, clearly fundamental rights." *Id.* at 653 (quoting *Rodriguez*, 411 U.S. at 30). And if providing public schools is at the "very apex" of the functions of the State, then it is difficult to see how this function can be fulfilled if there is no reasonable opportunity to obtain literacy. *Id.*

120. *Case Profile Gary B. v. Snyder*, UNIV. MICH. L. SCH. C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=15474> [<https://perma.cc/R823-ADST>] (last visited Oct. 30, 2023); Alyssa Evans, *The Other Branch: Outcomes of Gary B. v. Snyder*, EDNOTE (July 15, 2020), <https://ednote.ecs.org/the-other-branch-outcomes-of-gary-b-v-snyder/> [<https://perma.cc/R34G-C6TX>]. The settlement also included individual awards to the seven student plaintiffs, funding to support literacy programs, establishment of two task forces to monitor Detroit schools

A similar, though not identical, legal and political strategy challenged the lack of civics education in some of the public schools of Rhode Island. The Rhode Island Federal District Court met the arguments and evidence with considerable sympathy for the plaintiff's approach but concluded that the Supreme Court had effectively barred their claims in decisions, including *Rodriguez*.¹²¹ The Court of Appeals for the First Circuit affirmed, while acknowledging the importance of education as "the most important function of state and local governments" and as the "very foundation of good citizenship."¹²² Hence, the appellate court ultimately found no basis for a constitutional right to an adequate civics education and held that a lacking civics education did not amount to "total

and to advise the Michigan Governor on education reform in the city. In harmony with the panel decision are arguments under the Thirteenth Amendment, see Jeffrey Shulman, *A Right to Literacy as the "Pathway from Slavery to Freedom"?*, NAT'L CONST. CTR. (Aug. 3, 2018), <https://constitutioncenter.org/blog/a-right-to-literacy-as-the-pathway-from-slavery-to-freedom#> [<https://perma.cc/Z625-FUQE>]. For the government's duties to promote civic engagement, see generally Talia Traskos-Hart, *Teaching the Vote: The Right to Civic Education and Cook v. McKee*, COLUM. UNDERGRADUATE L. REV. (2022). For continuing efforts to pursue a federal right to education, see Andy Froelich, *A Constitutional Right to An Education: Revisited*, 40 CHILD. LEGAL RTS. J. 159 (2021) (advocating for continuing efforts to pursue a federal right to education). Federal reinforcement of state-created rights, some argue, also could support a constitutional recognition of a fundamental interest in public education. Shaw, *supra* note 108, at 1179; *see also* Liu, *supra* note 112, at 330 (arguing that the Fourteenth Amendment obligates Congress to provide a quality education).

121. *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 174–75 (D.R.I. 2020).

122. *A.C. v. Raimondo*, 494 F. Supp. 3d 170 (D.R.I. 2020), *aff'd sub nom. A.C. ex rel. Waithe v. McKee*, 23 F.4th 37, 43 (1st Cir. 2022) (quoting *Rodriguez*, 411 U.S. at 29–30).

Raimondo, was the district court case affirmed by *Waithe*. It is illuminating to read the holding's extensive treatment of *Rodriguez* and *Gary B. v. Snyder*. According to the district court judge, Judge William Smith, plaintiffs relied on "dicta" in *Rodriguez* that said: "[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [the individual's right to speak and to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short . . ." *Raimondo*, 494 F. Supp. 3d at 186 (quoting *Rodriguez*, 411 U.S. at 36–37). In other words, plaintiffs said that the Court did not address whether a subset of basic education—civics education—is guaranteed by the Constitution, and argued that their Complaint contained the evidence that had been lacking in *Rodriguez*. Judge Smith concluded no, "but the call is closer than Defendants suggest, and closer than one might conclude on first pass." *Id.* Judge Smith points to public perceptions and the shift in the "Warren Court" to the "Burger Court" as part of why *Rodriguez* was decided the way it was. *Id.* at 187. He goes further to examine *Rodriguez*'s legacy, particularly as a catalyst for state-law litigation and education reform. *Id.* at 188. And with great detail and no small amount of admiration, Judge Smith analyzes the *Gary B.* case. *Id.* at 189–91. Ultimately, however, he concludes that even assuming the *Gary B.* holding is correct, the question to be decided before him is whether it can be taken to include a right to civics education. *Id.* at 193. He answers no: literacy is imperative for political participation, but political participation is "not wholly inaccessible without civics education." *Id.* at 192. While Judge Smith believes there is reason to believe a future Court "would be open to the right kind of challenge," looking not only to language in *Rodriguez* but also in *Papasan* and *Plyer*, that case is not in front of him. *Id.* at 189.

deprivation of a minimally adequate education.”¹²³ The en banc court did not undo the factual findings and expression of concern by the district court judge.¹²⁴

In light of the poor prospects for reversal by the Supreme Court, I and others urged the plaintiffs’ counsel in the Rhode Island case to settle. Settlement in such an instance can strengthen public awareness and political momentum for change.¹²⁵ Here, the resulting settlement produced some practical steps, including the creation of a task force to examine and improve civics education in the state.¹²⁶ Further, the state commissioner of education agreed to create a mechanism for recognizing students who complete capstone projects combining active civic engagement and research and also promised to consider creating awards for middle school students demonstrating civic engagement.¹²⁷ Despite losing victory in

123. *A.C. ex rel. Waithe v. McKee*, 23 F.4th 37, 45 (1st Cir. 2022). The First Circuit held that adequate civics education in public schools was not a fundamental constitutional right and that Rhode Island’s system of civics education satisfied rational basis review for due process and equal protection claims. *Id.* at 42. The court essentially repeated the logic of *Rodriguez*: while education was acknowledged to be a very important function of state and local governments, it was not a fundamental personal right “guaranteed by the Constitution.” *Id.* (quoting *Rodriguez*, 411 U.S. at 30, 33). And even if an “absolute denial” of education could possibly trigger a constitutional right, the appellants argued for a specific right to a civics education that prepared them for public and political life. *Id.* at 43. However, “the Court has never suggested that the minimum ‘quantum of education’ that *could be* constitutionally required must necessarily include instruction in certain subject matters or ensure certain educational outcomes (perhaps with the exception of an opportunity for basic literacy).” *Id.* The student plaintiffs here relied on the Sixth Circuit panel majority’s determination that the Detroit Public Schools had plausibly denied students of their fundamental right to a basic minimum education, including one that provided access to literacy. *Gary B.*, 957 F.3d at 648. However, the *Waithe* court distinguished between the *Gary B.* plaintiffs who alleged a total deprivation of basic education and the *Waithe* plaintiffs who instead alleged that the Rhode Island civics curricula were inadequate to prepare them for public life. *Waithe*, 23 F.4th at 43.

