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ARTICLE

Rodriguez at Fifty: A Legacy of Intersecting Inequalities

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Abstract

Fifty years after the Supreme Court issued its ruling in *San Antonio Independent School District v. Rodriguez*, the trajectory of school finance desegregation has shifted from expansive federal hopes to narrower state efforts. Attempts to address many of the disparities continue to be constrained by the complex and intersecting nature of the inequalities, rooted in compounding decades of discrimination. This article examines the legal historiography and politics of the *Rodriguez* decision, analyzing the path from *Brown v. Board of Education* to *Rodriguez* in the context of the scholarship around *Rodriguez* over the last fifty years as well as the wide body of work discussing state-based litigation efforts since the 1973 ruling.

Keywords: *San Antonio v. Rodriguez*; race; poverty; educational inequality; segregation

Like many late twentieth-century political issues in the US, school funding inequality and desegregation cases reached a pivotal moment in 1968. The year of Martin Luther King Jr.'s Poor People's Campaign and assassination, Richard Nixon's election, and youth protests sweeping the world was also the year Demetrio Rodriguez and six other parents filed suit in federal court in Texas two months after many of their children led a walkout demanding better-resourced schools. And it was the year when both influential national scholarship and a state commission in Texas published proposals to remedy school finance disparities, as well as the year the Supreme Court began to at last push for real, immediate enforcement of school desegregation, fourteen years after *Brown v. Board of Education of Topeka.*

San Antonio Independent School District v. Rodriguez is perennially haunted by *Brown*. But unlike *Brown*, there are no triumphalist narratives around *Rodriguez* to counter. *Rodriguez* bookended *Brown* by closing the crack that *Brown* symbolically surfaced in the uneasy Cold War consensus between White liberalism and the civil rights

movement.[1] If *Brown* was an interest-convergence dilemma, in the words of Derrick A. Bell Jr., *Rodriguez* was an interest-divergence dilemma, as Lani Guinier narrated on *Brown*'s fiftieth anniversary, a case that closed off and individuated so many visibly connected things that it surfaced all the inconsistencies and intersections that had always been inherent in *Brown*.[2]

This article provides an overview of the history around the *Rodriguez* case and synthesizes the scholarship, legal cases, and archival sources in order to situate *Rodriguez* in three ways. First, it locates *Rodriguez* at a pivotal constitutional moment in Supreme Court equal-protection analysis and desegregation jurisprudence around race, class, and education and identifies *Rodriguez* as a desegregation case as much as a school finance case. Second, it analyzes sources to highlight the ways in which *Rodriguez* was a case deeply embedded in and reflective of the racial, social, and class politics of its time. Finally, it argues that Justice Thurgood Marshall's dissenting prophecy is reflected in many of the ongoing partial and contingent experiences of state-based school funding litigation after *Rodriguez*. The *Rodriguez* case itself confronted the court with three intersecting desegregation claims: discrimination on the basis of race, discrimination on the basis of wealth, and violation of the right to education, and each of these intersecting inequalities was foreclosed or dramatically shifted by the ruling.

Race, Wealth, and Education: From *Brown* to *Rodriguez*

Rodriguez is a school desegregation case, part of the legacy of *Brown* as much as it is part of the series of poverty law cases in the same era. If *Brown* was a (partial) overturning of the infamous *Plessy* ruling, legal scholars Charles Ogletree and Kimberly Jenkins have argued that "*Rodriguez* will one day be considered as erroneous as … *Plessy v. Ferguson*."[3] The seeds of *Rodriguez* were embedded in the litigation choices and judicial decision-making in *Brown,* and seeing them as a connected pair helps highlight those linkages. As Kevin Brown argues, "Supreme Court opinions like *Brown v. Board of Education* reveal their consequences and yield their secrets only with the passage of time."[4]

Brown was a short opinion, with the eyes of the world on it, and a canny Chief Justice Earl Warren worked assiduously to cultivate unanimity among the court.[5] The opinion strategically declared a dramatic shift in US racial politics in the context of education, without expanding racial equality to all aspects of law or explicitly naming the right to education as an element of the ruling. In many ways, the opinion had "a narrow

[1]Derrick A. Bell Jr., "*Brown v. Board of Education* and the Interest-Convergence Dilemma," *Harvard Law Review* 93, no. 3 (Jan. 1980), 518–33.

[2]Lani Guinier, "From Racial Liberalism to Racial Literacy: *Brown v. Board of Education* and the Interest-Divergence Dilemma," *Journal of American History* 91, no. 1 (2004), 92–118.

[3]Charles J. Ogletree Jr. and Kimberly Jenkins Robinson, "Inequitable Schools Demand a Federal Remedy," in "Forum: Rodriguez Reconsidered: Is There a Federal Constitutional Right to Education?," *Education Next* 17, no. 2 (Spring 2017), 70–77, 72.

[4]Kevin Brown, "The Road Not Taken in Brown: Recognizing the Dual Harm of Segregation," *Virginia Law Review* 90, no. 6 (2004), 1579–99.

[5]Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* (Princeton, NJ: Princeton University Press, 2000).

rationale" as a constitutional case, in legal scholar Michael Klarman's words, though both the historical backlash and global political symbolism and significance of the case have often overshadowed that nuance.[6] As education historian Charles M. Payne has suggested, *Brown* has become "a milestone in search of something to signify."[7]

The court drew from history and social science throughout the opinion to summarize the new constitutional approach it was pursuing, emphasizing that it could not "turn the clock back to 1868 … or … 1896" but must "consider public education in the light of its full development and its present place in American life."[8] Klarman argues that because the court at the time was unwilling to actually go so far as to name racial classification as inherently unconstitutional, it focused instead on the importance of education and highlighted psychological harm caused by school segregation.[9] As Cheryl I. Harris argues, *Brown* dismantled the old structure of "whiteness as property" but failed to "clearly expose the real inequities produced by segregation," which allowed dramatic material inequality to be "ratified as an accepted and acceptable base line."[10]

The dialectical contradiction of *Brown* has been noted by many observers, then and now. Judge Robert L. Carter, a former NAACP attorney who had helped craft the *Brown* litigation strategy, wrote in 2007 that he had "come to believe that the *Brown* jurisprudence is itself tainted; that it was rendered by the Court with the internal understanding that it would not be implemented."[11] Sheryll Cashin argues that *Brown* represented the idea "that there should be at least one institution in American society that provides a common experience of citizenship and equal opportunity, regardless of the lottery of birth."[12] But Jack Balkin points out that the case "always had a dual nature," because it symbolized the expansive goal of securing "social rights in a welfare state" but focused only on racial discrimination laws in pupil placement.[13]

As many scholars have noted, the shift in the twentieth-century Supreme Court's expanded consideration of rights created the modern constitutional order, and *Brown* was a pivot point.[14] *Brown* did two key things that would be further developed in

[6]Michael Klarman, "An Interpretive History of Equal Protection," *Michigan Law Review* 90, no. 2 (Nov. 1991), 213–318, 247.

[7]Charles M. Payne, "'The Whole United States Is Southern!': *Brown v. Board* and the Mystification of Race," *Journal of American History* 91, no. 1 (June 2004), 83–91.

[8]*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), 492.

[9]Klarman, "An Interpretive History of Equal Protection," 247.

[10]Guinier, "From Racial Liberalism to Racial Literacy," at 96, citing Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review* 106, no. 8 (June 1993), 1707–91, 1753.

[11]Robert L. Carter, "*Brown*'s Legacy: Fulfilling the Promise of Equal Education," *Journal of Negro Education* 76, no. 3 (Summer 2007), 240–49, 240.

[12]Sheryll Cashin, *Failures of Integration: How Race and Class Are Undermining the American Dream* (New York: Perseus, 2004), 208.

[13]Jack M. Balkin, "What *Brown* Teaches Us about Constitutional Theory," *Virginia Law Review* 90, no. 6 (Sept. 2004), 1537–77, 1572.

