Reviving Rationality and the Federal Role in Education

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INTRODUCTION

On March 12, 1956, nineteen United States Senators and eighty-two United States Representatives formally declared their opposition to racial integration by signing the Southern Manifesto on Integration. The Manifesto was a direct response to the U.S. Supreme Court's 1954 ruling in *Brown v. Board of Education*,[1] a landmark education case that declared racially-segregated schools unconstitutional. The 101 Congresspeople who supported this government-sanctioned proclamation viewed the *Brown* ruling as an affront to states' rights and their "habits, traditions, and way of life."[2] Put simply, these elected segregationists considered *Brown* to be a direct threat to a way of life that exalted the ill-fated idolatry of white supremacy.

Although school segregation is no longer formally sanctioned by law, the education children receive today remains inextricably tied to their zip code.[3] Indeed, nearly two-thirds of all Black students in New York state attend an intensely segregated public school.[4] In California, approximately 60% of Latinx students attend an intensely segregated public school.[5] Such de facto segregation has harmed generations of our most vulnerable students.[6] Worse still, advocates hoping to challenge this modern form of school segregation through the courts face long odds. Put another way, although an affirmative right to public K-12

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1. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

2. 102 CONG. REC. 4,460 (1956).

3. *See* Kimberly Jenkins Robinson, *The Essential Questions Regarding a Federal Right to Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 1, 3–7 (Kimberly Jenkins Robinson ed., 2019).

4. *See* ERICA FRANKENBERG ET AL., HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN*, THE CIVIL RIGHTS PROJECT 5 (May 10, 2019), https://escholarship.org/uc/item/23j1b9nv.

5. *See id.*

6. *See id.* at 11.

education is codified within each state constitution, litigants who have challenged the constitutionality of presumptively dubious school finance regimes—where the seeds of a de facto school segregation germinate—have prevailed in only half the states.[7]

With the federal judiciary continuing its virtual withdrawal from adjudicating school finance controversies,[8] the process of vindicating a child's right to education has once again been left to state and local officials to resolve.[9] As this Article demonstrates, however, states and localities have largely failed to protect this right to education in the absence of meaningful federal intervention. To recapture the promise of *Brown*, then, the federal judiciary must once again reenter the education reform arena as the final guarantor of equal educational opportunity that it is designed to be.[10] Such reentry into the education reform arena is particularly important in the context of school finance reform, where the vindication of a child's right to equal educational opportunity remains all but guaranteed.

At the epicenter of the school finance battleground is *San Antonio Independent School District v. Rodriguez*, a landmark Supreme Court case that involved a constitutional challenge to Texas's system of school finance.[11] Nearly fifty years after *Rodriguez*, the need for a greater, more meaningful federal role in education has only grown. As alluded to *supra*, a school district's educational quality today remains

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7. *See Appendix: School Finance Litigation Cases*, *in* THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY 275, 277 (Charles J. Ogletree, Jr. and Kimberly Jenkins Robinson eds. 2015).

8. *See* Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 112 (2004) ("[T]he Supreme Court's overall approach has been to withdraw the courts from involvement in Americans schools. I term this withdrawal the 'deconstitutionalization of education.' In numerous decisions, involving many different kinds of claims, the Supreme Court has professed almost unlimited deference to school officials and has refused to apply the Constitution in schools. The Court's abdication of responsibility for school desegregation and for equalizing educational opportunity must be understood as part of this larger pattern of the deconstitutionalization of education.").

9. *See* Milliken v. Bradley, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools.").

10. *See* Kimberly Jenkins Robinson, *No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism*, 27 STAN. L. & POL'Y REV. 201, 205 (2016).

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

inextricably tied to the property wealth of its surrounding community.[12] Even within mixed-income school districts—where the relationship between assessed property value and relative poverty is tenuous—high concentrations of student need and disadvantage persist.[13]

Legally, such a tale[14] of two systems of public education lacks any rational basis or legitimate government purpose. Support for this thesis is grounded in a novel body of Supreme Court precedents that employed a heightened form of rational basis review to invalidate presumptively suspect government action.[15] This form of rational basis review "with bite" has been found to "correct government conduct that implicates no recognized fundamental or specifically enumerated right[s], and deploys no judicially recognized suspect classification."[16] Accordingly, without needing to confer new constitutional rights or create new judicial classifications, this novel doctrine offers litigants a plausible legal theory of reform with which to protect the state right to education in federal court.[17] Thus, this Article is both descriptive, detailing states' virtual abdication of their responsibility for the constitutional rights of students, and normative, arguing that future litigants should adopt rational basis review with bite (RBRB) as the most plausible legal theory with which to gain meaningful protection of the state right to education within federal forums.

Whether states continue to deprive children—but, for the purposes of this Article's thesis, indigent students—of their state constitutional right to education raises novel issues at the intersection of both liberty and equality. Despite the treatment RBRB has received in judicial opinions and legal scholarship,[18] neither has undertaken an exhaustive

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12. *See* CARMEL MARTIN ET AL., A QUALITY APPROACH TO SCHOOL FUNDING: LESSONS LEARNED FROM SCHOOL FINANCE LITIGATION, CTR. FOR AM. PROGRESS 7 (Nov. 2018), https://cdn.americanprogress.org/content/uploads/2018/11/08042733/LessonsLearned_School Funding-report-4.pdf.

13. *See* MATTHEW M. CHINGOS & KRISTIN BLAGG, MAKING SENSE OF STATE SCHOOL FUNDING POLICY, URBAN INST. 4 (2017), https://www.urban.org/sites/default/files/ publication/94961/making-sense-of-state-school-funding-policy_0.pdf.

14. *See generally* DOROTHY DUCKETT JOSEPH, A TALE OF TWO SYSTEMS: AN EDUCATOR'S PERSONAL ACCOUNT OF INEQUITY IN OUR PUBLIC SCHOOLS (2002).

15. *See* Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 288–90 (2015).

16. *Id.* at 282, 326.

17. *See id.* at 287.

18. *See* discussion *infra* Part II.

analysis of its application to education rights after *Gary B. v. Whitmer*.[19] This Article aims to fill that gap. Given the renewed focus on the foregoing disparities due to the COVID-19 pandemic, this contribution is particularly timely.[20] As a normative matter, moreover, this Article contributes to the literature by contending that RBRB should be adopted as the most politically feasible, judicially manageable legal theory with which to usher the federal judiciary back into the education reform arena.

This Article proceeds in four Parts. Part I provides a brief overview of *Rodriguez* and its practical and constitutional consequences. Part II offers a critique of state and federal litigation trends in the education rights arena following *Rodriguez*. Part III further defines RBRB and briefly describes its jurisprudential development. This Part then proposes RBRB as the most politically feasible, judicially manageable legal theory with which to vindicate an indigent child's state right to education in federal court. Part IV offers concluding remarks.

I. BACKGROUND

A. *San Antonio Independent School District v. Rodriguez*

In May of 1968, hundreds of students at Edgewood High School (EHS) walked out of their school building in protest.[21] Demetrio Rodriguez, a proud parent of four EHS students, had taught his children the importance of standing up for what is right, and the substandard

19. *See* discussion *infra* Part II.A.2.

20. *See, e.g.,* Letter from Nat'l Governors Ass'n, to Cong. Leaders (Jul. 17, 2020), https://www.nga.org/advocacy-communications/letters-nga/letter-regarding-educational-funding-and-local-control/; *see also* SUMIT CHANDRA ET AL., COMMON SENSE MEDIA & BOSTON CONSULTING GROUP, CLOSING THE K-12 DIGITAL DIVIDE IN THE AGE OF DISTANCE LEARNING 3, 5 (2020); David Harrison, *Recession Forces Spending Cuts on States, Cities Hit by Coronavirus*, WALL ST. J. (July 8, 2020), https://www.wsj.com/articles/recession-forces-spending-cuts-on-states-cities-hit-by-coronavirus-11594200600; Daarel Burnette II, *Devastated Budgets and Widening Inequities: How the Coronavirus Collapse Will Impact Schools*, EDUC. WEEK (May 8, 2020), https://www.edweek.org/ew/articles/2020/05/09/devastated-budgets-and-widening-inequities-how-the.html.