124. *Raimondo*, 494 F. Supp. 3d at 197 (“Plaintiffs should be commended for bringing this case. It highlights a deep flaw in our national education priorities and policies. The Court cannot provide the remedy Plaintiffs seek, but in denying that relief, the Court adds its voice to Plaintiffs’ in calling attention to their plea. Hopefully, others who have the power to address this need will respond appropriately.”).

125. The sheer act of bringing such a case can produce public attention and public awareness. See Khadaroo, *supra* note 109 (reporting on a lawsuit in Rhode Island); see also Briker, *supra* note 109, at 2315–16, 2318–19, 2333–37 (discussing the relationship between social movements and litigation).

126. Linda Borg, *RI Outlines Steps to Strengthen Civics Education in Response to Lawsuit*, PROVIDENCE J. (June 15, 2022, 3:01 PM), <https://www.providencejournal.com/story/news/education/2022/06/15/ri-civics-education-civil-lawsuit-students-education-commissioner-reach-agreement/7634485001/> [<https://perma.cc/7DP9-Q9L3>] (“The commissioner of education has agreed to create a civics task force as part of an agreement to end a federal lawsuit brought by students across the state.”).

127. See generally Press Release, State of R.I. Dep’t of Educ., Rhode Island Government, Students, Advocates, and State Reach Agreement on Improving Civics Education in Rhode Island

court, the case engendered pressure for equitable educational opportunities and a settlement that makes a short-term difference while contributing to a continuing campaign for state legislation.¹²⁸ The two recent federal cases demonstrate how judicial action can trigger political responsiveness to claims for greater educational equality. These results actually resemble steps taken by nations that recognize positive rights in their constitutions where judicial rulings have triggered political processes for change.¹²⁹

E. Using Socioeconomic Status for Educational Reforms

Perhaps the unexpected silver lining from the *Rodriguez* decision is that public schools and other government actors may use wealth or income characteristics in student assignment to particular educational opportunities. Because the Supreme Court ruled that wealth discrimination does not warrant vigorous judicial scrutiny, addressing disadvantages in family socioeconomic status can be a “plus” factor in admission to high-quality schools or programs. Using socioeconomic factors is a pathway for greater equity in access to selective exam schools run by public school systems of growing importance in the face of serious legal challenges to affirmative action based on race or ethnicity. While facing a litigation challenge, Boston’s exam schools have replaced an admissions program that had included applicants’ race as a factor in addition with a plan looking at applicant students’ socioeconomic status.¹³⁰ This avenue will

(June 15, 2022), <https://ride.ri.gov/press-releases/students-advocates-and-state-reach-agreement-improving-civics-education-rhode-island> [<https://perma.cc/K57Z-KCXY>].

128. See Borg, *supra* note 126 (reporting the steps Rhode Island will take to strengthen its civics education).

129. See John J. Williams, *The Grootboom Case and the Constitutional Right to Housing: The Politics of Planning in Post-Apartheid South Africa*, in INCLUSIVE CITIZENSHIP: MEANINGS AND EXPRESSIONS, NAILA KABEER OF THE CLAIMING CITIZENSHIP SERIES: RIGHTS, PARTICIPATION AND ACCOUNTABILITY 219 (John Gaventa ed., 2005) (providing a background on the *Grootboom* case and resulting implications); *The Landmark Case of Grootboom versus the Republic of South Africa*, TADAMUN (Jan. 5, 2014), <http://www.tadamun.co/the-landmark-case-of-grootboom-versus-the-republic-of-south-africa/> [<https://perma.cc/9LW3-83RX>] (recounting the Constitutional Court’s response to assertions of constitutional right to housing called for deliberate attention by the state including new processes of consultation and planning); see also KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 167 (2012) (providing examples from South Africa, Canada, Colombia, Germany, Ghana, India, United Kingdom, the United States, and international systems in which courts play a catalytic role in development of socioeconomic rights); Dennis M. Davis, *Socioeconomic Rights: Do They Deliver the Goods?*, 6 INT’L J. CONST. L. 687, 688 (2008) (assessing positive rights implementation as modest but still not to be discounted).

130. Mark Walsh, *Federal Appeals Court Backs Socioeconomic-Based Admissions Plan for Boston ‘Exam Schools’*, EDUC. WK. (Apr. 29, 2021), <https://www.edweek.org/policy-politics/federal-appeals-court-backs-socioeconomic-based-admissions-plan-for-boston-exam-schools/2021/04> [<https://perma.cc/UK3F-55PM>].

become a focal point now that the Supreme Court has rejected the race-based affirmative action in the cases pending from Harvard and the University of North Carolina.¹³¹

Arguments for boosting opportunities for students from low-income families amplify arguments made in *Rodriguez*. In the current moment, students from low-income families are more likely to attend substandard K–12 schools; when compared with other students, those from low-income families are one-third as likely to take advanced placement courses in high school in no small measure because their schools do not offer these courses.¹³² “Students from families in the bottom 25% of incomes comprise only three percent of enrollment in our most competitive colleges, while those from the top 25% comprise 72%.”¹³³ This pattern will not change as long as dominant criteria of grades and test scores guide admission to competitive institutions of higher education.