[14]See Klarman, "An Interpretive History of Equal Protection"; Jim Newton, *Justice for All: Earl Warren and the Nation He Made* (New York: Riverhead, 2007); Erwin Chemerinsky, *The Case against the Supreme Court* (New York: Penguin, 2015); Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (New York: Basic Books, 2015).

future jurisprudence, in addition to its social and political impact.[15] First, it deployed the Equal Protection Clause to state that heightened judicial scrutiny would likely be required for any legislation that included race.[16] However, the decision's language limited itself to overturning the "separate but equal" doctrine of *Plessy v. Ferguson* specifically "in the field of public education."[17] The *Loving v. Virginia* case thirteen years later extended this ruling and announced the "very heavy burden of justification" under the Fourteenth Amendment that the court would henceforth require of any statutes drawn according to race.[18]

Second, *Brown* appeared to suggest that education itself was an unenumerated fundamental right. The opinion famously called education "perhaps the most important function of state and local governments," "the very foundation of good citizenship," and affirmed that "such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[19] Other unenumerated rights the court had deemed fundamental before and after *Brown* included the right of a parent to choose a child's education, the right to travel, the right to procreate, the right to privacy in decisions affecting procreation, and the right to marry.[20] While the opinion demurred on actually calling education a fundamental right, the language it used in defending access to public education was forceful, and it was immediately clear that the decision was extraordinarily significant, judging from the national as well as international reception.[21]

When *Brown v. Board of Education* turned fifty in 2004, Klarman argued that although *Brown* had been a judicially challenging decision—unanimity outcome notwithstanding—it was made possible by myriad social and historical circumstances in 1954 that included the civil rights movement as well as the justices' own preferences in the historical sweep of postwar developments, and that while the case was "less directly responsible than is commonly supposed" for ensuing civil rights protests, "it was more directly responsible for their violent reception."[22] The White backlash of

[15]For the impact of *Brown*, see: Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (New York: Vintage Books, 2004); James T. Patterson, Brown v. Board of Education: *A Civil Rights Milestone and Its Troubled Legacy* (New York: Oxford University Press, 2001); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 2005); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford: Oxford University Press, 2005).

[16]This analytic approach built on crucial hints dropped by the opinion in Sweatt v. Painter 339 U.S. 629 (1950), most notably, as well as previous cases.

[17]*Brown v. Board of Education*, 495.

[18]*Loving v. Virginia*, 388 U.S. 1 (1967), 9. See also *McLaughlin v. Florida*, 379 U.S. 184 (1964).

[19]*Brown v. Board of Education*, 493.

[20]See, for example, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of parents to oversee children's education); *Edwards v. California*, 314 U.S. 160 (1941) (discussion of a fundamental right to interstate travel); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (right to procreate); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to interstate travel); *Roe v. Wade*, 410 U.S. 113 (1973) (right to privacy); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marriage).

[21]Mark Tushnet, "The Significance of *Brown v. Board of Education*," *Virginia Law* Review 80, no. 1 (Feb. 1994), 173; Dudziak, *Cold War Civil Rights*.

[22]Michael J. Klarman, "'Brown' at 50," *Virginia Law Review* 90, no. 6 (Oct. 2004), 1613–33, 1633.

Klarman's thesis was even more central in national politics and governance by the time of *Rodriguez*.[23]

In the years after *Brown*, the court built a third meaningful strand of jurisprudence on poverty law. In a series of decisions throughout the 1950s and 1960s, the justices decided cases suggesting poverty was also perhaps a suspect classification that, like race, would now trigger heightened constitutional scrutiny under the Fourteenth Amendment.[24] In fact, in 1963, dissenting Justice John Mashall Harlan II grumbled in one such case about the court's "new fetish for indigency."[25] And in a 1969 case, Warren wrote for the majority in non-binding language, or dictum, that "a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[26] While not formally binding, it was evident the court was perhaps building toward a wealth discrimination precedent.

After the 1968 election of Richard Nixon signaled a broader rightward backlash against civil rights and the Johnson administration's War on Poverty, the court still showed sympathy to indigent defendants claiming wealth discrimination within the context of other fundamental rights.[27] So in *Boddie v. Connecticut* in 1971, the court found that the ability of indigent people to file for divorce affected their fundamental right to marry or to exit marriage if there were high filing fees.[28] The court's opinion in another 1971 case alleging combined racial and wealth discrimination in housing avoided the wealth discrimination claim entirely and only examined the record for racial discrimination.[29] This made it virtually inevitable that the court would have to settle the question of whether wealth discrimination was an unconstitutional suspect classification, but it also illustrates the ability of courts to analyze intersectional claims when they choose.

Meanwhile, the immediate symbolic vision of *Brown I* was devastated by the concomitant instruction the next year in *Brown II* ordering desegregation to occur "with all deliberate speed," serving as a near-endorsement of the slow-down and avoidance tactics that pro-segregationist hard-liners would pursue for years to come.[30] Finally, fourteen years after *Brown*, in *Green v. County School Board of New Kent County* in 1968, the court ruled that a freedom-of-choice plan was still not an acceptable desegregation plan and stated firmly that "such delays are no longer tolerable."[31] And in

[23] Klarman, From Jim Crow to Civil Rights; Joseph Lowndes, *From the New Deal to the New Right: Race and the Southern Origins of Modern Conservatism* (New Haven, CT: Yale University Press, 2009).

[24] *Griffin v. Illinois*, 351 U.S. 12 (1956); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Harper v. Virginia State Board of Elections*, 383 U.S. 662 (1966); *McDonald v. Board of Elections*, 394 U.S. 802 (1969).

[25] *Douglas v. California*, 359.

[26] *McDonald v. Board of Elections*, at 807.

[27] See Lowndes, *From the New Deal to the New Right*.

[28] *Boddie v. Connecticut*, 401 U.S. 371 (1971).

[29] James v. Valtierra, 402 U.S. 137 (1971); note Marshall's dissent, which focused on the wealth discrimination aspect of the case.

[30] *Brown v. Board of Education*.

[31] *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), 438, building on *Griffin v. School Board*, 377 U.S. 218 (1964), 234: "The time for mere 'deliberate speed' has run out."

Alexander v. Board of Education of Holmes County in 1969, the court issued a brief opinion that overturned its own standard of "all deliberate speed" from *Brown II* as unconstitutional and bluntly required all school districts to cease operating segregated schools "at once."[32] Desegregation had finally come to even the most recalcitrant southern schools, though the actual period of judicially supervised desegregation was brief.[33] And as Kevin Kruse argued in the context of Atlanta, Whites leaving cities for suburbs to avoid court-ordered desegregation throughout this era "fought to take their finances with them."[34]

The final case that casts a shadow over *Rodriguez* was decided just the year before, in 1972's *Wright v. Council of the City of Emporia*. The majority opinion found that the creation of new school districts in systems that had not yet completed desegregation was a violation of the court's rulings in *Brown* and *Green*.[35] Four Nixon nominees—Justices Harry Blackmun, Lewis Powell Jr., William Rehnquist, and Warren Burger—all argued that local control had a special and sacrosanct position in the history of education, an idea which education law scholar Derek Black has illustrated was more inventive than real.[36] Ultimately, the ascendant conservative wing of the court was unifying around the idea that forms of "secession" to avoid desegregation, whether geographic or, in the case of *Rodriguez*, fiscal, went beyond the mandate of *Brown*'s oversight. In *Rodriguez* the dissenters in *Wright* had their triumph.

While scholars have debated the impact of *Brown*, most have agreed that whatever other political, judicial, and social impacts it had, actual desegregation only substantively occurred for a few years, once the court had the cover of congressional action in the Civil Rights Act of 1964.[37] Gerald Rosenberg argues that this failure illustrates that "in terms of judicial effects … *Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform."[38] But Mark Tushnet points out that while *Brown* did not transform education in the segregated South, it did exemplify a critical moment in American political development as part of "a long-term collaboration between the Supreme Court and the New Deal (and later the Great Society) political coalition."[39] And legal historian Mary Dudziak, in the tradition of Bell's "interest-convergence" argument, shows that *Brown* reflects the ways in which "the Cold War *simultaneously* harmed the movement and created an opportunity for limited reform."[40]

[32] *Alexander v. Board of Education of Holmes County*, 396 U.S. 19, 20 (1969).

[33] For more context, see Rosenberg, *The Hollow Hope;* Cashin, *Failures of Integration.*

[34] Kevin M. Kruse, "The Politics of Race and Public Space: Desegregation, Privatization, and the Tax Revolt in Atlanta," *Journal of Urban History* 31, no. 5 (2005), 610, 612–13.

[35] *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972).

[36] Derek W. Black, "Localism, Pretext, and the Color of School Dollars," *Minnesota Law Review* 107 (2022), 1415, 1419.

[37] Gary Orfield and E. Susan Eaton, *Dismantling Desegregation: The Quiet Reversal of* Brown v. Board of Education (New York: The New Press, 1996).

[38] Rosenberg, *The Hollow Hope*, 71.

[39] Mark Tushnet, "Some Legacies of *Brown v. Board of Education*," *Virginia Law Review* 90, no. 6 (Oct. 2004), 1693, 1694.

[40] Mary L. Dudziak, "*Brown* as a Cold War Case," *Journal of American History* 91, no. 1 (June 2004), 32–42, 41 (emphasis author's).