21. *See* David Hinojosa & Karolina Walters, *How Adequacy Litigation Fails to Fulfill the Promise of Brown (But How It Can Get Us Closer)*, *in* THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS: *MENDEZ*, *BROWN*, & BEYOND 357 (Kristi L. Bowman, ed., 2015).

learning conditions that EHS students had to face were far from it.[22] As a parent leader within the Edgewood Independent School District (EISD), Rodriguez supported this student-led protest by helping form the Edgewood District Concerned Parents Association (EDCPA), a grassroots coalition of sixteen fellow EISD parents.[23] This coalition of concerned parents helped transform this student protest into a formal legal challenge. Indeed, forty days after the EHS student protest, EDCPA filed a class action lawsuit in the U.S. District Court for the Western District of Texas challenging the constitutionality of Texas's school finance system.[24]

The EDCPA made two central claims against Texas education officials. First, the EDCPA claimed that public K-12 education was a fundamental right guaranteed by the Fourteenth Amendment of the U.S. Constitution.[25] Second, the EDCPA claimed that wealth-based discrimination in the provision of public education constituted a suspect classification, which would have required the district court to apply the most exacting judicial scrutiny of the Texas statute.[26] These inter-district funding disparities were the result of a Texas law that required the distribution of supplemental state and federal dollars be based on assessed property values.[27] Due to EISD's relatively low property tax base, however, officials were only able to raise about 40% of the tax revenue raised in the more affluent Alamo Heights School District (AHSD) that bordered EISD.[28] This funding differential persisted despite EISD's high tax effort. In fact, EISD residents were taxed at the highest rate in their county.[29]

As a result of the substantial disparities in assessed property value between districts like EISD and AHSD,[30] the district court held that the state of Texas had discriminated against students who came from low-wealth households.[31] The court reasoned that, "[n]ot only are defendants

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22. *See* JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 317 (2018).

23. *See id.*

24. *See* Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 281 (W.D. Tex. 1972) (per curiam).

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.* at 282.

29. *Id.*

30. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 11 (1973).

31. *See id.* at 1.

unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications."[32] This victory at the district court level, though significant, was short-lived. On March 21, 1973, the Supreme Court reversed the district court in a narrow 5-4 decision.[33] Justice Powell, writing for the majority, explicated two principal reasons for its decision. First, the Court held that public education was not a fundamental right guaranteed under the U.S. Constitution.[34] Second, Powell reasoned that wealth-based discrimination in the provision of education did not constitute a suspect classification,[35] thereby placing the Court's imprimatur on such disparities between school districts as consistent with the strictures of the federal Equal Protection Clause.

Powell further reasoned that the Court not only lacked the necessary expertise[36] to reach an informed conclusion on matters it deemed more local in nature but also noted that invalidating the challenged state law would be at odds with the principles of federalism.[37] Put differently, the *Rodriguez* Court viewed such education disputes as best left to state and local leaders to resolve rather than nine unelected members of the federal judiciary.[38] Such a view has led to myriad practical and constitutional consequences. The next Subpart introduces both in turn.

B. The Practical Consequences of *Rodriguez*

The practical consequences of the *Rodriguez* decision were manifold. First, the *Rodriguez* decision had a significant impact on where litigants could argue their case.[39] By failing to strike down Texas's school funding regime as unconstitutional, the *Rodriguez* Court sent a clear message to education litigants nationwide: The federal courts were effectively closed to litigants who wanted to bring legal

32. *Id.* at 126.
33. *See id.* at 1.
34. *See id.* at 33–35.
35. *See id.* at 25–27.
36. *See id.* at 41.
37. *See id.* at 58.
38. *See id*. at 43.
39. *See* Hinojosa & Walters, *supra* note 21, at 39.

claims that were similar to those brought in *Rodriguez*.[40] This implicit message is still being sent today. Indeed, if such a challenge were brought before the current Roberts Court—whose growing conservative majority continues to outstrip the comparatively moderate Burger Court[41]—then the outcome would, at best, reaffirm *Rodriguez*. At worst, the Court may further undermine traditional public education.[42]

Second, following the *Rodriguez* majority's explicit embrace of "some inequality"[43] within the province of public K–12 education, litigants began abandoning their pursuit of such relief within federal forums; instead, education rights litigants turned their attention to state constitutions and state courts to seek judicial relief.[44] Although this shift from federal to state courts has produced important gains in certain states,[45] limiting education litigation in such a way has produced many more costs.[46] These costs, as the following passages demonstrate, have informed much of our nation's current patchwork racially and socioeconomically stratified system of public K–12 education.[47]

A final consequence involves the political limitations of state courts. As described above, all fifty state constitutions explicitly obligate the state to provide education for its citizens. With the federal courthouse

40. *See* Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson, *Creating New Pathways to Equal Educational Opportunity*, *in* THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY 263, 264 (2015).

41. *See* Justin Driver, *Just How Rightward-leaning Was the Burger Supreme Court?*, WASH. POST (June 17, 2016), https://www.washingtonpost.com/opinions/just-how-rightward-leaning-was-the-burger-supreme-court/2016/06/17/4c722b8e-2b65-11e6-9de3-6e6e7a14000c_story.html.

42. Bruce Meredith & Mark Paige, *Reversing* Rodriguez: *A Siren Call to a Dangerous Shoal*, 58 HOUS. L. REV. 355, 360 (2020) (noting the danger in bringing right-to-education challenges before the current Supreme Court "because they invite an increasingly conservative federal bench to define a constitutional right to education through market-based solutions that often erroneously conflate 'choice' with equality and will work to undermine our nation's system of *public* education.").

43. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 51 (1973).

44 *See* James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1229 (2008).

45. *See Appendix*, *in* THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY 275, 275–80 (2015).

46. *See* Jason P. Nance, *The Justifications for a Stronger Federal Response to Address Educational Inequities*, *in* FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 37–45 (Kimberly J. Robinson ed., 2019).

47. *See* David G. Sciarra & Danielle Farrie, *From Rodriguez to Abbott: New Jersey's Standards-Linked School Funding Reform*, *in* THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY 119, 120–25 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015).

door effectively closed to education litigants after *Rodriguez*, reformers proceeded to bring nearly 200 state constitutional challenges to nearly every school finance system over the next five decades.[48] Despite this important progress, at least eight states have abstained from reviewing the merits of school finance disputes on separation of powers grounds.[49] What is more, litigants in nineteen states have never won a school finance challenge in state court.[50] As a consequence, schoolchildren in these states are often left to rely on the same recalcitrant legislatures that have failed to protect their right to education time and again.

Accordingly, this Article demonstrates that neither judicial embrace of a new judicial classification nor an outright reversal of *Rodriguez* is needed to usher the federal judiciary back into the education reform arena. Instead, litigants should adopt RBRB as the most plausible legal theory with which to facilitate this process.

C. The Constitutional Consequences of *Rodriguez*

Although the Supreme Court's holding in *Rodriguez* effectively shut the federal courthouse door to education litigants, this door was only marginally open before *Rodriguez*.[51] Indeed, the Court's "high-water mark"[52] for protecting students' constitutional rights occurred in the 1969 case of *Tinker v. Des Moines Independent Community School District*.[53] Decided in the last year of the Warren Court era, *Tinker* raised the question of whether the First Amendment protected the speech rights of students in school settings.[54] Writing for the majority,

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48. *See The State Role in Education Finance*, NAT'L CONF. OF STATE LEGISLATORS (NCSL), https://www.ncsl.org/research/education/state-role-in-education-finance.aspx (last visited July 1, 2021) [hereinafter NCSL].

49. *See*, *e.g.*, Ex parte James, 836 So. 2d 819 (Ala. 2002); Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 408 (Fla. 1996); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1200 (Ill. 1996); La. Ass'n of Educators v. Edwards, 521 So. 2d 390, 394 (La. 1988); Neb. Coal. for Educ. Equity & Adequacy (Coal.) v. Heineman, 731 N.W.2d 164, 183 (Neb. 2007); Okla. Educ. Ass'n v. State, 158 P.3d 1058, 1065–66 (Okla. 2007); Marrero v. Commonwealth, 739 A.2d 110, 113–14 (Pa. 1999); City of Pawtucket v. Sundlun, 662 A.2d 40, 55–56 (R.I. 1995).

50. *See Appendix, supra* note 45, at 275, 277; *see also* R. CRAIG WOOD, EDUCATION FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS – AN ANALYSIS OF STRATEGIES 69–70 (4th ed., 2015).

51. *See* Chemerinsky, *supra* note 8.

52. Broussard v. Sch. Bd. of Norfolk, 801 F. Supp. 1526, 1534 (E.D. Va. 1992).

53. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

54. *See id* at 505.

Justice Abe Fortas answered in the affirmative, roundly rejecting the notion that such school-based disputes were per se immune from constitutional scrutiny.[55] "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[56] The *Tinker* majority's powerful holding served as a direct challenge to the Court's long-held practice of deferring almost entirely to state and local education officials to resolve education-related controversies.[57] Still, the next five decades of Supreme Court jurisprudence would render Chief Justice Warren's powerful rebuke of such intractable Court orthodoxy little more than anomalistic.

Indeed, the Court has narrowed students' privacy[58] and speech rights,[59] infringed upon students' right to be free from illegal searches and seizures,[60] and deprived students of their right to equal protection of the laws over that span of time.[61] The *Rodriguez* Court's broad deference to Texas state officials, therefore, merely reified the Court's broader withdrawal from adjudicating education-related disputes that raised questions of constitutional import. Such a withdrawal was observed by Erwin Chemerinsky's research on the "deconstitutionalization of education":

55. *See id.* at 506.