But the opportunities to use income and wealth to increase equitable access to scarce resources such as magnet schools and selective college does not address the fundamental question that led to the *Rodriguez* case. How legally, programmatically, and practically can genuine, high-quality opportunities be made available to all students?

Richard Kahlenberg has long argued that integrating students from different economic backgrounds is the key to improving educational opportunities for disadvantaged and marginalized students.¹³⁴ He marshals empirical research to support his conclusion: “[T]he economic integration strategy helps create in all schools the single most powerful predictor

131. *Students for Fair Admissions, Inc. v. Harvard Coll.*, 143 S. Ct. 2141 (2023). It is possible that the Supreme Court rejects uses of socioeconomic status and other elements with an eye to advancing racial diversity, strategies using socioeconomic status that have been found lawful would be in jeopardy. See Karina Elwood, *Appeals Court Upholds Thomas Jefferson High School’s Admission Policy*, WASH. POST (May 23, 2023, 7:17 PM), <https://www.washingtonpost.com/education/2023/05/23/thomas-jefferson-admissions-policy-upheld/> [<https://perma.cc/8974-5JFC>] (reporting the holding of a case about discriminatory school policies). Contrary to the position taken in the past, the Court may disallow race-conscious measure that do not employ individual racial classifications. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in the judgment); Kevin D. Brown, *Reflections on Justice Kennedy’s Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy Is Right*, 59 S.C. L. REV. 735 (2008).

132. Kenin M. Spivak, *In Rebuttal: Yes, Socioeconomic Status Should Matter in Admission to Selective Colleges*, MINDING CAMPUS (Apr. 27, 2022), <https://www.mindingthecampus.org/2022/04/27/in-rebuttal-yes-socioeconomic-status-should-matter-in-admission-to-selective-colleges/> [<https://perma.cc/AV2J-QKGN>].

133. *Id.*

134. See Anemona Hartocollis, *The Liberal Maverick Fighting Race-Based Affirmative Action*, N.Y. TIMES (Mar. 29, 2023), <https://www.nytimes.com/2023/03/29/us/richard-kahlenberg-affirmative-action.html> [<https://perma.cc/ULD7-PDKD>] (reporting the works of Richard D. Kahlenberg).

of a good education: the presence of a core of middle-class families who will insist upon, and get, a quality school for their children.”¹³⁵ Studies repeatedly indicate that rather than per pupil expenditure, the composition of the student body better predicts access to quality education and good outcomes.¹³⁶ But housing and employment practices—including discriminatory laws—produce public school enrollments that do not merely continue but increasingly exacerbate the separation of students by economic status.¹³⁷ The same seems true of racial separation, even with school choice programs.¹³⁸

Substantial empirical evidence demonstrating educational benefits to all students from integration along racial and class lines could build support for policies and practices, argues Kahlenberg and his colleagues.¹³⁹ But the case must be made to persuade those with resources and privileged positions to counter widely held views that education opportunity is a zero-sum game. Research evidence amply demonstrates that socioeconomic integration increases quality opportunities for everyone.¹⁴⁰

135. Richard D. Kahlenberg, *Socioeconomic School Integration*, 10 *POVERTY & RACE* 1–2 (2001); see also Eloise Pasachoff, Book Review, *The Future of School Integration: Socioeconomic Diversity as an Education Reform Strategy*, 46 *U. MICH. J.L. REFORM ONLINE* 39 (2012–2013).

136. See Michael Heise, *The Story of San Antonio Independent School Dist. v. Rodriguez: School Finance, Local Control, and Constitutional Limits*, in *EDUCATION LAW STORIES* (Michael A. Olivas & Ronna Greff Schnieder eds., 2008) (describing studies).

137. Richard D. Kahlenberg, *The Walls of Exclusion in Massachusetts*, CENTURY FOUND. (Dec. 2, 2021), <https://tcf.org/content/report/walls-exclusion-massachusetts-three-mothers-overcome-discriminatory-zoning-laws-improve-lives-children/> [<https://perma.cc/E2Q4-D6HR>]; Ann Owens, *Growing Economic Segregation Among School Districts and Schools*, BROOKINGS INST. (Sept. 10, 2015), <https://www.brookings.edu/blog/brown-center-chalkboard/2015/09/10/growing-economic-segregation-among-school-districts-and-schools/> [<https://perma.cc/42DQ-87VT>]; see also Conor P. Williams, *Welcome to D.C.—Publicly Progressive, Privately Guarding Its Privilege*, THE74 (July 12, 2022), <https://www.the74million.org/article/williams-welcome-to-d-c-publicly-progressive-privately-guarding-its-privilege/> [<https://perma.cc/A5KF-C3A4>] (reporting on the irony that D.C. has some of the most progressive school diversity policies but has a housing market that prohibits diversity).

138. An empirical study of 100 school districts found:

[A] substantive positive correlation between how friendly districts are to school choice and the degree to which their high schools are racially imbalanced for blacks and whites. In districts with low school quality, a common application for all schools, and that provide transportation for students to schools of choice, high schools, on average, over enroll black students. The same conditions of choice are associated with white under enrollment.

Grover J. “Russ” Whitehurst, *New Evidence on School Choice and Racially Segregated Schools*, BROOKINGS INST. (Dec. 14, 2017), <https://www.brookings.edu/articles/new-evidence-on-school-choice-and-racially-segregated-schools/> [<https://perma.cc/962G-PV9D>].

139. Halley Pottinger et al., *School Integration Is Popular: We Can Make It More So*, CENTURY FOUND. (June 3, 2021), <https://tcf.org/content/commentary/school-integration-is-popular-we-can-make-it-more-so/> [<https://perma.cc/58C3-AZFV>].