If *Rodriguez* is haunted by *Brown*, the pain of resource inequality (a core issue in the four other cases unified under *Brown*) is the lingering cry of the unsettled ghost. Calling *Brown*'s egalitarianism "more symbolic than real," Kevin Gaines argues that the case failed to achieve the "structural vision of equality and redistributive justice" many Black people sought, and only offered "an attenuated formal equality that failed to address the inequitable distribution of resources and opportunities."[41]

It was virtually inevitable that a case would eventually reach the Supreme Court that *would* take up these resource inequalities. The social impact of *Rodriguez*, bookending *Brown*, was enormous. On *Rodriguez*'s relation to *Brown*, Robert L. Carter wrote that *Rodriguez* "effectively eviscerated many of the gains that were won in *Brown*" by validating huge disparities between poor, minority districts and wealthy White suburbs.[42]

Edgewood or Alamo Heights: Injustice, Inequality, and Politics

A legal case is built from briefs and filings, but also from a social context, embedded in place, space, and time. The local and national context of *Rodriguez* highlight why *this* case came at *this* moment in time. Compounding injustices, complex layers of inequality, and the political backdrop locally and nationally in the late 1960s and early 1970s were critical in bringing this particular case to the Supreme Court and determining the federal constitutional precedent for educational finance.

Three of Demetrio Rodriguez's four sons attended Edgewood Elementary School a block from his neat white house across a dusty field.[43] It was 1968 in San Antonio, Texas, and Rodriguez, a veteran who worked at nearby Kelly Air Force Base, was afraid that the education at Edgewood—with nearly half the teachers uncertified and on emergency permits in a poorly supplied and "crumbling" school building—"would not prepare his sons to compete for the good jobs that 'Anglos' controlled in San Antonio."[44] Students were frustrated as well, and hundreds of them marched out of Edgewood High School one morning in May 1968 to the superintendent's office to give a list of their demands for better educational opportunities.[45] They held signs demanding school and teaching improvements, often in stark language: "We want a gym not a barn."[46]

Demetrio Rodriguez became a community activist and organized with other concerned parents to request school improvements, but learned quickly that there was

[41]Kevin Gaines, "Whose Integration Was It? An Introduction," *Journal of American History* 91, no. 1 (June 2004), 19, 21.

[42]Carter, "*Brown*'s Legacy," 246.

[43]Peter Irons, *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court* (New York: Free Press, 1988), 283.

[44]Irons, *The Courage of Their Convictions,* 283–84.

[45]Matt Barnum argues that right at the moment when poor children might have a chance at greater resources to address their education, the notion spread that perhaps they were "uneducable" and money had no impact. Barnum, "The Racist Idea That Changed American Education," *Chalkbeat*, Feb. 22, 2023, https://www.chalkbeat.org/2023/2/27/23612851/school-funding-rodriguez-racist-supreme-court. See also Richard Schragger, "*San Antonio v. Rodriguez* and the Legal Geography of School Reform," in *Civil Rights Stories*, ed. Myriam E. Gilles and Risa Lauren Goluboff (San Francisco: Foundation Press, 2007), 92.

[46]Barnum, "The Racist Idea That Changed American Education."

no money to rebuild the schools and hire more qualified teachers.[47] They met with local civil rights attorney Arthur Gochman, who emphasized the central paradox: the low property wealth in the district, combined with the state property tax caps, made it impossible for the community to ever raise the necessary funds for quality education. Gochman's first act was to send a memo detailing the issues in the case to the newly established Mexican American Legal Defense and Educational Fund (MALDEF) in the hopes it could take on the costs of litigation—when MALDEF said no, Gochman paid for the litigation himself.[48]

As a new organization, it was understandable that MALDEF did not have the funds or perhaps the appetite to take on a case combining school segregation and resource inequality issues. Jeanne Powers has described the different paths taken by the Mexican American and African American desegregation campaigns through three major differences that highlight variations in the process of racial subordination among groups over time.[49] First, Mexican Americans were more likely to experience extralegal segregation by state actors, requiring the judiciary to attend to actions, data, and outcomes, rather than the explicit language of law alone. Additionally, Mexican Americans had been frequently considered "not-quite-white" by some courts, which, in the context of the early campaign to end de jure segregation by race, rendered their status complex. Finally, school districts often claimed that separation of Mexican American students owed to language rationales, which many courts found "plausible" as a defense of segregation.[50] Additionally, Steven Wilson argues that "the legacy of *Brown* is more troubled for Mexican Americans" because school districts manipulated existing "biracial (black-white) formulas" initially to transfer Black students into predominantly Mexican American schools and then call the schools "desegregated."[51]

But, in 1967, a significant ruling in the District Court of Washington, DC, by Circuit Judge J. Skelly Wright had foreshadowed the way courts could treat the complex intersection of race and wealth in education.[52] In *Hobson v. Hansen* Judge Wright wrote a sweeping and detailed opinion finding that the District of Columbia's public school system unconstitutionally deprived Black and poor children of their right to an equal education on par with the White and wealthy children of DC.[53] Mark Yudof, who became a co-counsel with Gochman in the *Rodriguez* litigation, wrote in 1974 that Gochman was cognizant of the *Hobson* ruling the year before he filed the complaint and

[47] Irons, *The Courage of Their Convictions,* 284–85.

[48] Mark G. Yudof and Daniel C. Morgan, "*Rodriguez v. San Antonio Independent School District*: Gathering the Ayes of Texas: The Politics of School Finance Reform," *Law and Contemporary Problems* 38, no. 3 (Winter 1974), 383, 391.

[49] Jeanne M. Powers, "On Separate Paths: The Mexican American and African American Legal Campaigns against School Segregation," *American Journal of Education* 121, no. 1 (Nov. 2014), 29, 30.

[50] Powers, "On Separate Paths," 29, 30.

[51] Steven H. Wilson, "*Brown* over 'Other White': Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits," *Law and History Review* 21, no. 1 (Spring 2003), 145, 191, 193.

[52] *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967) and "*Hobson v. Hansen*: Judicial Supervision of the Color-Blind School Board," *Harvard Law Review* 81, no. 7 (May 1968), 1511–27; Beatrice A. Moulton, "*Hobson v. Hansen*: The De Facto Limits on Judicial Power," *Stanford Law Review* 20, no. 6 (June 1968), 1249–68.

[53] *Hobson v. Hansen,* 406.

that it contributed to his legal strategy.[54] Gochman sought to extend the intersectional and intra-district logic in *Hobson* to disparities across districts within Texas.[55]

In Texas, meanwhile, the Governor's Committee on Public School Education had been charged by Governor John Connally in 1965 to thoroughly examine and develop a long-term plan to make Texas a leader in public education.[56] While the committee did suggest reforms to Texas's Minimum Foundation Program, including encouraging more equalization of affluent and poor districts, the timing ultimately failed.[57] The committee's report was published in 1968, "too late to have much chance of success" as the new governor "showed no inclination to push for school financing reform."[58] On the national stage, however, education law scholar Arthur Wise influentially argued in his 1968 book *Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity* that school finance litigation was the next step in equal protection advocacy.[59]

Given these legal and political trends, Gochman believed this was the moment to make an argument that disparities between schools could be a constitutional violation under the Fourteenth Amendment's Equal Protection Clause.[60] In a federal complaint in July 1968, he made three claims—wealth discrimination, race discrimination, and a violation of the fundamental right to education—each of which could be tenuous legally in its own way, but in combination made a powerful argument about the intersecting and overlapping nature of segregation, inequality, and opportunity.[61] The state court delayed hearing the case initially for several years to allow legislators to act on promised reforms, but the legislature failed to take action.[62]

While the *Rodriguez* plaintiffs waited, the movement toward school finance equality in courts gained more momentum. Three education policy scholars wrote an influential book in 1970 that argued for fiscal neutrality in schooling by building a system that mitigated disparities due to wealth.[63] Building on this conversation, in *Serrano v. Priest* in 1971, the California Supreme Court ruled for the plaintiffs in a case very similar to *Rodriguez*, and pointed out that "affluent districts can have their cake and eat it too" only because they were able to pay lower taxes while providing a high-quality education for their children, but that poor districts "have no cake at all."[64]

Back in Texas in December 1971, one of the judges on the three-judge panel lectured the states' lawyers about the disingenuousness of the legislative reform assurances

[54] Yudof and Morgan, "*Rodriguez v. San Antonio Independent School District*," 391.

[55] Michael Heise, "The Story of *San Antonio Independent School District v. Rodriguez*: School Finance, Local Control, and Constitutional Limits," in Michael Olivas and Ronna Schneider, eds., *Education Law Stories* (San Francisco: Foundation Press, 2007), 18.

[56] Yudof and Morgan, "*Rodriguez v. San Antonio Independent School District*," 387.

[57] Yudof and Morgan, "*Rodriguez v. San Antonio*," 389.

[58] Yudof and Morgan, "*Rodriguez v. San Antonio*," 390.

[59] Arthur E. Wise, *Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity* (Chicago: University of Chicago Press, 1968).