56. *Id.*

57. *See id.*

58. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) (describing exceptions that allow schools to refuse sponsoring student speech when school officials consider such speech to be "inconsistent with 'the shared values of a civilized social order.'"); *see also* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 657 (1995) (explaining that plaintiffs, as public school student athletes, are "[s]omewhat like adults who choose to participate in a 'closely regulated industry' . . . [they] have reason to expect intrusions upon normal rights and privileges, including privacy.").

59. *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 676 (1986) (allowing the enforcement of a school rule that infringed students' speech rights because "[s]urely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.").

60. *See* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (outlining schools as an exception to probable cause and warrant requirements of the Fourth Amendment, as failing to do so "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.").

61. *See* Milliken v. Bradley, 418 U.S. 717, 719 (1974) (noting that Detroit school districts were not required to desegregate "[w]ith no showing of significant violation by the fifty-three outlying school districts and no evidence of any inter-district violation or effect.").

> [T]he Supreme Court has professed almost unlimited deference to school officials and has refused to apply the Constitution in schools. The Court's abdication of responsibility for school desegregation and for equalizing educational opportunity must be understood as part of this larger pattern of the deconstitutionalization of education.[62]

D. School Finance Litigation: Moving from Federal to State Courts

The move from challenging educational inequality in federal courts to challenging them in state courts has led to a substantively uneven patchwork of educational quality nationwide. Every state constitution possesses an education article that requires, in some textual form or another, that its state legislature establish and maintain a system of free public schools within its jurisdiction.[63] Although state constitutions have helped define the scope of such a right in the years following *Rodriguez*, the significant textual variations that exist between each state's education clause has stymied this constitutional progression.[64] For example, legislatures in fifteen states are constitutionally required to do little more than establish a system of free public schools.[65] However, in states like Colorado, Delaware, and Idaho, the legislature is constitutionally required to not only establish a system of public schools but also ensure that this system provides a baseline standard of educational quality.[66]

State legislatures in California and Indiana, by contrast, are constitutionally required to not only establish a system of education that

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62. Chemerinsky, *supra* note 8, at 112.

63. *See* NCSL, *supra* note 48.

64. Joshua E. Weishart, *The Compromised Right to Education?*, 71 STAN. L. REV. ONLINE 123, 128–30 (2018).

65. ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; CONN. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; KAN. CONST. art. VI, §§ 1, 6; LA. CONST. art. VIII, §§ 1, 11 & 13; MISS. CONST. art. VIII, §§ 201, 206 & 206A; NEB. CONST. art. VII, § 1; N.M. CONST. art. XII, §§ 1, 4; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, §§ 1, 2; OKLA. CONST. art. XIII, §§ 1, 1a; S.C. CONST. art. XI, § 3; UTAH CONST. art. X, §§ 1, 2 & 5; VT. ch. II, § 68.

66. COLO. CONST. art. IX, § 2; DEL. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1.

meets a certain minimum level of quality but must also ensure that each system coheres to the animating principles of education.[67] Finally, in states like Illinois, Maine, and Michigan, public K-12 education is a fundamental right afforded to every child.[68] Legislatures in these states must not only meet all of the preceding requirements but must also establish a system of education that ensures substantive equality for all students, irrespective of how objectively "good" the state's education system is overall.[69] Consequently, these textual variations have led, at least in part, to our nation's uneven floor of educational quality between states. Perhaps more important, however, these state-level protections have more often failed to protect the right to education, which has resulted in significant short- and long-term harm to students.

E. Inequitable School Finance Regimes and Their Role in Creating Student Harm

Our nation's uneven floor of educational quality has led to unequal educational opportunity. Since educational opportunity is largely determined by the amount of property wealth a given community possesses,[70] these educational disparities too often lead to short- and long-term consequences for students.[71] Nearly fifty years ago, the *Rodriguez* Court skeptically viewed the relationship between equitably-distributed education funding and education quality.[72] As decades of research have indicated, however, the provision of substantively equal school funding is a necessary condition for providing substantively equal educational opportunities.[73] Regrettably, our nation's public schools remain largely segregated along lines of race and

67. CALIF. CONST. art. IX, §§ 1, 5 ("[preserving] [] the rights and liberties of the people"); IND. CONST. art. VIII, § 1 ("[preserving] [] a free government").

68. ILL. CONST. art. X, § 1; ME. CONST. art. VIII, Pt. 1, § 1; MICH. CONST. art. 8, §§ 1, 2.

69. Derek W. Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1414 (2010).

70. *See* Kira Barrett, *The Evidence is Clear: More Money for Schools Means Better Student Outcomes,* NAT'L EDUC. ASS'N (Aug. 1, 2018), https://www.nea.org/advocating-for-change/new-from-nea/evidence-clear-more-money-schools-means-better-student-outcomes.

71. *See* BRUCE D. BAKER, HOW MONEY MATTERS FOR SCHOOLS 7 (Learning Policy Institute 2017), https://learningpolicyinstitute.org/sites/default/files/productfiles/How_Money_Matters_REPORT.pdf.

72. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 23–24 (1973).

73. *See* Rob Greenwald et al., *The Effect of School Resources on Student Achievement*, 66 REV. EDUC. RES. 361, 362 (1996).

socioeconomic status.[74] Indeed, recent research suggests that "while racial segregation matters, it matters primarily because it leads to differences in exposure to poor schoolmates."[75]

Worse still, without meaningful involvement by the federal judiciary, twenty-three states continue to operate regressive school funding regimes.[76] These state funding regimes have had the effect of providing low-income, predominately Black and brown communities with less overall state funding than more affluent, predominately white communities.[77] Furthermore, the highest-spending districts nationwide spend nearly ten times more than the lowest-spending school districts nationwide.[78] Such disparities paint a more sobering picture at the per pupil level. Among the nation's highest poverty districts—which serve the largest share of students from low-income households—state officials spend approximately 7% less per pupil than students educated in our nation's highest-wealth districts.[79] For a district serving 5,000 pupils, then, this seemingly minor gap amounts to approximately $5 million dollars less in overall funding each year when compared to spending levels within the nation's highest wealth districts.[80]

The foregoing disparities have harmed generations of vulnerable children. Indeed, such state-sanctioned harm has led many state supreme courts to find that these students have been deprived of their right to a substantively equal educational opportunity.[81] Court decisions

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74. *See* FRANKENBERG ET AL., *supra* note 4, at 5, 17, 19, 26.

75. Sean F. Reardon et al., *Is Separate Still Unequal? New Evidence on School Segregation and Racial Academic Achievement Gaps* 29 (Ctr. for Educ. Pol'y Analysis, Working Paper No. 19-06 Sept. 2019).

76. *See* Rachel Kaufman, *New School Funding Report Shows the Effects of Segregation Persist*, NEXT CITY (Feb. 27, 2019), https://nextcity.org/daily/entry/new-school-funding-report-shows-the-effects-of-segregation-persist.

77. *See id.*

78. *See* Jeff Raikes & Linda Darling-Hammond, *Why Our Education Funding Systems Are Derailing the American Dream*, LEARNING POL'Y INST., (Feb. 18, 2019), https://learningpolicyinstitute.org/blog/why-our-education-funding-systems-are-derailing-american-dream.

79. *See* IVY MORGAN & ARY AMERIKANER, THE EDUC. TRUST, FUNDING GAPS 2018: AN ANALYSIS OF SCHOOL FUNDING EQUITY ACROSS THE U.S. AND WITHIN EACH STATE (2018), https://edtrust.org/resource/funding-gaps-2018/.

80. *See id.*

81. *See*, *e.g.*, McDuffy v. Sec'y of Exec. Off. of Educ., 615 N.E.2d 516, 552–53 (Mass. 1993); Abbott v. Burke (Abbott V), 710 A.2d 450, 461–71 (N.J. 1998).

in Alabama,[82] Florida,[83] Rhode Island,[84] Oklahoma,[85] and Illinois,[86] by contrast, have declared the right to education to be nonjusticiable, once again leaving our most vulnerable children and families to rely on the good will of legislators to meet their constitutional charge. Taken together, this state-sanctioned harm—which has disproportionately and adversely affected students from low-income households—lacks any rational basis or legitimate governmental purpose. What is needed, then, is a more politically feasible, judicially manageable legal theory to better protect the right to education in federal court. RBRB, as this Article contends, is that legal theory.

II. A CRITIQUE OF LITIGATION TRENDS

Following the *Rodriguez* decision, school finance advocates at both the state and federal level proposed scores of ambitious, well-intended theories of reform meant to better protect the right to education. Advocates at each level, however, have largely missed the mark. On the one hand, the unique legal and political challenges at the state level have felled state-level theories of reform.[87] On the other, lofty legal theories at the federal level have proved too ambitious for the modern Court.[88] This Part surveys these trends and critiques their effectiveness at protecting the right to education at each corresponding level. It then argues that courts should adopt RBRB as a more modest middle ground for litigants seeking judicial relief within federal forums.