140. *Id.*

And even if the only question is resource allocation within states, Professor Charles Ogletree Jr. has rightly emphasized another topic deserving serious attention: many states spend three to four times more per capita on incarceration than education.¹⁴¹

All educational programs, in the meantime, must address the opportunities and challenges posed by technological innovations. Large Language Models such as ChatGPT, for example, introduce the real possibility of giving people the capability to obtain answers to factual and analytic questions based on technology that reads available materials and predicts responses based on human prompts.¹⁴² Instead of devoting class time in middle school to writing the perfect five-paragraph essay, students might benefit more from learning how to frame prompting questions and sharpening their critical analysis skills—enabling them to assess and refine what the computer generates.¹⁴³ This is the crucial frontier for efforts to pursue equal educational opportunities, a frontier with great risks of exacerbating disparities but also great potential to transform learning, transcend geographic separations between people of different economic, language, and linguistic backgrounds, and unprecedented resources for developing every child’s talents.

III. WHAT NOW?

Unimaginable fifty years ago—except to avid science fiction fans—the fact that most Americans aged eighteen and older now own a ‘smartphone’ grants them digital access to a wealth of knowledge and information, as well as communication channels reaching across the

141. Charles J. Ogletree, Jr., *The Legacy and Implications of San Antonio Independent School District v. Rodriguez*, 17 RICHMOND J.L. & PUB. INT. 515, 542–53 (2014). Among the thoughtful tributes to Professor Ogletree, who passed away on August 4, 2023, see Mark H. Morial, *Charles Ogletree Leaves a Profound Legacy of Commitment to Justice and Equity, Compassion and Kindness*, WASH. POST (Aug. 16, 2023), <https://www.washingtoninformer.com/morial-charles-ogletree-leaves-a-profound-legacy-of-commitment-to-justice-and-equity-compassion-and-kindness/> [<https://perma.cc/D6GQ-6RPE>] (documenting Professor Ogletree’s legacy).

142. See, e.g., Alex Tamkin & Deep Ganguli, *How Large Language Models Will Transform Science, Society, and AI*, STAN. U. HUMAN-CENTERED A.I. (Feb. 5, 2021), <https://hai.stanford.edu/news/how-large-language-models-will-transform-science-society-and-ai> [<https://perma.cc/9QL5-REGA>].

143. See Chris Chambers Goodman, *Just-AIED: An Essay on Just Applications of Artificial Intelligence in Education*, 123 W. VA. L. REV. 937, 944 (2021) (“[Artificial Intelligence] may be enabled by smart classrooms, learning environments and institutions, education and administrative management systems, and also learning analytics.”); see also Enkelejda Kasneci et al., *ChatGPT for Good? On Opportunities and Challenges of Large Language Models for Education*, 103 LEARNING & INST. DIFFERENCES 1 (2023) (discussing artificial intelligence’s impact in education).

world.¹⁴⁴ Students can prompt Large Language Models that employ deep learning algorithms to identify, summarize, translate, predict, and create text and images based on what they learn from taking in enormous datasets.¹⁴⁵ The technology can quickly write essays and poetry, solve math problems, and do many tasks that schooling historically prepared each new generation to do.¹⁴⁶ At least for now, however, such learning algorithms make many mistakes and do not generate their own questions or revisions, which points to crucial tasks and challenges for students (and their teachers).

Online learning—including through augmented and virtual reality—can connect a student with the very best experts in any field. Digital resources offer learning opportunities through games and real-time interactions, receive personal guidance and feedback, and enable users to create music, videos, applications, and programs.¹⁴⁷ More will exponentially develop. The United States Military already uses games as part of its efforts to educate and improve decision-making among its members.¹⁴⁸ As such digital technologies open opportunities and challenges, teachers and administrators must rethink both the purposes and methods of instruction. Lauren Goodlad, a professor at Rutgers University who chairs

144. As of 2021, 97 percent of Americans had a smart phone. *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/mobile/> [<https://perma.cc/JGR2-DFAX>].

145. See Dorian Drost, *Interacting with Large Language Models*, MEDIUM (May 24, 2023), <https://towardsdatascience.com/interacting-with-large-language-models-76c11cfd6290> [<https://perma.cc/F342-LVQ6>] (describing the role of prompts in the use of large language models); see also John Mikton, *Prompting Strategies for Educators Using ChatGPT and LLMs*, INT'L EDUCATOR (July 5, 2023), <https://blog.tieonline.com/prompting-strategies-for-educators-using-chatgpt-and-llms/> [<https://perma.cc/8CVY-A2KT>] (providing suggestions for teachers assisting students with prompts for large language models); see also Kevin Roose, *Don't Ban ChatGPT in Schools: Teach with It*, N.Y. TIMES (Jan. 12, 2023), <https://www.nytimes.com/2023/01/12/technology/chatgpt-schools-teachers.html> [<https://perma.cc/FJP5-NXTW>] (discussing fears that ChatGPT is causing cheating, but the potential is worth the risk).

146. See Angie Lee, *What Are Large Language Models For?*, NVIDIA (Jan. 26, 2023), <https://blogs.nvidia.com/blog/2023/01/26/what-are-large-language-models-used-for/> [<https://perma.cc/5KHJ-JE9F>] (discussing the uses of large language models).

147. See, e.g., *Lavner Camps and Programs*, LAVNER EDUC., <https://www.lavnercampsandprograms.com/location/virtual-tech-camps-usa-online-summer-tech-camps-stem-camps-elearning/> [<https://perma.cc/XSE7-VK3W>] (last visited Sept. 14, 2023) (“[E]mpower students across the globe by giving them the in-demand skills and confidence to succeed in a rapidly evolving digital world.”).