[60] Yudof and Morgan, "*Rodriguez v. San Antonio*," 391.

[61] Schragger, "*San Antonio v. Rodriguez* and the Legal Geography of School Reform," 92.

[62] Yudof and Morgan, "*Rodriguez v. San Antonio*," 392.

[63] John E. Coons, William H. Clune III, and Stephen D. Sugarman, *Private Wealth and Public Education* (Cambridge, MA: Harvard University Press, 1970).

[64] *Serrano v. Priest*, 5 Cal.3d 584 (1971), 600.

(the legislature had adjourned that year without addressing the issue), saying that "it makes you feel that it just does no good for a court to do anything than, if it feels these laws are suspect, declare them unconstitutional."[65] The case went to trial, and Gochman designed a strategy to contrast the profoundly minimal funding and resources in Edgewood schools with the wealthy, overwhelmingly White Alamo Heights school district.[66] While three out of every four Alamo Heights residents had completed high school, "the Edgewood figure was less than one in ten."[67]

Geography played an important role in the case. Richard Schragger argues that because the argument of the plaintiffs in the *Rodriguez* case was fundamentally comparative, it was deeply geographical as well.[68] As he points out, the wooded North San Antonio hills of Alamo Heights had been historically settled by wealthy Whites in part to protect them from the flash flooding in the lower areas of the city, like Edgewood on the West Side, where poor and working-class Mexican Americans were concentrated.[69] These floods could quickly lead to tragedies, including reports that children were killed in floods as they walked to school, but racially restrictive covenants had long blocked Black and Mexican American people from purchasing housing on the north side of the city.[70] Another scholar, Christine Drennon, notes that such school districts are "constitutive of the class and race relations" embedded in their histories and landscapes of "privilege and deprivation," yet the judiciary treats each district as "the source of its own identity, its own problems, and its own solutions."[71]

The three-judge panel ruled within days that Texas had failed to even establish a reasonable basis under the Fourteenth Amendment for the financing system, as well as affirming Gochman's novel claims about wealth as a suspect class and education as a fundamental right. *Serrano* had initially appeared to be the case that would bring the school finance issue before the Supreme Court, but *Serrano* also relied on the California state constitution as well as the US Constitution, creating more complex potential grounds for appeal. So it was *Rodriguez*—a case that had been described as "frivolous" by the Texas attorney general early on—that reached the court first, thanks in part to Texas's immediate decision to appeal the District Court ruling.[72]

Dividing the Court: *Rodriguez* and *Milliken*

When *Rodriguez* reached the US Supreme Court, some in the civil rights community and in the media anticipated that *Rodriguez* would be the "*Brown v. Board of Education*

[65]Irons, *The Courage of Their Convictions,* 286.
[66]Irons, *The Courage of Their Convictions,* 286.
[67]Irons, *The Courage of Their Convictions,* 287.
[68]Schragger, "*San Antonio v. Rodriguez* and the Legal Geography of School Reform," 86.
[69]Schragger, "*San Antonio v. Rodriguez* and the Legal Geography of School Reform," 87.
[70]Mary Beth Rogers, *Cold Anger* (Denton: University of North Texas Press, 1990), 110–13; Peter Skerry, *Mexican Americans: The Ambivalent Minority* (New York: Free Press, 1993), 177–78, cited in Schragger, "*San Antonio v. Rodriguez*," 87.
[71]Christine M. Drennon, "Social Relations Spatially Fixed: Construction and Maintenance of School Districts in San Antonio, Texas," *Geographical Review* 96, no. 4 (Oct. 2006), 567–93, 568.
[72]Yudof and Morgan, "*Rodriguez v. San Antonio*," 392.

of the 1970s," as described by a front-page *Wall Street Journal* story.[73] However, the composition of the court had changed significantly in the few years since some of the pivotal cases discussed earlier, from *Alexander v. Holmes County* to *Boddie v. Connecticut*. With the change in composition had come a resistance to the progressive racial desegregation and heightened scrutiny of differential treatment based on poverty that those cases symbolized.

By 1973 Justice William O. Douglas, nominated to the court by Franklin D. Roosevelt, was the sole remnant of the *Brown* court, and four of the five justices who voted in favor of Texas in *Rodriguez* were Nixon nominees.[74] The *Rodriguez* Court was thus, as Charles Ogletree has argued, fundamentally "a different forum in which to advance the argument that education was a fundamental right or that wealth was a suspect class."[75] The Burger Court was once described as "the counter-revolution that wasn't," yet Klarman argues that while that might hold for cases on gender or free speech, there is a key area in which the Burger Court's reversals proved fateful.[76] The true counterrevolution was in stepping back from the Warren Court trajectory that would have identified discriminatory wealth effects—in education and other areas—as violations of equal protection.[77]

As mentioned earlier, the *Rodriguez* case made three intersecting desegregation claims: discrimination on the basis of race, discrimination on the basis of wealth, and violation of the right to education.[78] Gochman's complaint argued all three, and he later said that Demetrio Rodriguez was chosen as the named plaintiff in the hopes that his surname would emphasize the racial angle in the case.[79] Unlike Judge Wright in *Hobson*, the court dismissed the opportunity to engage in an intersectional desegregation analysis of the issues.[80] Daniel HoSang has argued that politics in this era often explained racial segregation "entirely through neutral market forces" and used claims of "racial innocence" and "suburban innocence" to undergird anti-desegregation campaigns.[81] HoSang also describes a White suburban "political affect" that interpreted low property taxes and racially homogenous education as "not only unassailable prerogatives, but conditions that had no connection to or culpability for the widening social

[73] Barnum, "The Racist Idea That Changed American Education."

[74] Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004).

[75] Charles J. Ogletree Jr., "The Legacy and Implications of *San Antonio Independent School District v. Rodriguez*," *Richmond Journal of Law and the Public Interest* 17, no. 2 (Winter 2014), 515–48, 533.

[76] Klarman, "An Interpretive History of Equal Protection," 281-90.

[77] Klarman, "An Interpretive History of Equal Protection," 283.

[78] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

[79] Irons, *The Courage of Their Convictions*, 284.

[80] For discussion of the intersectionality issues present in this case, see Camille Walsh, "Erasing Race, Dismissing Class: *San Antonio Independent School District v. Rodriguez*," *Berkeley La Raza Law Journal* 21, no. 133 (2011), 133–71; Rachel Moran, "Stopping the Conversation about Isolation by Race and Poverty Before it Really Began: The Case of *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)," in *Critical Race Judgments: Rewritten U.S. Court Opinions on Race and the Law*, ed. Bennett Capers et al. (Cambridge: Cambridge University Press, 2022), 675–94.

[81] Daniel Martinez HoSang, *Racial Propositions: Ballot Initiatives and the Making of Postwar California* (Berkeley: University of California Press, 2010), 121, 111, 120–21.

and racial inequalities in neighboring urban areas."[82] This type of innocence presumption was embedded in the *Rodriguez* ruling as well as *Milliken v. Bradley* a year later to justify segregation.

As Texas reeled from the initial decision in *Rodriguez*, the US Senate held hearings on school finance inequalities and instituted a select committee on the issues chaired by Senator Walter Mondale. An attorney from the nationwide resource on school finance lawsuits, the Lawyers' Committee for Civil Rights Under Law, testified in 1971 that the goal of the *Rodriguez* litigation was to go beyond *Serrano* and combine wealthy White and poor minority school districts in order to achieve true desegregation.[83]

In Supreme Court oral arguments in 1972, Texas's attorney, Charles Alan Wright, acknowledged disparities in an "imperfect" system.[84] While Justice Marshall was ill the day of the oral arguments, Justice Douglas asked a final pointed question to Wright, highlighting that the record of the case "pretty clearly demonstrated" that Mexican Americans as a group were suffering from disproportionately unequal funding. Wright acknowledged that while it was "a major portion of the plaintiff's complaint," race and taxable wealth correlations in the case were just "a happenstance."[85] Gochman, meanwhile, responded to Wright's argument that Texas only need give students a "minimum" education by pointing to the contrasts, asking, "Are we going to have two classes of citizens—minimum opportunity students, and first class citizens?"[86]

The debate in *Rodriguez* was also in part structured by what education writer Matt Barnum has described as "educational fatalism," or "the racist idea at the heart of *Rodriguez*."[87] Barnum points out that this popular idea in the Nixon administration absolved government of responsibility for spending to improve opportunities, drawing on a controversial 1966 report by sociologist James Coleman that purported to show no relationship between spending and outcomes.[88] This backlash against spending gained political traction at almost precisely the moment desegregation orders were beginning at last to be enforced, as discussed earlier, highlighting that a fiscal justification for inequality could neatly slot in to replace an explicitly racialized legal structure.