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

83. *See* Coal. for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 406–08 (Fla. 1996) (per curiam).

84. *See* City of Pawtucket v. Sundlun, 662 A.2d 40, 58 (R.I. 1995).

85. *See* Okla. Educ. Ass'n v. State, 158 P.3d 1058, 1066 (Okla. 2007).

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

87. *See* Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 967–74 (2014); *see also* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701 (2010).

88. *See* Ryan, *supra* note 44, at 1256 ("Courts should set for themselves a more modest goal: ensuring the opportunity for an adequate education by focusing on resources that are relevant to that goal. They need not and should not be any more precise or ambitious than that. Courts should be explicit about their own institutional limitations and the end goal of school funding litigation, which should be to create the conditions for adequacy, not adequacy itself."); *see generally* Aaron Y. Yang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1202–04 (2011).

A. Trends for Pursuing Substantively Equal Educational Opportunity

1. State Litigation Trends

Education scholars have long framed state-based school finance litigation in terms of successive "waves" of reform.[89] Beginning in the first-wave of reform, litigants argued for little more than non-discrimination.[90] That is, so long as students received equal state expenditures, state officials could avoid violating the dictates of the *federal* Equal Protection Clause. As education advocates and plaintiffs soon discovered, however, this version of formal equality failed to address the various needs of disadvantaged students.[91] This discovery led education rights litigants to employ a different judicial approach within the second-wave, albeit with mixed results.

Instead of grounding second-wave claims within the ambit of the federal Equal Protection Clause—as plaintiffs within the first-wave of education rights litigation had done—litigants began filing these formal equality claims under *state* equal protection guarantees.[92] Relying on the protective function inherent to state constitutions, litigants also began making education clause claims.[93] Unlike in the equal protection context, however, litigants who made education clause claims placed courts in a tough spot both politically and practically. Put differently, the traditional tiers of judicial scrutiny better accommodate *negative* rights, rather than *positive* rights, enforcement. Since the right to

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89. *See* Lauren Webb, *Educational Opportunity for All: Reducing Intra-district Funding Disparities*, 92 N.Y.U. L. REV. 2169, 2185–86 (2017) (describing the evolution of school finance litigation); *see generally* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995) (surveying the history and characteristics of school finance reform litigation).

90. *See* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 600 (1994) (describing the first "wave" of school finance litigation, which began in the late 1960s and concluded with the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez* (1973)).

91. *See* Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 965–66 (2016).

92. *See* Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 579–85 (1998).

93. *See* Thro, *supra* note 90, at 601–03.

education under state education clauses provides for a positive right[94] against the government, states must affirmatively protect the right-holder—that is, the student—from observable harms.[95]

In the context of school finance litigation, then, performance of this constitutional duty would require a state to provide all school children within its borders with the baseline funding needed to "meet qualitative educational thresholds."[96] As explained in more detail below, however, compelling states to provide such baseline levels of educational quality privileges the "formalistic reliance on the usual standards of the law of equal protection."[97] Therefore, strict scrutiny—as applied to education clause claims—proved less practically and politically conducive for second-wave courts hoping to better balance the competing demands of both negative and positive liberty.[98]

As the application of strict scrutiny in this context became less clear for second-wave courts, courts and litigants began to question the utility of traditional tiered analyses within the province of education rights claims altogether. Since strict scrutiny fails to compel government action, a state could theoretically fund its public schools at inadequate levels and still be able to pass strict scrutiny review "provided that inadequacy is equally shared."[99] Recognizing this additional limitation, second-wave courts subsequently abandoned tiers of scrutiny when adjudicating claims under their own state's education clause.[100] Accordingly, by moving away from equal protection's more

94. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1132, 1136–37 (1999).

95. *See* Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 320 (2011).

96. Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 221 (2017).

97. *See* Horton v. Meskill (Horton II), 486 A.2d 1099, 1105–06 (Conn. 1985).

98. *See* Weishart, *supra* note 96, at 249–50 ("[I]n the education context, [strict scrutiny] was fatal politically and practically because . . . courts initially believed that enforcing equal protection as immunity against unequal treatment meant they had to embrace horizontal equity as the remedy.").

99. Derrick Darby & Richard E. Levy, *Slaying the Inequality Villain in School Finance: Is the Right to Education the Silver Bullet?*, 20 KAN. J.L. & PUB. POL'Y 351, 360 (2011); *see also* Weishart, *supra* note 96, at 249 ("[T]he fact that a majority of second-wave courts resorted to rational basis review—even after deciding that the right to education is fundamental or remaining undecided on that question—indicates serious reservations with heightened scrutiny generally . . . By the early 1970s, courts understood that federal equal protection analysis implicating strict scrutiny "was 'strict' in theory and fatal in fact.").

100. *See* Weishart, *supra* note 96.

mechanistic tiers of judicial review, second-wave courts began to also abandon horizontal equity and fiscal neutrality as remedies for unequal spending between districts. As the following Parts demonstrate, moreover, the rejection of horizontal equity and fiscal neutrality was the result of additional pressures that were both practical and political.

When a state court determines that a school finance law unduly discriminates on the basis of wealth, the judicial remedy can take the following tack: "either horizontal equity among school districts, such that per-pupil revenues [are] roughly equalized by the state, or at least fiscal neutrality, such that the revenues available to a school district would not depend solely on the property wealth of the school district."[101] As a practical matter, horizontal equity and fiscal equalization—as court ordered remedies to unequal spending regimes—were largely unresponsive to the needs of differently-situated students.[102] Put another way, to receive an educational opportunity that approximates the quality of education provided to students living in more affluent school districts, students from less affluent districts needed *more*—not equal—state funding.[103] By redistributing resources according to student need, then, such differently-situated students stood a greater chance of receiving an educational opportunity that approximated the education received by their more affluent peers.

These practical limitations were not the only challenge facing second-wave courts. As a political matter, the prospect of redistributing tax resources to those most in need (that is, students within predominately low-income, largely Black and Brown districts) became a reality in the *Serrano II*[104] litigation—leading to significant backlash. In *Serrano II*, the California Supreme Court ordered its legislature to

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101. William S. Koski & Jesse Hahnel, *The Past, Present, and Possible Futures of Educational Finance Reform Litigation*, *in* HANDBOOK OF RESEARCH IN EDUC. FINANCE AND POL'Y 42, 47 (Helen F. Ladd & Margaret E. Goertz eds., 2015).

102. *See* Henry Ordower, *Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted*, 7 FLA. TAX. REV. 259, 294 (2006) ("The Court has never held that equal protection requires vertical equity . . . ").

103. *See* William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1203–11 (2003) (noting the distinctions between vertical and horizontal equity in the context of school finance litigation).

104. *See* Serrano v. Priest (Serrano II), 18 Cal. 3d 728, 751, 557 P.2d 929, 940 (1976), supplemented, 20 Cal. 3d 25, 569 P.2d 1303 (1977) ("[T]he trial court employed inappropriate criteria insofar as it focused on the notion of so called 'fiscal neutrality.'").

redistribute tax revenue such that the prevailing funding disparities between public school districts amounted to no more than $100 per pupil.[105] A year after its decision, however, California's more affluent, predominately white voting bloc responded to the *Serrano II* court's redistributive decree by supporting a ballot measure that significantly reduced property tax rates statewide.[106] Although the sociopolitical and racial dynamics animating this political backlash are worth further exploration, these dynamics are beyond the scope of this Article.

In the most general sense, the response to the *Serrano II* decision created a lasting tension between the state's judicial and legislative branches. On the one hand, a primary responsibility of the judiciary is to serve as a counter-majoritarian check on democratic overreach through its interpretative and adjudicative functions.[107] On the other hand, the legislative branch's principal charge is to faithfully represent the interests of their constituency. Regrettably, this tension remains largely unresolved—leaving California's more economically insecure students with a titular constitutional right rather than a substantive one. The *Serrano I* court underscored this tension by analogy: "[a]ffluent districts can [now] have their cake and eat it too; they can provide a high-quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all."[108]

The third and final wave of school finance litigation focused on achieving *adequate* educational opportunities for students.[109] Unlike litigants' approach during the second-wave, though, reformers' pursuit of adequate educational opportunities in the third-wave of school finance litigation managed to avoid the political and practical pitfalls that followed the *Serrano I* decision.[110] Rather than embrace horizontal equity, courts in the third-wave required that "each school district have enough funding so that all of its students could achieve a minimum qualitative threshold."[111] The third-wave's shift to the adequacy

105. *See* NARDA ZACCHINO, CALIFORNIA COMEBACK: HOW A "FAILED STATE" BECAME A MODEL FOR THE NATION 222 (2016).

106. *See id.*

107. *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 355 (1997) ("The courts possess a unique institutional ability and obligation to protect individual rights against majoritarian intrusion.").

108. Serrano v. Priest (Serrano I), 5 Cal. 3d 584, 600, 604 (1971).

109. *See* Koski & Hahnel, *supra* note 101, at 47.