148. Kristy Simon, *Why and How the Military Uses Video Gaming for Military Training*, PROFOLUS (Jan. 9, 2021), <https://www.profolus.com/topics/how-us-uses-video-gaming-for-military-training/#> [<https://perma.cc/Y8UV-6YMK>] (explaining the reasoning and implementation of video games into military training). On the effectiveness of U.S. Military schools, see MINOW, *supra* note 5, at 153–55.

its Critical Artificial Initiative, notes: “ChatGPT may have better syntax than humans, but it’s shallow on research and critical thinking.”¹⁴⁹

Yet inequities in educational opportunities could grow even more extreme with unequal access to these new possibilities and thoughtfully redesigned schooling.¹⁵⁰ A different future is possible: digital and technological resources could also lower the barriers to accessing excellent opportunities and individualized attention for students and teachers alike. Experiences with remote education as schools adjusted to COVID-19 reveal both possibilities. The pandemic not only accelerated the adoption of digital learning in many schools but also highlighted the disparities in access to the internet and computers across different school districts.¹⁵¹

But access to the right technology is only part of the story. Learning online, especially for younger students and for any lacking usual levels of self-motivation, calls for appropriate structure, personalization, and interaction online and in person.¹⁵² Digital learning can incorporate engaging and fun activities and platforms that permit students to connect both within their own community or school and with peers from other communities and countries. Digital capacities can also connect students with personal mentors, animated avatars, and adjustments to address individual learning styles, abilities, and disabilities.¹⁵³ Teachers and studies report value in a hybrid format—combining online work with in-person activities—for the engagement and accomplishment of elementary school students.¹⁵⁴ And, research shows that teacher involvement and ongoing

149. Zoha Qamar, *Teaching In The Age Of AI Means Getting Creative*, FIVETHIRTYEIGHT (Jan. 23, 2023), <https://fivethirtyeight.com/features/teaching-in-the-age-of-ai-means-getting-creative/> [<https://perma.cc/84WL-TT5N>].

150. Goodman, *supra* note 143, at 951.

151. Cathy Li & Farah Lalani, *The Covid-19 Pandemic Has Changed Education Forever: This is How*, WORLD ECON. F. (Apr. 29, 2020), <https://www.weforum.org/agenda/2020/04/coronavirus-education-global-covid19-online-digital-learning/> [<https://perma.cc/S6CN-E65B>] (finding that “95% of students in Switzerland, Norway, and Austria have a computer to use for their schoolwork, only 34% in Indonesia do. . . . 25% [of students in the United States] from disadvantaged backgrounds” lack access to computers).

152. *Id.*

153. *About Universal Design for Learning*, CAST, <https://www.cast.org/impact/universal-design-for-learning-udl> [<https://perma.cc/B4ET-QRYJ>] (last visited Jan. 12, 2022); see Ben Rearick et al., *Implementing Universal Design for Learning Elements in the Online Learning Materials of a First-Year Required Course*, 4 WEAVE: J. LIBR. USER EXPERIENCE 1 (2021) (elaborating on the importance of creating a learning environment for all people based on their personal needs emphasizing special education technology for disabled students). Professor Chris Chambers Goodman explores possibilities opened by AI-powered teachers assistants and tutors. Goodman, *supra* note 143, at 946–48.

154. K–12 Dive Staff, *Survey: Educators, Parents See Value in Hybrid Learning*, K-12 BRIEFDIVE (June 30, 2022), <https://www.k12dive.com/news/survey-educators-parents-see-value-in-hybrid-learning/626348/> [<https://perma.cc/7GVQ-EC7N>].

learning and support for teachers remain crucial to student learning.¹⁵⁵ Education for most people requires human interactions with feedback, encouragement, and engagement with peers.¹⁵⁶ Digital instruction in public school settings also introduces new issues about privacy and security.¹⁵⁷ At least in the near term, effective digital education may not produce cost savings, although the subject is prompting research and debate. And educational equity will increasingly require opening up access for students and school districts that otherwise cannot afford proprietary and fee-based services.¹⁵⁸ Indeed, the resources and missions of private-sector innovators—both non-profit and for-profit—make them critical partners in tackling disparities in educational opportunities.¹⁵⁹

Nonetheless, there remains much promise, notably in narrowing the persistent divergence between resources available in wealthier and poorer school districts. Education for every student can focus more on critical thinking skills and preparation for more creative and remunerative jobs—unless new technologies and public policies radically reduce employment for human beings. Digital technologies can also enable contact and collaboration, connecting students from different backgrounds and cultures in a way that can reduce prejudices and open up avenues for

155. Alberto Muñoz-Najar et al., *Remote Learning During Covid: Lessons From Today, Principles for Tomorrow*, WORLD BANK GRP. (2021), <https://documents1.worldbank.org/curated/en/160271637074230077/pdf/Remote-Learning-During-COVID-19-Lessons-from-Today-Principles-for-Tomorrow.pdf> [<https://perma.cc/ZBB4-4JUY>].

156. *Id.*

157. On the risks, see Shauna De La Rosa, *Social Media Use in Distance Learning Raises Privacy Concerns*, K-12 BRIEFDIVE (Oct. 8, 2020), <https://www.k12dive.com/news/teachers-turn-to-social-media-raising-privacy-concerns/586538/> [<https://perma.cc/Z9DJ-2N6H>] (noting privacy and equity concerns); Glorin Sebastian, *The Changing Face of Education: Risk, Security, and Process Around Distance*, 4 ISCA J. (July 14, 2021), <https://www.isaca.org/resources/isaca-journal/issues/2021/volume-4/the-changing-face-of-education> [<https://perma.cc/W954-9MV8>] (discussing confidentiality and integrity issues); Andrea Vittoria, *Student Data Guardrails Draw Scrutiny as Edtech Use Grows*, BL (June 22, 2023, 4:05 AM), <https://news.bloomberglaw.com/privacy-and-data-security/student-data-guardrails-draw-scrutiny-as-digital-learning-grows> [<https://perma.cc/Q3LX-YGSK>] (June 22, 2023, 1:27 PM) (discussing privacy and security concerns and the federal government's plan). Digital privacy and security risks suggest the need for lessons geared to students sorted by grade level. See *Digital Citizenship Curriculum*, COMMON SENSE EDUC., <https://www.commonsense.org/education/digital-citizenship/curriculum> [<https://perma.cc/VM7K-ESVC>] (last visited Nov. 22, 2023) (illustrating lessons like this geared at students from kindergarten to twelfth grade).