On handwritten notes on an early draft opinion, Powell wrote, "Don't admit or refer to 'discriminatory treatment of children'—it is not 'discriminatory'; there are inequalities resulting from [the] system."[89] And under a page of handwritten notes for conference on *Rodriguez*, Powell wrote in large letters that "Brown was based on racial discrimination."[90] Yet as the NAACP amicus brief asserted, "*Plaintiffs are all Mexican Americans*. They claimed relief as and for Mexican Americans" (emphasis in

[82] HoSang, *Racial Propositions*, 120–21.

[83] Testimony of Sarah Carey, U.S. Senate Select Committee on Equal Educational Opportunity, *Part 16B: Inequality in School Finance* (Washington, DC: GPO, Oct. 1971), 6872.

[84] *San Antonio v. Rodriguez* oral arguments, https://www.oyez.org/cases/1972/71-1332.

[85] *San Antonio v. Rodriguez* oral arguments; Irons, *The Courage of Their Convictions*, 289.

[86] *San Antonio v. Rodriguez* oral arguments; Irons, *The Courage of Their Convictions*, 289.

[87] Barnum, "The Racist Idea That Changed American Education."

[88] Barnum, "The Racist Idea That Changed American Education."

[89] Lewis Powell, undated revisions, *San Antonio v. Rodriguez*, Series 10.6, Supreme Court Case Files, Box 8–153, Lewis F. Powell Jr. Papers, Washington and Lee University (hereafter *Rodriguez:* Powell Papers).

[90] Lewis Powell, undated conference notes, *Rodriguez:* Powell Papers.

original).[91] Similarly, an amicus brief from the ACLU, La Raza, and other organizations argued that the inequalities in Texas's school funding and residential segregation were *prima facie* racial discrimination, and that, to the litigants and observers nationwide, the issue of race was "not an afterthought" but instead "the very core of this case."[92] *Rodriguez* was a desegregation case to advocates and activists, but not the court.

Derek Black argues that in both *Rodriguez* and *Milliken*, the Supreme Court "articulated a localism narrative premised on the assumption that local control is the historical foundation of public education … without bothering to seriously engage education history."[93] In *Rodriguez*, this idea took root, with the majority calling local control "vital" and "of overriding importance," and by *Milliken* the following year the court was prepared to say that "no single tradition in public education is more deeply rooted than local control over the operation of schools."[94] James Ryan similarly argues that disparate types of school inequality are linked by the belief in the sacredness of district control, specifically suburban districts, pointing out that "each major reform has had the potential to link the fate of urban and suburban schools, or urban and suburban students, but that potential has not been realized."[95]

Class was ever-present in the litigation. As Mark Yudof said in the lead-up to the Supreme Court argument, "Poor districts do not choose to spend less for education. It's like telling a man who makes $50 a week that he has the same right as a millionaire to send his son to Exeter."[96] For attorneys, *Rodriguez* was the "doorstop to the Warren Court's poverty precedents."[97] As I have argued elsewhere, *Rodriguez* also illustrated the culmination of a language of wealth and Whiteness that claimed the mantle of taxpayer and adhered to a marketplace model of educational mobility.[98] Gochman pointed out in oral argument that "if it was a rich guy in a poor district he could just move," a sentiment that Justice Powell at least hinted at in the majority opinion, implying that this kind of marketplace of choice was part of the beneficial nature of local control.[99] Powell indeed viewed himself as "the education justice" as a former school board member and a principal author of an amicus brief opposing busing filed on behalf of two Virginia counties in the 1972 case *Swann v. Charlotte-Mecklenburg Board of Education*.[100]

[91] Jack Greenberg et al., *Brief for the NAACP Legal Defense Fund as Amicus Curiae Supporting Appellees*, filed Aug. 21, 1972, 7, *San Antonio v. Rodriguez*, 411 U.S. 1 (1973) 1972 WL 136434.

[92] Norman Dorsen et al., *Brief for La Raza et al. as Amicus Curiae Supporting Appellees*, filed Sept. 7, 1972, 11 *San Antonio v. Rodriguez*, 411 U.S. 1 (1973) 1972 WL 136443.

[93] Black, "Localism, Pretext, and the Color of School Dollars," 3.

[94] Black, "Localism, Pretext, and the Color of School Dollars," 3; *Milliken v. Bradley*, 741, cited in Black, "Localism, Pretext, and the Color of School Dollars," 3.

[95] James E. Ryan, *Five Miles Away, A World Apart: One City, Two Schools, and the Story of Educational Opportunity in Modern America* (Oxford: Oxford University Press, 2011), 12.

[96] Summary of remarks made at the National Council for the Advancement of Education Writing Seminar on School Finance, Oct. 3, 1972, by Mark Yudof, co-counsel for the *Rodriguez* plaintiffs, *Rodriguez* backgrounder from NCAEW, Jan. 1973, Part I, Box 297, Papers of William Brennan, Library of Congress.

[97] Schragger, "*San Antonio v. Rodriguez* and the Legal Geography of School Reform," 97.

[98] Camille Walsh, *Racial Taxation: Schools, Segregation, and Taxpayer Citizenship, 1869-1973* (Chapel Hill: University of North Carolina Press, 2018).

[99] *San Antonio v. Rodriguez* oral arguments.

[100] John C. Jeffries Jr., Justice Lewis F. *Powell: A Biography* (New York: Fordham University Press, 2001), 284.

The 5-4 verdict was authored by Justice Powell in a fifty-five-page majority opinion, with a concurrence from Justice Potter Stewart and dissents by Justices William J. Brennan, Byron White, and Thurgood Marshall. Only Justice Marshall's dissent rivalled Powell's at sixty-two pages in length, addressing point by point each of the majority's claims. Marshall called the ruling "a retreat from our historic commitment to equality of educational opportunity" that would enable "state discrimination," and described it as "unsupportable acquiescence" to a financing system that kept children from their full potential.[101]

Marshall also called the fiscal backlash argument that money has no effect on educational quality an "absurdity" and asked sardonically why, if money didn't matter, had so many of the wealthiest school districts across the country zealously jumped in to support the Texas legislation?[102] Finally, he concluded that "the Court's suggestions of legislative redress and experimentation will doubtless be of great comfort to the school children of Texas' disadvantaged districts, but, considering the vested interests of wealthy school districts in the preservation of the status quo, they are worth little more."[103] Marshall's prediction of state discrimination would later come to fruition in the complex and sometimes contradictory state outcomes, as discussed in the last section.

While the *Brown* Court dealt with significant Cold War anxieties, those anxieties contributed to the framing, delivery, and urgency of that decision rather than reversing its sought outcome.[104] In a very different way, in *Rodriguez* the anti-communist fears of Justice Powell and others tainted any argument for equal or even more equitable educational funding, particularly equalization premised in the long-term disparities in incomes among families and neighborhoods.[105]

As I have argued elsewhere, it was one thing in an anti-communist era to pay at least lip service to racial desegregation and thereby eliminate one pillar of the Soviet critique of US hypocrisy—it was quite another to directly admit that income inequality in the US was unjustified.[106] Political scientist Paul Sracic describes Powell's belief system as "filtered through the prism of anticommunism," and Powell's notes preparing for the initial conference on the case show him adamant that "in a free enterprise society we could hardly hold that wealth is suspect. This is a communist doctrine but is not even accepted (except in a limited sense) in Soviet countries."[107] He feared "national control of education" would be the outcome of the case and wrote that such a system would resemble "Hitler, Mussolini, and all Communist dictators."[108]

[101] *Rodriguez*, 71.
[102] *Rodriguez*, 84–85.
[103] *Rodriguez*, 132.
[104] Dudziak, *Cold War Civil Rights*.
[105] Paul Sracic, "The *Brown* Decision's Other Legacy: Civic Education and the *Rodriguez* case," *PS: Political Science and Politics* 37, no. 2 (April 2004), 217; Camille Walsh, "*Rodriguez* in the Court: Contingency and Context," in Charles J., Ogletree Jr. and Kimberly Jenkins Robinson, eds., *The Enduring Legacy of* Rodriguez*: Creating New Pathways to Equal Educational Opportunity* (Cambridge, MA: Harvard Education Press, 2015), 45–64.
[106] Walsh, *Racial Taxation*, 148–54.
[107] Sracic, "The *Brown* Decision's Other Legacy," 217.
[108] Memo from Powell to Hammond, Oct. 9, 1972, *Rodriguez*: Powell Papers, 1–3.