110. *See* ZACCHINO, *supra* note 105.

111. Weishart, *supra* note 96, at 236–37.

approach led to a more "substantive brand of equal educational opportunity, conferring an immunity against inequitable (as opposed to unequal) spending."[112] By jettisoning horizontal equity for this more substantive, vertical form of equity, moreover, third-wave advocates largely shunted the socioeconomic inequities that persisted within and between school districts.

Instead, adequacy proponents emphasized "that all children should have access to a quality education up to a certain threshold—enough to acquire the capabilities (substantial freedoms) to function as equal citizens *and* avoid political, economic, and social subjugation."[113] This pursuit of adequacy's more substantive brand of equity, however, had its own unique limitations. Although the third-wave's embrace of vertical equity avoided the liberty-based concerns that arose with the second-wave's approach to horizontal equity,[114] the third-wave's focus on adequacy vis-à-vis vertical equity meant that "wealthy and politically powerful school districts would remain free to spend more to provide a greater-than-adequate education to their students."[115] This is a problem. Since education is widely considered a "positional" good, inequities above the adequacy threshold "exacerbate the positional advantage of some students from better off school districts over disadvantaged students from worse off school districts."[116] Consequently, then, "[t]he main egalitarian objection against the adequacy view is that it does not provide an adequate answer to the problem of fair competition."[117]

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112. Weishart, *supra* note 91, at 966.

113. Joshua E. Weishart, *Protecting a Federal Right to Educational Equality and Adequacy*, *in* FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 310 (Kimberly J. Robinson ed., 2019).

114. *See* Weishart, *supra* note 96, at 230–31 ("[V]ertical equity is also conducive to the demands of liberty, both negative (freedom from) and positive (freedom to). Allocating resources in a way that advances vertical equity does not impinge negative liberty, namely the privilege of parents to control their children's education . . . [W]hereas horizontal equity threatened to encroach on local control by leveling down educational spending, vertical equity requires leveling up to a certain threshold—not to the very top but to the point that disadvantages below the threshold are mitigated while positional advantages held by children above the threshold are diminished.").

115. *See id.* at 237.

116. Darby & Levy, *supra* note 99, at 368.

117. Johannes Giesinger, *Education, Fair Competition, and Concern for the Worst Off*, 61 EDUC. THEORY 41, 42 (2011).

Nearly half a century after turning to state courts and constitutions, education rights litigants today are left to wonder whether states are becoming less amenable to their claims. "[State] courts previously willing to intervene have begun to demur, faced with the prospect of enforcing the right in ways that might continuously encroach on legislative prerogatives. Hence, despite decades of school funding litigation and the vast literature annotated above, the right to education remains conceptually fragmented."[118] Such conceptual fragmentation is a product, at least in part, of the *Rodriguez* Court's overbroad deference to the laboratory of the states to resolve virtually all school funding disputes.[119] With state courts unable to consistently balance the competing demands of equity and adequacy—which function as fonts of equality and liberty, respectively—it is incumbent upon future education litigants to once again turn to the federal courts for relief.[120] Prior to reentering the federal courts as education rights claimants, however, litigants must adopt a more judicially manageable, politically feasible legal theory with which to challenge presumptively suspect school finance regimes. RBRB, as this Article contends, should be that theory.

2. Federal Litigation Trends

In the decades following *Rodriguez*, education scholars and advocates have invested significant time and resources constructing ambitious theories of reform that may persuade the federal judiciary to recognize education as a fundamental right.[121] Despite these efforts, however, *Rodriguez* has remained good law for five decades.[122] Further, the Supreme Court's recent shift to the political right[123] lessens these

118. Weishart, *supra* note 91, at 920.

119. *See* Kristi L. Bowman, *A New Strategy for Pursuing Racial and Ethnic Equality in Public Schools*, 1 DUKE F. FOR L. & SOC. CHANGE 47, 57–58 (2009).

120. *See* Weishart, *supra* note 96, at 221 (describing equity and adequacy as fonts of equality and liberty).

121. *See* Weishart, *supra* note 91, at 961 ("Other constitutional collaterals have been proposed—the First Amendment's Free Speech Clause, the implied right to vote, the Privileges and Immunities Clause, the Citizenship Clause, the Ninth Amendment.").

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

123. *See* David Leonhardt, *A Supreme Court, Transformed*, N.Y. TIMES (July 6, 2021), https://www.nytimes.com/2021/07/06/briefing/supreme-court-donald-trump.html; *see also* Melissa Murray, *Don't Be Fooled: This is Not a Moderate Supreme Court*, WASH. POST (July 1, 2021) https://www.washingtonpost.com/opinions/2021/07/01/make-no-mistake-this-is-

lofty theories' odds for success. What litigants need, then, is a more politically feasible, judicially manageable legal theory that will allow future litigants to reenter the federal courts with a more realistic shot of successfully challenging substantively unequal school finance regimes. As this Article argues, RBRB is such a theory.

As described above, the reasoning that the U.S. District Court for the Western District of Texas employed to invalidate Texas's school finance law failed to persuade a majority of the *Rodriguez* Court.[124] This failure notwithstanding, the Court was still required to review whether Texas's system of public K-12 education bore at least "some rational relationship to legitimate state purposes."[125] This form of review—which this Article terms "traditional" rational basis review—is the most permissive form of judicial review of government action, requiring only that such laws "rationally further a legitimate state purpose or interest."[126] Given this permissiveness, the *Rodriguez* Court concluded that Texas's system of school financing satisfied this traditional rational basis review standard.[127] Before reversing the district court, however, the *Rodriguez* Court conveyed its reluctance in reviewing the matter in the first instance. To the Court, the federal judiciary was not the appropriate forum to adjudicate such school-based controversies; rather, these issues were best left to local officials to resolve, especially given their "specialized knowledge and expertise"[128] on such matters.

For all the opportunities that were foreclosed to education rights advocates in the wake of *Rodriguez*, the Court managed to leave open one potential avenue of reform. Although the *Rodriguez* majority was loath to recognize a *general* federal fundamental right to education, as demonstrated above, it did consider the prospect of finding a

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conservative-supreme-court-it-just-sometimes-acts-slowly/; *see also* Joan Biskupic, *The Supreme Court Hasn't Been This Conservative Since the 1930s*, CNN (last updated Sept. 26, 2020), https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html.

124. *See* generally *Rodriguez*, 411 U.S. 1 (1973).

125. *Id.* at 40.

126. *Id.* at 55.

127. *See id.* at 54–55 ("To the extent the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory.").

128. *Id.* at 42.

constitutional right to a *minimally adequate* education.[129] As Derek Black has observed:

> [T]he Court's reluctance toward a general fundamental right to education in contrast to its receptivity toward a minimally adequate education indicates that the Court did not, in principle, object to constitutionalizing education, but rather objected to constitutionalizing education if there was no objective floor by which to evaluate it.[130]

In other words, the Court may have reached a different outcome in *Rodriguez* had plaintiffs argued that the challenged school funding regime deprived students of a bare minimum level of education. Over the next sixteen years, the Supreme Court had occasion to define the contours of this potential right to a minimally adequate education. On each occasion, however, the Court failed to define the contours of this right.

The first occasion was in *Papasan v. Allain*, a 1986 case involving an Equal Protection challenge[131] to wealth disparities in the allocation of resources for public education.[132] Specifically, plaintiffs claimed that such wealth-based disparities deprived students of their constitutional right to a minimally adequate education.[133] The Court disagreed, however, and remanded the case.[134] Fortunately, while it failed to reach

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129. *See id.* at 36–37 ("Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short . . . in the present case[.] [N]o charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.").

130. Black, *supra* note 69, at 1407.

131. *See* Papasan v. Allain, 478 U.S. 265, 289 (1986) ("Given that the State has title to assets granted to it by the Federal Government for the use of the State's schools, does the Equal Protection Clause permit it to distribute the benefit of these assets unequally among the school districts as it now does?"); *id.* at 286 ("The petitioners' allegation that, by reason of the funding disparities relating to the Sixteenth Section lands, they have been deprived of a minimally adequate education is just such an allegation.").

132. *See id.* at 285–86 ("The [Plyler] Court did not, however, measurably change the approach articulated in *Rodriguez*. It reiterated that education is not a fundamental right . . . .").

133. *Id.* at 286.