158. Goodman, *supra* note 143, at 949–50.

159. See Benjamin Michael et al., *Toward a Synergistic Model for Improving the Use of Research in Court-Driven Educational Reform: Examining Gary B. v. Snyder and Literacy Improvement in Detroit*, 48 EDUC. RSCH. 543, 546 (2019) (“[S]uggest[ing] three principles for a synergistic model of court-driven education reform that is attuned to both the institutional characteristics of the courts and research findings on long-term educational improvement.”).

understanding.¹⁶⁰ With imagination and investment, online learning can bring world-class instruction within the reach of any student, and invoke dynamic interactive materials, personalized support and feedback, and chances to collaborate in debates, research projects, community histories, entrepreneurial ideas, and artistic endeavors. Done poorly, however, online learning will magnify the disparities between households based on resources, including parents with varying degrees of educational background and time to oversee online activities. Greater use of online learning could also impair the development of social and emotional learning, including dealing with differences among people and developing patience and emotional management. Devising educational programs—and attendant rights—in the future will involve both the promise and challenges of digital resources. Whether enacted through judicial orders, legislation, or administrative oversight, the promises and risks posed by reliance on digital learning should become focal points for educational reformers, artificial intelligence regulators, and leaders of private technology companies.¹⁶¹

Digital resources should become significant elements of larger efforts to ensure tailored, individualized learning geared to each student’s stage of development but also with supports customized to the individual’s strengths and challenges. “Personalized learning” can be traced historically to John Dewey’s efforts at the turn of the twentieth century, if not before.¹⁶² Now, technology, if informed by research findings, would

160. Sandy Schumann & Ysanne Moore, *What Can be Achieved with Online Intergroup Contact Interventions? Assessing Long-Term Attitude, Knowledge, and Behaviour Change*, 22 ANALYSES SOC. ISSUES & PUB. POL’Y 1072, 1072–91 (2022) (concluding that online intergroup contact is a strong tool for intergroup relations). The hope that contact reduces prejudice reflected in the movement for school desegregation has generated varied social science findings, though recent meta-analysis suggests some positive effects from in-person contact on students’ attitudes about people unlike themselves—with perhaps more malleability related to attitudes about disability than around other differences. Elizabeth Levy Paluck et al., *The Contact Hypothesis Re-Evaluated*, 3 BEHAV. PUB. POL’Y 129, 129–58 (2018).

161. For a judicial order requiring technology in schools during the COVID-19 pandemic, see *Court Orders State to Provide Students the Technology They Need*, N.M. CTR. ON L. & POVERTY (Apr. 30, 2021), <https://www.nmpoertylaw.org/2021/04/30/court-orders-state-to-provide-student-s-the-technology-they-need/> [<https://perma.cc/796Q-Z6ZW>] (reporting that a court ordered the state to provide computers and high-speed internet access to “at-risk” students). If digital instruction, including access to large language models, because a priority for educational excellence, courts may be asked to order such access. On pending state legislation involving technologies and schools, see News Staff, *Ed-Tech Legislative Watch*, GOV’T TECH. (Oct. 21, 2022), <https://www.govtech.com/education/k-12/ed-tech-legislative-watch-october-2022> [<https://perma.cc/W7DP-R8T2>] (reporting on pending legislation that include funding for technology in schools).

162. See Morgan K. Williams, *John Dewey in the 21st Century*, 9 J. INQUIRY & ACTION EDUC. 91, 94 (2017) (describing Dewey’s focus on each student as a unique learner and contemporary pedagogies based on that focus).

enable continually improving and scalable efforts to tailor materials, instruction methods, feedback, and opportunities to each student's stage of learning and interests—and help shape their learning.¹⁶³

Paul Reville, former Secretary of Education for Massachusetts and now a professor of practice at the Harvard Graduate School of Education who runs the Education Redesign Lab, explains: “[t]he central shortcoming of American public education has been its failure to become the great equalizer. The evidence is clear: the dream of educational equity will never be realized without comprehensively addressing the racial and socioeconomic disparities that begin at birth and grow exponentially throughout life.”¹⁶⁴ His lab focuses on increasing the success of students in marginalized communities by designing and promoting individualized support systems, which includes “a caring adult who compiles a child’s diagnostic profile and then leverages the resources (i.e., tutoring, sports programs, health services, music lessons) and monitors the child’s progress” while connecting the child to opportunities within and beyond their communities.¹⁶⁵

“Until Learning Has No Limits” is another powerful effort that marshals research, technology, and partnerships with schools to design learning accessible to every kind of student.¹⁶⁶ Initially designed to facilitate access to education for students with disabilities, this work by the nonprofit organization Center for Applied Special Technology (CAST) devised “Universal Design for Learning”—a framework based on research about how human beings learn and deploying technology enabling student engagement and expression in relation to customized learning materials and environments.¹⁶⁷ In 1985, this work started with the graphical

163. Mindshift, *The Growing Role of Technology in Personalized Learning*, KQED (Jan. 25, 2017), <https://www.kqed.org/mindshift/47376/the-growing-role-of-technology-in-personalized-learning> [<https://perma.cc/66N5-H6P8>]; see Marcia Linn, *Technology and Science Education: Starting Points, Research Programs, and Trends*, 25 INT’L J. SCI. EDUC. 727, 728–58 (2003) (discussing how digital tools permit visualization of science content and adaptation of materials to individual preferences).

164. Paul Reville, Project, *Reimagining Our Education System: Building Community-Wide System of Opportunity through Individualized Student Supports (2021–2024)*, HARV. GRADUATE SCH. EDUC., <https://www.gse.harvard.edu/faculty/paul-reville> [<https://perma.cc/JSR9-3D2B>] (last visited Nov. 26, 2023).

165. *Id.*

166. *Until Learning Has No Limits*, CAST, <https://www.cast.org/binaries/content/assets/cast/downloads/cast-onepager-20230606-a11y.pdf> [<https://perma.cc/TV62-NK88>] (last visited Sept. 8, 2023).