While the *Keyes v. Denver School District No. 1* case, argued the same day as *Rodriguez*, was significant in defining de facto segregation in a northern city as a remediable constitutional violation in the same vein as the de jure segregation challenged in *Brown*, it proved to be one of the last gasps of the court's brief commitment to the more expansive interpretation of *Brown*.[109] And, in fact, hints of the opening chasm are seen from the four dissenting justices in *Rodriguez*, who circulated a memorandum early on in *Keyes* arguing that the de facto segregation at issue was an infringement of the fundamental right to education, a rationale ultimately not incorporated into the compromise majority opinion.[110]

The tenuous victory in *Keyes* and the blistering defeat in *Rodriguez* were followed a year later by the slamming of the metropolitan desegregation door in *Milliken v. Bradley*. In discussing *Milliken*, Powell's former law clerk J. Harvie Wilkinson connected the case to *Rodriguez*, saying that by 1974 "urban school finance was in desperate shape" and that the "Court had not helped much either."[111] He argued that the taxing of suburban property (under the kind of broad metropolitan desegregation sought in *Milliken* and ultimately denied by the majority) to support all schools, while also working to ensure racial composition throughout, was "a way for the Court to soften the fiscal blow dealt the dispossessed in *Rodriguez*."[112] Instead, "the Court 'saved' the suburbs," in what Wilkinson called "an act of absolution" for White Americans' responsibility for urban poverty.[113]

Justice Douglas wrote in his *Milliken* dissent that "today's decision, given *Rodriguez*, means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the black schools are not only 'separate' but 'inferior.'"[114] Justice Marshall argued that after "20 years of small, often difficult steps … the Court today takes a giant step backwards," and suggested the ruling was more a reflection of "a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principle of law."[115] Finally, Marshall predicted that simply allowing growing metropolitan segregation would be a choice "our people will ultimately regret."[116]

Jack Balkin posits that in *Rodriguez* and *Milliken*, the four Nixon appointees reflected "the white majority's attitudes toward the Second Reconstruction and produced a corresponding retrenchment in constitutional doctrine."[117] Sheryll Cashin argues that *Milliken*, decided "only six years after the Court had finally begun to enforce *Brown* with alacrity, presaged its demise" because the ruling "effectively sanctioned

[109] *Keyes v. Denver School District No. 1*, 413 U.S. 189 (1973).

[110] Klarman, "An Interpretive History of Equal Protection," 283.

[111] J. Harvie Wilkinson III, *From* Brown *to* Bakke: *The Supreme Court and School Integration: 1954-1978* (Oxford: Oxford University Press, 1979), 221.

[112] Wilkinson III, *From* Brown *to* Bakke, 221.

[113] Wilkinson III, *From* Brown *to* Bakke, 222, 224.

[114] *Milliken v. Bradley*, 418 U.S. 717, 761 (1974).

[115] *Milliken v. Bradley*, 782, 814.

[116] *Milliken v. Bradley*, 815.

[117] Balkin, "What *Brown* Teaches Us about Constitutional Theory," 1555.

separate and unequal schooling."[118] In *Milliken*, the court solidified its retrenchment away from the Warren Court's focus on the rights of the disadvantaged, as Adam Cohen argues, and stepped back from active desegregation rulings by ruling interdistrict desegregation unconstitutional.[119] And as Michael Klarman argues, *Rodriguez* was the case in which "the door to discovery of new fundamental rights was firmly shut."[120] Other scholars describe the *Rodriguez* decision as a moment when the Supreme Court "dramatically weakened the efficacy of the Equal Protection Clause for challenging racial funding disparities."[121]

James Ryan connects the justifications used by the court in *Milliken* and in *Rodriguez*, arguing that "in the desegregation context, local control protected the ability of suburban schools to reserve their seats for local students," while "in the school finance context, local control protected the ability of wealthy suburban districts to spend greater resources on their own schools."[122] The result of this is to leave suburban schools "untouched" by school finance restructuring, just as they were "untouched" by desegregation orders.[123]

In the *Plyler v. Doe* case in 1982, the court confronted another case from Texas calling into question whether the state was permitted to entirely deprive children of undocumented parents from having access to public education.[124] The Supreme Court found that absolute deprivation of education was different than the aspects of inadequacy and inequality in *Rodriguez*.[125] Several years later the *Kadrmas v. Dickinson* case once again raised the question of wealth and poverty in public education, when a family sued their rural school district claiming that fees for busing discriminated against poor families, which the Supreme Court dismissed.[126]

In later school desegregation cases the court pulled back bit by bit on the remedies they would allow and the extent of desegregation oversight.[127] Cashin writes that Justice Marshall felt "personal devastation" in his final term, when as his clerk she worked with him on his dissent in *Board of Education of Oklahoma City v. Dowell* in 1991, as the majority allowed federal desegregation orders to lapse.[128] Marshall wrote that Oklahoma had maintained segregated schools, either de jure or de facto, since statehood began until the state was finally forced in 1972 by a federal court to implement an actual desegregation plan. "The majority today suggests that 13 years of

[118] Sheryll Cashin, *White Space, Black Hood: Opportunity Hoarding and Segregation in the Age of Inequality* (Boston: Beacon Press, 2022), 142–45.

[119] Adam Cohen, *Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America* (New York: Penguin, 2021).

[120] Klarman, "An Interpretive History of Equal Protection," 281, 282.

[121] Preston C. Green III, Bruce D. Baker, and Joseph O. Oluwole, "School Finance, Race, and Reparations," 27 *Washington and Lee Journal of Civil Rights and Social Justice* 483, no. 2 (2021), 498.

[122] Ryan, *Five Miles Away, A World Apart*, 7.

[123] Ryan, *Five Miles Away, A World Apart*, 8.

[124] Plyler v. Doe, 457 U.S. 202 (1982).

[125] *Plyler v. Doe*.

[126] *Kadrmas v. Dickinson*, 487 U.S. 450 (1988).

[127] *Crawford v. Board of Education*, 458 U.S. 527 (1982); *Board of Education of Oklahoma City v. Dowell*, 489 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992); and *Missouri v. Jenkins* (Missouri II), 515 U.S. 70 (1995).

[128] Cashin, *Failures of Integration*, 209.

desegregation was enough."[129] Following this, in 2007's *Parents Involved in Community Schools v. Seattle School District No. 1*, the court majority invalidated voluntary school desegregation plans in Seattle and Louisville, Kentucky, as overly broad and placed a strong punctuation mark on the modern court's shift away from *Brown* and its progeny (even as the majority and dissent both cited the case as affirming their positions).[130] Retrenchment in constitutional doctrine increased with each decision, and resegregation quickly followed.[131]

The *Rodriguez* ruling ensured that even where states attempt some internal form of equalization, the precedent it set would not address the often-larger resource needs of disadvantaged students nor respond to the interstate and interdistrict resource inequalities that perpetuate many of those disadvantages.[132] In his notes on the *Rodriguez* case, Powell acknowledged that while his opinion would effectively kick the case and any similar cases back to state courts, such state judiciaries were "long shots" for plaintiffs "challenging discrimination in school finance systems."[133] At first, state courts proved him wrong with a handful of victories for litigants arguing for school funding equality at the state constitutional level. However, as shown below, Marshall's dissenting prediction, that "the vested interests of wealthy school districts in the preservation of the status quo" would be unlikely to substantively address such profound and long-term inequalities, proved to be prescient.

Rodriguez's Legacy for State School Finance Law

Mark Yudof, Gochman's co-counsel in *Rodriguez*, years later began a talk by describing school finance as "like a Russian novel: long, tedious, and everyone dies in the end."[134] Education law scholar Julie Underwood describes it as "like a Stephen King novel—it takes months to read and scares you half to death in the process."[135] These analogies highlight the legacy of *Rodriguez*'s drastic foreclosure of federal remedies: widely variable state-level school funding desegregation rulings that have forced advocates to employ constantly shifting litigation strategies. Many scholars have identified an initial series of waves—at least three—of school finance litigation spanning the 1960s through the 2000s at least.[136] In the initial challenges to the system of school funding in the

[129] Cashin, *Failures of Integration*, 211.

[130] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). See also Erwin Chemerinsky, "Making Schools More Separate and Unequal: *Parents Involved in Community Schools v. Seattle School District No. 1*," *Michigan State Law Review*, no. 3 (2014), 633–46.

[131] Sean F. Reardon et al., "*Brown* Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools," *Journal of Policy Analysis and Management* 31, no. 4 (Fall 2012), 876–904.

[132] Ogletree Jr. and Jenkins Robinson, "Inequitable Schools Demand a Federal Remedy," 70–77, 74.

[133] Justice Lewis Powell to J. Harvie Wilkinson III, memorandum, Aug. 30, 1972, undated conference notes, *Rodriguez*: Powell Papers.

[134] Mark Yudof, "School Finance Reform in Texas: The Edgewood Saga," *Harvard Journal on Legislation* 28, no. 2 (Summer 1991), 499–506, 499.

[135] Julie K. Underwood, "School Finance Litigation: Legal Theories, Judicial Activism, and Social Neglect," *Journal of Education Finance* 20, no. 2 (Fall 1994), 143–62.