134. *Id.* at 289.

a decision on the case at bar, the *Papasan* Court did acknowledge that the federal right to a minimally adequate education remained an open question for the Court: "[T]his Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."[135]

Two years after *Papasan*, the Court again failed to define the legal parameters of a minimally adequate education. In *Kadrmas v. Dickinson Public Schools*, a student from a low-income household challenged a North Dakota statute that allowed select school districts to impose transportation fees onto students who rode its buses.[136] The student–plaintiff argued that the transportation fee violated the Equal Protection Clause of the Fourteenth Amendment, alleging that such a fee would deprive lower-income students of "minimum access to education."[137] The *Kadrmas* Court was unpersuaded, however, holding that, "it is difficult to imagine why choosing to offer the [bus] service should entail a constitutional obligation to offer it for free."[138] Consequently, the North Dakota statute was upheld on traditional rational basis review grounds.[139] Justice Marshall, writing in dissent, opined the fact that the Court had again failed to resolve this open question:

> The Court [] does not address the question whether a State constitutionally could deny a child access to a minimally adequate education. In prior cases, this Court explicitly has left open the question whether such a deprivation of access would violate a fundamental constitutional right. That question remains open today.[140]

The central question at issue in both *Papasan* and *Kadrmas*—whether a minimally adequate education is a fundamental right under

135. *Id.*
136. *See* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 453–55 (1988).
137. *Id.* at 458 (internal citations omitted).
138. *Id.* at 462.
139. *See id.* at 458, 460–62 (denying transportation access, not basic education).
140. *Id.* at 473 n.1 (Marshall, J., dissenting) (citation omitted).

the U.S. Constitution—would finally receive an answer nearly three decades later. This answer, however, did not come from the Supreme Court.

In *Gary B. v. Snyder*, seven student–plaintiffs argued that their fundamental right to a minimally adequate education had been infringed through the denial of their right of access to basic literacy.[141] This argument was supported by the abysmal conditions of plaintiffs' school environment. From rat-infested classrooms and inoperable HVAC units, to unqualified teachers and outdated textbooks[142]—such conditions amounted to a school environment "in name only . . . [where] [the students] lacked the most basic educational opportunities that children elsewhere . . . take for granted."[143] Despite these horrid conditions, the District Court dismissed[144] the student–plaintiffs' complaint on the merits—holding that there was no fundamental right of access to basic literacy.[145]

On April 23, 2020, however, a three-judge panel of the Court of Appeals for the Sixth Circuit affirmed in part and reversed in part.[146] Crucially, the Sixth Circuit disagreed with the lower court's reasoning to dismiss plaintiffs' due process claim, thereby recognizing a fundamental right of access to literacy for the first time.[147] The panel held that the state of Michigan had "deprived [the students] of an education that could provide access to literacy,"[148] which it characterized as a "limited right."[149] As a consequence, the court declared the deprivation of a minimally adequate education (through the denial of basic literacy) as violative of the Equal Protection Clause and Due Process Clause guarantees of the Fourteenth Amendment.[150]

Complainants sought to explicate the underlying threat to equal liberty that lay at the heart of the issue: "[p]laintiffs sit in classrooms

141. *See* Gary B. v. Snyder, 313 F. Supp. 3d at 852, 856 (E.D. Mich. 2018).

142. *See id.* at 863.

143. Gary B. v. Whitmer, 957 F.3d 616, 624 (6th Cir. 2020) (internal quotations omitted) (citation omitted), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem).

144. *See Snyder*, 313 F. Supp. 3d at 857.

145. *Id.* at 875–76.

146. *Whitmer*, 957 F.3d at 662.

147. *See id.* at 621.

148. *See id.* at 643 ("[fundamental rights are] 'deeply rooted in this Nation's history and tradition.'" (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997))).

149. *Id.* at 660.

150. *See id.* at 657.

where not even the pretense of education take[s] place . . . This abject failure makes it nearly impossible for young people to attain the level of literacy necessary to function—much less thrive—in higher education, the workforce, and the activities of democratic citizenship."[151] Despite the historic decision in *Gary B.*, the victory was fleeting. Not long after the ruling, Michigan officials settled the case. Among the terms of the settlement was an agreement from the state to pay $280,000[152] in an effort to enhance financial literacy supports and other critical academic resources in high-need areas. The settlement dollars also funded two independent taskforces[153] charged with conducting annual academic evaluations of these academic supports.

Although valuable as stop-gap measures, the prevailing political constraints at the state level would likely undermine the long-term, system reform that the student-plaintiffs sought in the first instance. That is to say, the settlement's terms also required Governor Whitmer—the second of two named defendants in the *Gary B.* litigation—to work to create relevant legislative reform during her time as governor.[154] If successful, such legislation would lead to nearly $95 million dollars in additional state funding for enhanced literacy opportunities within Detroit's public school system.[155] But such legislative success is far from guaranteed, especially given the current composition of Michigan's state legislature. As a Republican-led body, Michigan state legislators have been vocal in their opposition to the *Gary B.* ruling.[156]

There are two additional limitations that arise in the wake of *Gary B*. The first is political. If the plaintiffs in *Gary B.* had not quickly settled, then the case would have likely been appealed to the Supreme Court, a judicial body that is currently predisposed against recognizing

151. Compl. at 2, Gary B. v. Snyder, 313 F. Supp. 3d 852 (E.D. Mich. 2018) (No. 16-CV-13292), 2016 WL 4775474, at 2.

152. *See* Terms for Settlement Agreement Release Between All Plaintiffs and the Governor of the State of Michigan in *Gary B. v. Whitmer*, at 3 (May 13, 2020).

153. *See id.* at 4–5.

154. *See id.* at 2 ("[I]f the legislation is not enacted and if she is re-elected to a second term, also during her second term of office.").

155. *See id.*

156. Koby Levin, *GOP Lawmakers Want Judges to Review Detroit Literacy Case*, CHALKBEAT (May 13, 2020, 6:13 P.M.), https://detroit.chalkbeat.org/2020/5/13/21257962/gop-lawmakers-review-detroit-literacy-case (noting how the *Gary B. v. Whitmer* decision was a "precedent-setting error of grave and exceptional public importance.").

new substantive rights.[157] The *Rodriguez* Court was clear on this latter point. Indeed, if the Burger Court had declared education a fundamental right in *Rodriguez*, then it would have, in its view, undermined the core tenets of federalism.[158] In light of this context, it is difficult to imagine the modern Roberts Court—arguably the more conservative of the two Courts—arriving at a different conclusion.[159]

This initial limitation is further supported by the Sixth Circuit's decision to rehear the *Gary B.* case en banc, a rare procedure intended for "the rarest of circumstances."[160] The rehearing resulted in the court signing an order to vacate the panel's ruling.[161] By vacating the ruling, the court reversed the panel decision on the merits, thereby eliminating any future effort to employ the panel decision as valuable federal precedent. However, as the federal circuit that has been reversed more than 80%[162] of the time in recent years, the Sixth Circuit's decision to rehear its panel ruling en banc may well telegraph how the majority of the court's judges felt about *Gary B.*'s fate if it had reached the Supreme Court.

The second limitation involves the judicial manageability of finding a federal right to education, particularly as it relates to the application of a predictable standard of review (or the lack thereof). In other words,

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157. *See* Leonhardt, *supra* note 123.

158. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973).

159. *See* Justin Driver, *Just How Rightward-leaning Was the Burger Supreme Court?*, WASH. POST, (June 17, 2016), https://www.washingtonpost.com/opinions/just-how-rightward-leaning-was-the-burger-supreme-court/2016/06/17/4c722b8e-2b65-11e6-9de3-6e6e7a14000c_story.html.

160. Mitts v. Bagley, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring) (mem) (citation omitted).

161. Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020).

162. *See* Mark Walsh, *A Sixth Sense: 6th Circuit Has Surpassed the 9th as the Most Reversed Appeals Court*, ABA J. (Dec. 1, 2012, 9:30 AM CST), https://www.abajournal.com/magazine/article/a_sixth_sense_6th_circuit_has_surpassed_the_9th_as_the_most_reversed_appeal; *see also* Linda Qiu, *Does the Ninth Circuit Have the Highest Reversal Rate in the Country?*, N.Y. TIMES (Nov. 26, 2018), https://www.nytimes.com/2018/11/26/us/politics/fact-check-trump-ninth-circuit.html ("From 2006 to 2015, the Supreme Court heard 160 cases from the Ninth Circuit, reversing 106 decisions and vacating 24, according to a law journal article by Judge Timothy B. Dyk of the United States Court of Appeals for the Federal Circuit. That is a reversal or vacating rate of about 81 percent, which is higher than the average reversal rate of nearly 73 percent. But the highest rate belongs to the Sixth Circuit, with nearly 84 percent.").

although the *Gary B*. court acknowledged[163] that basic literacy was best protected through the convergence of the Equal Protection and Due Process clauses of the Fourteenth Amendment, the three-judge panel failed to explicate exactly *how* the judiciary could predictably apply a hybrid form of both principles. As observed by Joshua Weishart:

> [S]cholars continue to contemplate hybrid equality-liberty claims evolving into claims for "equal dignity" or "antisubordination." But while the legal theory is ascendant, it is incomplete—the second part of the question of how to apply equal protection and due process together goes unanswered. The standard of review remains undetermined, and perhaps that is the way the current chief architect, Justice Kennedy, wants it. But for those who look to the law for a modicum of predictability, objectivity, or uniformity, it is disconcerting. In fact, this very problem has persisted for decades in state courts, which were among the first courts to contemplate the interrelation of equality and liberty interests, yet have likewise struggled with the doctrine and the applicable standard of review.[164]

What is more, Chief Justice Roberts expressed his opposition to the merging of federal Due Process and Equal Protection doctrines, further signaling the significant political hurdles that a claim to a federal right to education could face, if it were to come before the Supreme Court.[165]

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163. *See* Gary B. v. Whitmer, 957 F. 3d 616, 679 n.16 (6th Cir. 2020) ("Though this partakes of both the equal protection and due process inquiries, the Supreme Court endorsed such an approach in *Obergefell*, which discussed the partial convergence of the Fourteenth Amendment's Equal Protection and Due Process Clauses. The Due Process Clause and the Equal Protection Clause are connected in a profound way . . . Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." (internal citations omitted)).