167. *About Universal Design for Learning*, *supra* note 153. “CAST” came from the initial name, Center for Applied Special Technology, but the nonprofit organization is now known simply as CAST. *About CAST*, CAST, <https://www.cast.org/about/about-cast> [<https://perma.cc/M6MH-RMBP>] (last visited Oct. 30, 2023); see also Washington Post Live, *Sal Khan on How Lack of*

interface and text-to-speech capabilities of personal computers to afford scaffolds for students with learning disabilities.¹⁶⁸ This work moved “from the margin to the center;” from serving students with disabilities to pioneering learning opportunities that are accessible for each and every student.¹⁶⁹

CAST partners with Apple Computers (now Apple Inc.), the publisher Scholastic, Harvard University, the federal government, text publishers, Google, school systems, and community organizations.¹⁷⁰ Its work has grown to offer practical tools for learners and teachers anticipating and responsive to the variety of learning styles of individuals, those students learning English and students with varying physical and cognitive abilities.¹⁷¹ CAST’s work has also turned to policy reform; I served as a policy director in its partnership with the Federal Department of Education

Exposure to AI is ‘Hurting’ Students in How Artificial Intelligence Could Impact the Workforce and the Global Economy, WASH. POST (July 11, 2023, 2:00 PM), <https://www.washingtonpost.com/washington-post-live/2023/07/11/how-artificial-intelligence-could-impact-workforce-global-economy/> [<https://perma.cc/DMX2-NV8J>] (“If you’re not already using these tools in some way, shape or form, you’re probably not doing your work optimally anymore . . . The tools that leverage generative AI are only going to get better and better. We’re not even at the top of the first inning just yet. Given that it’s going to be in the workplace, it is going to be hurting these students if they don’t get exposure to these tools.”).

168. *Timeline of Innovation*, CAST, <https://www.cast.org/impact/timeline-innovation> [<https://perma.cc/TH5V-9CJ7>] (last visited Oct. 30, 2023).

169. David Rose & Anne Meyer, *Teaching Every Student in the Digital Age: Universal Design for Learning*, CAST, <https://www.cast.org/products-services/resources/2002/universal-design-learning-udl-teaching-every-student-rose> [<https://perma.cc/FD6G-69PN>] (last visited Sept. 10, 2023); see BELL HOOKS, *Preface to FEMINIST THEORY: FROM MARGIN TO CENTER*, at ix (1984) (“To be in the margin is to be part of the whole but outside the main body. . . . Much feminist theory emerges from privileged women who live at the center, whose perspectives on reality rarely include knowledge and awareness of the lives of women and men who live in the margin. As a consequence, feminist theory lacks wholeness, lacks the broad analysis that could encompass a variety of human experiences. . . . At its most visionary, [feminist theory] will emerge from individuals who have knowledge of both margin and center.”); see generally JUSTIN O’CONNOR & DEREK WYNNE, *FROM THE MARGINS TO THE CENTRE: CULTURAL PRODUCTION AND CONSUMPTION IN THE POST-INDUSTRIAL CITY 1* (1996). For material on the spread to public health, see Derek M. Griffith, “Centering the Margins”: *Moving Equity to the Center of Men’s Health Research*, 12 AM. J. MENS HEALTH 1317–27 (2018) (“[R]ethinking definitions of men’s health and health equity and focusing on those areas currently at the margins of the field provide[s] tremendous potential to both inspire the field to move in new directions that can help improve men’s health and move the field closer to achieving health equity.”). For social policy frameworks, see RACHEL BLACK & K. SABEEL RAHMAN, *NEW AM., CENTERING THE MARGINS: A FRAMEWORK FOR EQUITABLE AND INCLUSIVE SOCIAL POLICY 2* (2017), https://d1y8sb8igg2f8e.cloudfront.net/documents/Centering_the_Margins_r1.pdf [<https://perma.cc/Y9J7-XR5T>] (arguing that the key test of the government’s integrity is their commitment to the freedom of individuals who have historically been excluded and oppressed).

170. For more information on CAST, see *supra* notes 166–69.

171. For the development’s of CAST in varied learning styles, see *supra* notes 166–69.

to help implement the 1997 amendments to the Individuals with Disabilities Act.¹⁷² Because of the work of CAST, the Higher Education Opportunity Act of 2008 embraces the concept of Universal Design for Learning.¹⁷³

Another example of digital tools already reshaping education is Khan Academy and its sister nonprofit organizations Schoolhouse.world, Khan Lab School, and Khan World School.¹⁷⁴

Sal Khan developed his interest in education when he was an undergraduate student. He developed math software for children with Attention Deficit and Hyperactivity Disorder and tutored fourth- and seventh-grade public school students in Boston.¹⁷⁵ From appealing instructional videos to artificial intelligence tools for teachers and parents, he has launched nonprofit organizations aimed at enabling access—free to users—for personalized education.¹⁷⁶ His work is used by students, parents, teachers, and school districts around the world and became particularly useful during the pandemic to many who had never heard of it.¹⁷⁷ One powerful feature is the digital connection with human tutors, in real time, offered without charge.¹⁷⁸

172. Emily Newburger, *Book Smart*, HARV. L. BULL. (July 1, 2004), <https://hls.harvard.edu/today/book-smart/> [<https://perma.cc/5NKN-EKFZ>].

173. BAKER, *supra* note 55, at vii (quoting the Higher Education Opportunity Act and describing the National Education Technology Plan).

174. See KHAN ACAD., <https://www.khanacademy.org/> [<https://perma.cc/F5WT-37H5>] (last visited Sept. 11, 2023) (providing exercises, instructional videos, and a personalized learning dashboard across field ranging from math to art history, and including K-14 and test preparation (i.e., SAT, Praxis, LSAT) content); see also *World-Class AI for Education*, KHAN ACAD. LABS, <https://www.khanacademy.org/khan-labs> [<https://perma.cc/3GW9-SU2A>] (last visited Sept. 11, 2023) (providing artificial intelligence tools to assist teachers and parents).