[136] Michael Heise, "State Constitutions, School Finance Litigation, and the 'Third Wave': From Equity to Adequacy," *Temple Law Review* 68, no. 3 (Fall 1995), 1151; Christopher Roellke, Preston Green, and

1960s leading up to *Rodriguez,* the strategy involved making need-based claims, with advocates arguing that in many cases more resources may be needed for disadvantaged students than for affluent students.[137] Courts did not typically find this needs-based argument convincing, with the Virginia Supreme Court stating in the 1969 case *Burris v. Wilkerson* that "courts have neither the knowledge, nor the means, nor the power to tailor the public monies to fit the varying needs of the students throughout the State."[138] *Rodriguez*, following on *Serrano*, had already shifted to emphasizing the minimal property wealth that many poor districts had available and emphasizing a standard of "fiscal neutrality" between poor and rich districts' funding.[139]

This second wave of school funding litigation, emphasizing equalization, while obviously unsuccessful federally, had some brief success when rooted in state constitutions. The precedent around the idea of a *state* constitutional right to education post-*Rodriguez* has remained unchallenged, which Derek Black calls "a legacy that has outlived *Brown* in many important practical respects, even if not nearly as well known by the average person."[140] In the third wave, plaintiffs argued that states had not provided sufficient funding to achieve minimum educational standards, or "adequacy," which has generally been a more winning argument (approximately two-thirds of cases won).[141]

Scholars examining the *DeRolph v. State* litigation in Ohio have argued that the shifting definitions of adequacy track the changes in litigation strategy. Indeed, the concept of "basic minimal skills" adequacy mentioned in *Rodriguez* was used in *Board of Education of Levittown v. Nyquist* in 1982 to uphold the state's school finance system as minimally adequate.[142] But at least at the state level, local judges have also seemed less likely to credulously accept the spending backlash argument that levels of funding were totally irrelevant, with one responding to a state's argument with, "Money doesn't matter? That dog won't hunt in Dodge City."[143]

Erica H. Zielewski, "School Finance Litigation: The Promises and Limitations of the Third Wave," *Peabody Journal of Education* 79, no. 3 (2004), 104; Lauren Gillespie, "The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education," *Cornell Law Review* 95, no. 5 (July 2010), 989–1020; Carlee Poston Escue, William E. Thro, and R. Craig Wood, "Some Perspectives on Recent School Finance Litigation," *West's Education Law Reporter* 268, no. 601 (Aug. 2011), 1–22; David G. Hinojosa, "Race-Conscious School Finance Litigation: Is a Fourth Wave Emerging?," *University of Richmond Law Review* 50, no. 3 (March 2016), 869–92.

[137]Kim Reuben and Sheila Murray, "Racial Disparities in Education Finance: Going Beyond Equal Revenues," Brookings Tax Policy Center Discussion Paper No. 29 (Nov. 2008), https://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/411785-Racial-Disparities-in-Education-Finance-Going-Beyond-Equal-Revenues.PDF.

[138]Reuben and Murray, "Racial Disparities in Education Finance."

[139]*Serrano v. Priest.*

[140]Derek W. Black, *Schoolhouse Burning: Public Education and the Assault on American Democracy* (New York: PublicAffairs, 2020), 202.

[141]Hinojosa, "Race-Conscious School Finance Litigation."

[142]Patricia F. First and Barbara M. de Luca, "The Meaning of Educational Adequacy: The Confusion of *DeRolph*," *Journal of Law & Education* 32, no. 2 (April 2003), 185–216, 201–5.

[143]Bruce D. Baker, *School Finance and Education Equity: Lessons from Kansas* (Cambridge, MA: Harvard Education Press, 2022), 5.

But even equalizing monetary inputs does not sufficiently address equity concerns, which is why the criteria have recently again become more "outcome, rather than input related."[144] Reuben and Murray argue that the wave of outcome-based adequacy lawsuits at the state level, from the 2000s on, are a rebirth of the "needs-based" claims of the 1960s.[145] For example, the *Abbott v. Burke* litigation in New Jersey in the 1990s used a "more expansive notion of adequacy," in finding that the state needed to give "poorer, disadvantaged children a chance to compete with relatively advantaged students."[146] However, James Ryan examined early state evidence in the decades after *Rodriguez* indicating that predominantly minoritized school districts are still less likely to have successful litigation or legislation, further entrenching racial inequality in school funding systems.[147] As Douglas Reed argues, "A racial thread winds around the core of class conflict over the distribution of educational money."[148]

But David Hinojosa suggests that a fourth wave of race-conscious school finance litigation may be emerging in cases such as *Montoy v. Kansas* (2003), *Lynch v. Alabama* (2011), and *Williams v. Reeves* (2020).[149] Similarly, Michael Heise argues that "the *Sheff v. O'Neill* litigation in Connecticut, which conspicuously conflated race and school finance, addressed a task side-stepped by the Supreme Court in *Rodriguez*" by "synthesizing school finance and desegregation theory."[150] Kiracofe and Weiler also examine recent federal school finance lawsuits as a signal of the fourth wave in educational finance litigation.[151] They hypothesize that the future may hold "more cases filed in federal courts contending a state's funding formula is denying a specific group of students access to an adequate and equitable education."[152] Another scholar argues that an "individual-rights approach to enforcing education obligations" could sidestep the challenges of systemic litigation.[153]

[144]Underwood, "School Finance Litigation," 144.

[145]Reuben and Murray, "Racial Disparities in Education Finance."

[146]First and de Luca, "The Meaning of Educational Adequacy," 208-9.

[147]James E. Ryan, "The Influence of Race in School Finance Reform," *Michigan Law Review* 98, no. 2 (Nov. 1999), 432–81, 433. See also James E. Ryan, "*Sheff*, Segregation, and School Finance Litigation," *NYU Law Review* 74, no. 2 (May 1999), 529–74.

[148]Douglas S. Reed, *On Equal Terms: The Constitutional Politics of Educational Opportunity* (Princeton, NJ: Princeton University Press, 2001), 164–65.

[149]Hinojosa, "Race-Conscious School Finance Litigation."

[150]Heise, "The Story of *San Antonio Independent School District v. Rodriguez*," 98-99.

[151]Christine Rienstra Kiracofe and Spencer Weiler, "Surfing the Waves: An Examination of School Funding Litigation from *Serrano v. Priest* to *Cook v. Raimondo* and the Possible Transition of the Fourth Wave," *BYU Education & Law Journal* 2022, no. 1 (2022), 5. See also Christie Geter, "Let's Try This Again, Separate Educational Facilities Are Inherently Unequal: Why Minnesota Should Issue a Desegregation Order and Define Adequacy in *Cruz-Guzman v. State*," *Law & Inequality* 38, no. 1 (2020), 165, 174–75; Lauren Nicole Gillespie, "Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education," *Cornell Law Review* 95, no. 5 (July 2010), 989–1020; Hinojosa, "Race-Conscious School Finance Litigation."

[152]Kiracofe and Weiler, "Surfing the Waves," 57.

[153]Scott R. Bauries, "A Common-law Constitutionalism for The Right to Education," 48 *Georgia. Law Review* 949 (2014), 949–1018, 954.

Time also matters in an interpretation of "equality" in resources. As Justice Stewart once said in a draft dissent, "a public school system is not built in a day."[154] Resource inequality builds exponentially with time, accreting ever more privileges, buildings, and multiplied benefits, or deteriorating to such drastic levels that a "fresh start" of "equal" funding will not mitigate circumstances. Tracy Steffes has argued that, by 1985, the Illinois Resource Equalizer Formula of 1973 that aimed to break the link between wealth and school funding had produced conditions "*more* inequitable than before the Resource Equalizer law was passed."[155] Steffes argues that wealthy districts "benefited from generations of tax benefits and an ability to monopolize their wealth," allowing them to build a politics that "defended those privileges as rights."[156]

Ian Millhiser examines the legislative school-financing efforts and highlights the relative budgetary powerlessness of local governments, arguing that the legislative branch is "structurally unfit to provide educational civil rights," and that "an affirmative right to an adequate education can only come from the courts."[157] Other scholars counter that "any solution through the judicial process will be inadequate… . While the courts can identify the wrong, they are incapable of providing effective remedies by adjusting formulas or mandating expenditures."[158]

There is a debate over how to interpret funding levels today across the nation, fifty years after *Rodriguez*. Reed argues that the "judicial revolution" in state litigation sparked by *Rodriguez* "has meaningfully changed the amount of money going to poor school districts."[159] But Matthew Saleh suggests that the more recent waves of litigation illustrate the challenge at the heart of cases from *Rodriguez* onward, that technically equal funding does not address unequal need, particularly "where these districts are already'in the hole' financially as the result of decades (if not centuries) of being historically underfunded."[160] As Steffes argues, school finance is "where structural inequality is made, remade, defended, and hidden."[161] It's clear that money matters a great deal in educational opportunity and outcomes, as Bruce Baker and others have argued.[162]

[154]Potter Stewart draft dissent in *Swann*, Feb. 1971, 9, Part I, Box 243, Papers of William Brennan. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[155]Tracy L. Steffes, "Assessment Matters: The Rise and Fall of the Illinois Resource Equalizer Formula," *History of Education Quarterly* 60, no. 1 (Feb. 2020), 24, 25.