164. Weishart, *supra* note 96, at 220 (footnotes omitted).

165. *See* Obergefell v. Hodges, 576 U.S. 644, 706 (2015) (Roberts, C.J., dissenting).

Taken together, the holdings in the foregoing cases leave federal education rights litigants beholden to the same strictures set forth in the *Rodriguez* decision. The limitations of the above case law, moreover, have largely prohibited meaningful judicial engagement and protection of public education at the federal level. And with the Supreme Court's new conservative supermajority,[166] the likelihood that such engagement can be achieved anytime in the near-term seems remote. With this in mind, education advocates have considered at least two alternative avenues of reform. First, education rights litigants have considered advocating for the provision of such a right through federal legislation.[167] Second, litigants have also considered such reform via constitutional amendment.[168] Both approaches, however, have been similarly constrained. Indeed, as Derek Black has observed:

> [L]egislation alone cannot guarantee long term assurance of educational funding, equity, and quality. Rather, mere legislation would leave education subject to the same political pressures that plague it now. Moreover, passing new legislation, or even a constitutional amendment, would require far more political will and public outrage than what seems to currently exist.[169]

Although the foregoing theories may one day lead the Court to overturn *Rodriguez*, their practical effects today remain quite limited. To respond to these political and practical limitations, education advocates must employ a more modest litigation strategy. This Article argues that RBRB is one such strategy that can not only overcome the above challenges but also allow the federal judiciary to intercede within the context of school finance litigation once again.

166. *See* Leonhardt, *supra* note 123.

167. *See* Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1714 (2007).

168. *See* H.R.J. Res. 29, 111th Cong. (2009).

169. Black, *supra* note 69, at 1348–49 (citations omitted).

III. ADDRESSING EDUCATIONAL INEQUALITY WITH RATIONAL BASIS REVIEW WITH BITE

Given the above limitations, RBRB functions as the most politically feasible, judicially manageable legal theory to achieve meaningful judicial review of suspect school finance laws. Education rights litigants can look to the Court's precedents for guidance as to how to successfully deploy this novel legal doctrine. The next Part begins by delineating this heightened form of rational basis review from its more traditional namesake. It then surveys the jurisprudential development of these precedents, which began in a non-education context. The remainder of this Part focuses on how to apply RBRB in the education rights context. This Part concludes by proposing a test for the application of RBRB in the education rights context. It then responds to potential counterarguments and offers evidence that further supports this Article's central thesis: That RBRB is the most politically feasible, judicial manageable legal theory to better protect the right to education within federal forums.

A. Distinguishing Rational Basis Review with Bite from Traditional Rational Basis Review

The Supreme Court's use of traditional rational basis review, relative to its more searching counterpart, is an exceedingly permissive form of judicial review. Under this highly deferential standard of review, the Court assesses the rationality of a government regulation[170] or classification[171] by its relation to some legitimate state interest. Whether a regulation or classification relates in some rational way to a legitimate state interest, however, need not accord with its actual ends.[172] As the Court declared in *FCC v. Beach Communications,*

170. *See* Wash. v. Glucksberg, 521 U.S. 702, 728 (1997) (holding that the Due Process clause required "that Washington's assisted-suicide ban be rationally related to legitimate government interests.").

171. *See* Heller v. Doe, 509 U.S. 312, 319–20 (1993) ("[s]uch a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." (citations omitted)).

172. *See* Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 493 (2011) ("The rational basis test as it currently stands is too weak. By allowing any plausible reason for the legislation to suffice, whether or not it was a true reason for the

Inc.,[173] a government classification "must be upheld against [an] equal protection challenge if there is *any* reasonably conceivable state of facts that could provide a rational basis for the classification."[174]

Under the traditional regime, the Supreme Court is predisposed to affording the state virtually unlimited discretion when creating certain classifications. To contest a given classification, then, a challenger must "negative every conceivable basis which might support [the classification]."[175] Put another way, traditional rational basis review requires the Court to "place a heavy judicial thumb on the government's side of the scales in the form of an essentially irrebuttable presumption that the government is pursuing constitutionally permissible ends, regardless of whether it actually is."[176] Such a dichotomy has not always existed within the judiciary.[177] To the contrary, in the intervening years since the end of the *Lochner* era, the Court's use of this traditional, highly permissive standard of review has only grown in frequency. Indeed, as long as the statute or regulation at issue implicated neither a fundamental right nor a suspect classification, the Court has upheld virtually all challenged government action since 1937.[178]

Rational basis review *with bite*, by contrast, is principally concerned with two interrelated factors. First, when this heightened form of judicial review has been employed, the Court has shown a willingness to require states to demonstrate a *legitimate government interest* for a

legislation, and by asking only whether lawmakers could have thought that it was reasonably related to the subject it purported to advance, the Court has essentially made the rational basis test the equivalent to no test at all.").

173. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

174. *Id.* (emphasis added) (citations omitted).

175. *Id.* at 315 (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

176. Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test Is Unconstitutional*, 14 GEO. J.L. & PUB. POL'Y 537, 543 (2016).

177. *See* Lochner v. New York, 198 U.S. 45, 64 (1905) ("[T]he freedom of master and employee to contract with each other . . . cannot be prohibited or interfered with, without violating the Federal Constitution."); *see also* Jackson, *supra* note 172, at 512 ("[T]he Court in *Lochner* made a crucial change to the calculus: Rather than presume the statute in question to be constitutional, the Court reversed the presumption to favor liberty of contract. Although not explicitly stating so, the Court clearly placed the burden on the state to justify the legislation as a labor or health law, and the state's failure to do so led to the law's demise.").

178. U.S. v. Carolene Prods. Co. 304 U.S. 144, n.4 (1938); *see also* Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 544–46 (2015) (noting the rise of judicial deference in the years following *Carolene Products*);

given classification.[179] Indeed, the Court in *U.S. Department of Agriculture v. Moreno* confirmed as much when it declared, "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest."[180] Despite the holding in *Moreno*, the Court's use of RBRB would still view all challenged government action as presumptively valid.[181] The principal distinction between the heightened form and the traditional form of rational basis review, then, is the absence of an irrebuttable presumption that the government is pursuing constitutionally permissible ends.[182] In other words, if the state's *actual* purpose—rather than merely its *proffered* one—animating a given classification is deemed illegitimate by the Court, then the challenged government action will likely be invalidated under this more searching form of rational basis review.[183]

Whether to invalidate a challenged government action has not been decided by the Court absent the necessary governing authority; that is, the Court has consistently grounded its decision to invalidate a given action as illegitimate within the appropriate Constitutional authority:

> [T]he legitimacy or illegitimacy of a governmental purpose is not an absolute quantity. Instead, it varies depending on the constitutional right that the challenged governmental action is alleged to violate. Legitimacy

179. *See* Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 314 (2011).

180. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

181. *See* James M. McGoldrick, Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Retrospective*, 55 SAN DIEGO L. REV. 751, 799–800 (2018) ("All that would be required is that the Supreme Court takes more seriously its judicial responsibility to see laws and classifications are reasonably sensible. This should be true for all laws, but especially for laws and classifications affecting things people care about in their daily lives. Legislation would still be presumed to be constitutional. The legislature would still be entitled to that level of respect as to all but those subjects or classifications that subvert the political processes. The changes are minimal.").

182. *See* Bhagwat, *supra* note 107, at 333.

183. *See* Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986), *overruled by Lawrence*, 539 U.S. at 578)).

> must be assessed based on principles that underlie that right, which can only be derived by interpreting the relevant constitutional provisions.[184]

Second, if a discriminatory law *is* found to possess a legitimate governmental purpose, the Court must also find that the classification at issue *rationally serves* the state's proffered interest.[185] To determine whether a classification rationally serves a state's proffered interest, the Court has often employed a two-part test. First, the Court has asked whether the relationship between the challenged law's means and ends bears a "positive causal relationship" to each other.[186] Second, the Court has asked whether a given classification imposes a "grossly unreasonable" burden when compared to the government's stated interest.[187] This relatively opaque two-part test has led many legal scholars to scour Supreme Court precedent in search of additional guidance to more consistently apply this novel doctrine.[188] Despite years of Court-watching and theorizing, however, advocates continue to opine the lack of explicit guidance from the Court on how, and when, it applies this heightened form of rational basis review.[189] In fact, the Court has never explicitly recognized, let alone adopted, any inveterate legal principal or standard that could guide lower courts and future litigants as to the doctrine's use.[190] Not surprisingly, then, such obfuscation around the use of this heightened form of rational basis

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184. Bhagwat, s*upra* note 107, at 334.