175. See *World-Class AI for Education*, *supra* note 174; NEWS EDITOR, *Education Now: Sal Khan on Innovations in the Classroom*, HARV. GRADUATE SCH. EDUC. NEWS (Jan. 2023), <https://www.gse.harvard.edu/ideas/education-now/23/01/sal-khan-innovations-classroom> [<https://perma.cc/79Z6-4AGG>] [hereinafter *Khan on Innovations*] (linked to a video interview and educational resources); *Start Tutoring with Khan Academy: Have Your Child Sign Up for Free Tutoring at Schoolhouse.world*, KHAN ACAD., <https://www.khanacademy.org/khan-for-educators/resources/parents-mentors-1/helping-your-child/a/start-tutoring-with-khan-academy> [<https://perma.cc/UW5T-PL68>] [hereinafter *Start Tutoring*] (last visited Sept. 11, 2023); Telephone Interview with Sal Khan, Founder, Khan Academy and Khan Lab School (July, 2022) (the conversation between Minnow and Khan was part of Harvard's exploration of educational initiatives following the report on Harvard and the legacies of slavery). See generally HARVARD & THE LEGACY OF SLAVERY, REPORT BY THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE 1 (2022).

176. *World-Class AI for Education*, *supra* note 174; *Start Tutoring*, *supra* note 175.

177. *Khan on Innovations*, *supra* note 175.

178. *Start Tutoring*, *supra* note 175 (stating that students themselves can become tutors and earn recommendations that assist in their own careers).

Especially resonant with the Rhode Island lawsuit challenge unequal access to civics education is iCivics, the nonprofit organization started in 2009 by former Supreme Court Justice Sandra Day O'Connor.¹⁷⁹ Her goal was to “ensure that all Americans have the knowledge and will to participate in our unique experiment in self-government.”¹⁸⁰ When she consulted with experts, Justice O'Connor discovered the research showing the power of electronic games to engage the attention and interest of young people. From that initial discovery came work with Georgetown University Law Center and Arizona State University, which is now a digital library that includes “more than 260 curricular resources, digital literacy tools, professional learning materials, and educational video games.”¹⁸¹ By 2013, it had become the most widely adopted civics education curriculum in the country.¹⁸² Evaluations found the games to be both engaging and effective.¹⁸³

These are examples of strategies that transcend the limitations of any given school system and overcome differences in per pupil expenditures based on geographically-based funding for schools. The methods are available to provide powerful and meaningful education and support to every student. Means to share high-quality instruction and individualized support now exist and should be used by any state or nation committed to educating the next generations. Author Terry Brooks once said, “[i]f I have the means, I have the responsibility to employ them.”¹⁸⁴

When the Court rejected challenges to the Texas school finance scheme in *Rodriguez*, it halted efforts to secure relief in federal courts for disparities in public school expenditures within and between states and to obtain an enforceable federal constitutional right to education.¹⁸⁵ The Court's decision spurred decades of social science research over when and how money matters to educational outcomes. It sparked litigation all over the country in state courts under state constitutions, with many state

179. *Who We Are*, ICIVICS, <https://www.icivics.org/who-we-are> [https://perma.cc/4AWN-RFFC] (last visited Sept. 11, 2023); see also *iCivics and Counties*, NACO, <https://www.naco.org/counties/icivics> [https://perma.cc/AN96-A8VJ] (last visited Sept. 11, 2023) (discussing NACO partnering with iCivics).

180. *Who We Are*, *supra* note 179.

181. *Id.*; Jeff J. Curley, *Introducing Our New Site*, ICIVICS (Nov. 19, 2013), <https://www.icivics.org/news/product-announcement/introducing-our-new-site> [https://perma.cc/CCE2-7LAH].

182. Curley, *supra* note 181.

183. Gabriel Neher, *The Proof is In: iCivics Games Strengthen Knowledge and Dispositions*, ICIVICS (Feb. 4, 2021), <https://www.icivics.org/news/blog-post/proof-icivics-games-strengthen-civic-knowledge-and-dispositions> [https://perma.cc/DZH3-KR96].

184. TERRY BROOKS, *THE HERITAGE OF SHANNARA* 176 (2003).

185. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973).

courts issuing orders meant to improve educational equity. And it even inspired renewed efforts to pursue federal relief and to trigger action by elected branches of government to advance educational opportunities. It has prompted experiments using socioeconomic status in student assignments to schools and in admissions to selective institutions of higher education.¹⁸⁶

Fifty years ago, Justice Thurgood Marshall observed that the Court's decision in *Rodriguez* can only be seen "as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens."¹⁸⁷ These words are haunting as low-income children in America fall on average two years behind wealthier students in school achievement, as the talents of those who do not get opportunities too often remain unrecognized and undeveloped with costs to society as well as to the individuals, and as the viability of a constitutional democracy—the experiment in self-government by millions of diverse individuals—falls under severe strain.¹⁸⁸ It falls to the rest of us to restore that commitment to educational opportunity for all; there are now greater means and methods to do so. What are we waiting for?

186. See Carlson et al., *supra* note 17, at 258 (discussing socioeconomic integration initiatives); Adam Rosario, *Substituting Socioeconomic Status for Race in College Admissions*, RAMAPO J.L. & SOC'Y (Dec. 20, 2014), <https://www.ramapo.edu/law-journal/thesis/substituting-socioeconomic-status-race-college-admissions/> [<https://perma.cc/ADL3-GDU7>] (explaining how socioeconomic status is the best alternative using two case studies).

187. *Rodriguez*, 411 U.S. at 71 (Marshall, J., dissenting).

188. Alvin Powell, *Where Are We Going, America?*, HARV. GAZETTE (Nov. 4, 2022), <https://news.harvard.edu/gazette/story/2022/11/where-are-we-going-america/> [<https://perma.cc/WM62-U6R8>]; *11 Facts About Poverty in America*, DOSOMETHING, <https://www.dosomething.org/us/facts/11-facts-about-education-and-poverty-america> [<https://perma.cc/P84N-RGXU>] (last visited Nov. 26, 2023); *Cost of Inadequate Education to Society Is Hundreds of Billions of Dollars*, COLUM. U. TCHR. COLL. (Oct. 24, 2005), <https://www.tc.columbia.edu/articles/2005/october/cost-of-inadequate-education-to-society-is-hundreds-of-billi/#> [<https://perma.cc/26CC-QHUF>].