[156]Steffes, "Assessment Matters," 57.

[157]Ian Millhiser, "What Happens to a Dream Deferred: Cleansing the Taint of *San Antonio ISD v. Rodriguez*," *Duke Law Journal* 55, no. 2 (Nov. 2005), 405–36, 406.

[158]Frank J. Macchiarola and Joseph G. Diaz, "Disorder in the Courts: The Aftermath of *San Antonio ISD v. Rodriguez* in the State Courts," *Valparaiso University Law Review* 30, no. 2 (1996), 553.

[159]Douglas S. Reed, "Twenty-Five Years after *Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism," *Law & Society Review* 32, no. 1 (1998), 175–220, 214.

[160]Matthew Saleh, "Modernizing *San Antonio ISD v. Rodriguez*: How Evolving Supreme Court Jurisprudence Changes the Face of Education Finance Litigation," *Journal of Education Finance* 37, no. 2 (Fall 2011), 99–129, 117–18.

[161]Steffes, "Assessment Matters," 57.

[162]Bruce D. Baker, *Educational Inequality and School Finance: Why Money Matters for America's Students* (Cambridge, MA: Harvard Education Press, 2018). See also Sylvia Allegretto, Emma Garcia, and Elaine Weiss, *Public Education Funding in the US Needs an Overhaul,* Economic Policy Institute, July 2022, https://www.epi.org/publication/public-education-funding-in-the-us-needs-an-overhaul/.

Kimberly Jenkins Robinson argues that education federalism has changed significantly because of federal actions and urges building on these federal interventions through reallocation of resources to states and localities that lack capacity.[163] Another scholar suggests that these federal legislative incursions into the realm of public education have perhaps now created an implicit federal right to education.[164] Local, state, and federal resources are all connected, as Black points out that "heavy reliance on local school funding drives school funding *inequality*, and low state aid drives overall school funding *inadequacy*, particularly in those districts suffering inequality."[165] And Goodwin Liu has argued compellingly that perhaps the key is to locate a federal right to education in the citizenship clause of the Fourteenth Amendment, building on state adequacy lawsuits by addressing the *federal* interstate inequalities that are out of reach of state litigants.[166] Whatever they are, federal remedies would be necessary to address the complex and differential outcomes of the state-based litigation legacy of *Rodriguez*.

Rodriguez left education as a state and local issue, and, along with Milliken, encouraged a deference to school districts that has often helped perpetuate the kinds of intersecting inequalities Demetrio Rodriguez was challenging. As Erika K. Wilson notes, White-student segregation is enabled by laws around school district boundary lines that enable White students to engage in "social closure" and therefore to monopolize high-quality schools.[167] Other scholars have examined schooling as a "white good" that White people defend aggressively.[168] This is illustrated by the fact that in 2016, "overwhelmingly white school districts received $23 billion more in state and local funding than majority nonwhite districts that serve about the same number of children."[169] Cashin also points out that "opportunity hoarding also occurs *within* school districts" through various mechanisms.[170] At the end of the day, inequalities exist "because those with economic and political power are advantaged by their continuation."[171] As James Ryan argues, "The continued separation of urban and suburban students has been the most dominant and important theme in education law and policy for the last fifty years."[172] Scholars examining the sixty-year legacy of *Brown* in 2014 found that that the South has since lost all the progress in desegregation it made

[163]Kimberly Jenkins Robinson, "How Reconstructing Education Federalism Could Fulfill the Aims of *Rodriguez*," in Ogletree Jr. and Jenkins Robinson, *The Enduring Legacy of* Rodriguez, 203-26.

[164]Sarah G. Boyce, "The Obsolescence of *San Antonio v. Rodriguez* in the Wake of the Federal Government's Quest to Leave No Child Behind," *Duke Law Journal* 61, no. 5 (Feb. 2012), 1025–66.

[165]Black, "Localism, Pretext, and the Color of School Dollars," 9.

[166]Goodwin Liu, "Education, Equality, and National Citizenship," *Yale Law Journal* 116, no. 2 (Nov. 2006), 330–411.

[167]Erika K. Wilson, "Monopolizing Whiteness," *Harvard Law Review* 134, no. 7 (May 2021), 2382, 2383.

[168]Benjamin Justice, "Schooling as a White Good," *History of Education Quarterly* 63, no. 2 (May 2023), 154–78.

[169]Cashin, *White Space, Black Hood,* 132. Cashin cites statistics from EdBuild, "Nonwhite School Districts Get $23 Billion Less than White Districts Despite Serving the Same Number of Students," 2016, https://edbuild.org/content/23-billion.

[170]Cashin, *White Space, Black Hood*, 136. See also Ain Grooms, "Turbulence in St. Louis County: School Transfers, Opportunity Hoarding, and the Legacy of Brown," *Peabody Journal of Education* 94, no. 4 (2019), 403–19.

[171]First and de Luca, "The Meaning of Educational Adequacy," 215.

[172]Ryan, *Five Miles Away*, 12–13.

after 1967, and emphasized the extremely high levels of segregation for Latino students in particular today.[173]

Finally, in the wake of the *Rodriguez* ruling, generations of unequal school finance, racist residential zoning policies, and stealth funding inequalities have combined to create a strong rationale for school finance litigation based on a reparations model, as some scholars have recently noted.[174] Others similarly argue that resource availability should be considered a civil right and assert that equity in school finance must be achieved in order to address disparities and challenges faced by BIPOC (Black, Indigenous, and people of color) communities.[175] The intersections between race and poverty in limiting access to education have shifted in specific contexts in the past fifty years, but in broad strokes they have also calcified and deepened in profound ways that *Rodriguez* helped legitimize.

Conclusion: Fifty Years of Inequality

Modern segregation intersects race, wealth, and unequal opportunity across space and time and through the imprimatur of law. Multiple and contingent historical contexts created the conditions for the *Rodriguez* decision, and that decision has in turn shaped and limited a state-based legal trajectory that has determined the material educational experience of countless children nationwide. Separateness and inequality build upon each other year after year, and they have mutually ossified landscapes of education, trapping them in injustice.

This article has argued for three ways to look back at the legacy of *Rodriguez*. First, understanding *Rodriguez* as a desegregation decision as much as *Swann* or *Milliken* or *Keyes* helps illuminate the crucial constitutional moment in Supreme Court equal protection analysis and desegregation jurisprudence that *Rodriguez* represents. Second, by seeing *Rodriguez* as a case deeply embedded in and reflective of the racial, social, and class politics of its time, we can understand why many advocates a few years prior to the ruling had great optimism for the court's capacity to address intersecting inequalities, from racial discrimination to poverty discrimination to the constitutional right of a child to education. Finally, looking back at the decades of state-based school funding and desegregation litigation that ensued after *Rodriguez* illustrates Justice Thurgood Marshall's dissenting prophecy that "the vested interests of wealthy school districts in the preservation of the status quo" would place profound obstacles in the path of deep and lasting equality of educational opportunity.

Rodriguez, fifty years later, exemplifies an approach to intersectional inequality rooted in a dangerous and superficial colorblindness combined with a dismissal of the poor inspired by Cold War capitalism. Lani Guinier points out that the *Rodriguez* ruling changed *Brown* "from a clarion call to an excuse not to act."[176] *Rodriguez* left

[173]Gary Orfield et al., *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, The Civil Rights Project, May 15, 2014, https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future.

[174]Green III, Baker, and Oluwole, "School Finance, Race, and Reparations," 519.

[175]Davíd G. Martínez and Julian V. Heilig, "An Opportunity to Learn: Engaging in the Praxis of School Finance Policy and Civil Rights," *Minnesota Journal of Law and Inequality* 40, no. 2 (June 2022), 311–34.

[176]Guinier, "From Racial Liberalism to Racial Literacy," 93.

multiple intersecting inequalities stranded without federal remedies, even as state litigation sought some limited degree of remediation. Meanwhile, generations of schoolchildren have experienced ongoing and multiplying resource inequality as the intersecting segregation system challenged in *Rodriguez* received federal constitutional endorsement. As Marshall argued in his dissent in *Rodriguez,* "Who can ever measure for such a child the opportunities lost and the talents wasted for want of a broader, more enriched education?"[177]

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[177] *Rodriguez v. San Antonio*, 84.

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