185. *See* Lawrence, 539 U.S. at 577–78 (citing *Bowers*, 478 U.S. at 216).

186. Forde-Mazrui, *supra* note 179.

187. *Id.*

188. *See* Raphael Holoszyc-Pimentel, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2072 (2015) (surveying all of the rational basis review with "bite" Supreme Court case law from the 1971 through the 2014 Terms. The commentator also identifies nine recurring factors that have been found to evoke this heightened form of rational basis review); *see generally* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357 (1999) (listing all of the rational basis review with "bite" Supreme Court case law from the 1971 through the 1996 Terms); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

189. *See* Thomas B. Nachbar, *Rational Basis "Plus,"* 32 CONST. COMMENT. 449 (2017).

190. *Compare Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (denying the existence of rational basis review with "bite" as a doctrine within the canon of Equal Protection judicial scrutiny), *with* United States v. Windsor, 570 U.S. 744, 793 (2013) (Scalia, J., dissenting) (acknowledging, albeit in less direct terms, the application of an elevated standard of judicial scrutiny above the traditional rational basis review standard).

review has led scholars to refer to its precedents as "the misfits" of constitutional law.[191]

Finally, in *United States v. Windsor*[192]—a legal challenge to section 3 of the Defense of Marriage Act (DOMA), which had prohibited same-sex couples from receiving federally-recognized spousal benefits enjoyed by opposite-sex unions—the Court observed that the federal government's interest in promoting opposite-sex marriage had relied on irrational animus.[193] However, as the Court in *Romer* declared, legislation that relies on irrational animus will invariably fail to rationally serve any governmental interest.[194]Accordingly, the Court in *Windsor* held that section 3 of DOMA violated the liberty guarantee of the Due Process Clause of the Fifth Amendment, which includes a right to Equal Protection.[195]

Since the facts in *Windsor* implicated neither a fundamental right nor a suspect or quasi-suspect classification, the Court's decision to invalidate section 3 of DOMA was somewhat unexpected. As explained above, government action that implicates neither a suspect classification nor a fundamental right would be subjected to the traditional, more permissive standard of rational basis review. Rather than applying this permissive form of review in *Windsor*, the Court elected to invalidate DOMA using the same heightened form of rational basis review that had been deployed in *Moreno* four decades earlier.

B. Applying Rational Basis Review with Bite in the Public K-12 Education Context

Through RBRB, future education rights litigants stand a better chance to receive meaningful federal judicial protection, despite the Court's holding in *Rodriguez*. The Court's holding in *Plyler v. Doe* offers support for this thesis. In *Plyler*, the Supreme Court struck down a Texas law that withheld state funds that would have supported the

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191. Bambauer & Massaro, *supra* note 15, at 282.

192. *See* United States v. Windsor, 570 U.S. 744, 770 (2013).

193. *See id.*

194. *See* Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

195. *See Windsor*, 570 U.S. at 770; *see also* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

education of undocumented children.[196] The plaintiffs in *Plyler*, much like the plaintiff in *Rodriguez*, grounded their claim in the Equal Protection Clause of the Fourteenth Amendment.[197] The facts at issue in *Plyler*, as in *Rodriguez*, implicated neither a fundamental right nor suspect classification.[198] The *Plyler* Court nonetheless broke from the *Rodriguez* Court by failing to uphold the challenged education law as rationally related to a legitimate state interest.[199] Stated differently, rather than applying the exceedingly permissive standard of traditional rational basis review, as the Court had done in *Rodriguez* nine years earlier, the *Plyler* Court invalidated the challenged legislation under this more heightened form of rational basis review.[200]

The *Plyler* Court should serve as an exemplar for litigants who adopt this heightened form of rational basis review. In *Plyler*, the State of Texas's principal argument reflected, at least conceptually, the same doctrinal argument that was employed in *Moreno*: That the state's proffered purpose for the legislation lacked a rational basis. Specifically, the State of Texas argued that denying undocumented children access to a free public education was not only sufficiently rational, but also duly sanctioned by federal law.[201] Although the *Plyler* majority acknowledged that states possess "some authority to act with respect to illegal aliens,"[202] this authority must derive from actions that further federal goals *and* legitimate state interests. Accordingly, the *Plyler* majority found Texas's proffered purpose wanting on both counts: "The State does not claim that the conservation of state educational resources was ever a congressional concern in restricting immigration. More important, the classification reflected in [the challenged law] does not operate harmoniously with the federal program."[203]

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196. *See* Plyler v. Doe, 457 U.S. 202, 221–23 (1982).

197. *See id.* at 205.

198. *See id.* at 223.

199. *See id.* at 230.

200. *See id.* at 223–24.

201. *See id.* at 224 ("Indeed, in the State's view, Congress' apparent disapproval of the presence of these children within the United States, and the evasion of the federal regulatory program that is the mark of undocumented status, provides authority for its decision to impose upon them special disabilities.").

202. *Id.* at 225 (citing the Court's decision in *DeCanas v. Bica*, which sanctioned state action with respect to undocumented immigrants so long as such action reflected Congress' broader objectives on the issue).

203. *Id.* at 225–26.

By invalidating the Texas law, moreover, the *Plyler* Court held that the challenged law failed to rationally relate to a legitimate government interest.[204] Simply put, depriving undocumented children access to publicly funded education embodied a form of "punitive discrimination"[205] that, in the eyes of the Court, could not constitute a legitimate government interest under the federal Equal Protection Clause. Crucially, since children possess no control over their immigration status, the Court further reasoned that "legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests a kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[206] This particular language reflects a specific legal standard employed by the *Plyler* majority—that is, the immutability standard—to invalidate the challenged Texas law. It is this standard, moreover, that serves as the crux of this Article's central thesis.

To be sure, the foregoing immutability standard employed by the *Plyler* Court is not the same standard employed by the Court in *Romer* or *Windsor*. In *Plyler*, the Court found difficulty in "conceiv[ing] . . . a rational justification for penalizing these children" "on the basis of a legal characteristic over which children can have little control."[207] Rather than using an animus-based standard,[208] which had been employed by the Court in *Romer* and *Windsor* to invalidate the government action at issue, the *Plyler* Court invalidated the challenged statute using the immutability standard. Although employed in the relatively narrow context of immigration, the *Plyler* Court's use of the immutability standard can, and should, be adopted by future litigants in the broader education rights context. The following Parts make that case.

The immutability standard should be adopted by future litigants to better protect the right to education within federal forums. First, the

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204. *See id*. at 230.

205. *Id.* at 240 (Powell, J., concurring) (summarizing the majority's finding that denial of education to undocumented children constituted an equal protection violation as "punitive discrimination").

206. *Id.* at 217 n.14.

207. *Id.* at 220.

208. *See* Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

immutability standard, as a judicial gloss of RBRB, serves as the most feasible legal theory with which to challenge school finance laws that discriminate based on wealth. In other words, the financial circumstances of a child's home life—much like the circumstances surrounding a child's immigration status[209]—are entirely beyond their control. Therefore, any government action imposing special disabilities upon an indigent child's receipt of an equal educational opportunity should be invalidated as violative of the Equal Protection Clause of the Fourteenth Amendment. Second, RBRB would not require the modern Court to overturn *Rodriguez*.[210] Instead, the Court would simply require a state to offer a legitimate defense of the challenged classification. Given that the right to education has been codified in every state constitution in the decades following *Rodriguez*, RBRB would thus prove more than sufficient to protect the right to education within federal court. Indeed, as Derek Black has observed:

> Although offering less protection than strict scrutiny, this heightened rational basis review would still force a state to make a reasoned defense of its educational system. The defenses from *Rodriguez*—that the state was fostering local control and was already exerting significant fiscal effort—may not even survive a basic rational basis review any longer, much less a heightened rational basis review. For instance, if the responsibility for delivering constitutional educational opportunities rests solely with the state, a state could not argue that fostering local control at the expense of meeting the state's constitutional responsibilities was a legitimate goal. Nor could the state argue that its methods were rationally related to a legitimate goal. In essence, any system that deliberately or consciously fails to provide an adequate education to students, when that education is constitutionally required, is irrational and would fail a heightened rational basis review.[211]

209. *See Plyler*, 457 U.S. at 220.
210. *See* Bambauer & Massaro, *supra* note 15.
211. Black, *supra* note 69, at 1412–13.

Third, and finally, the immutability standard, as a judicial gloss of RBRB, could fall under the protection of *Plyler*. Indeed, despite representing a larger and less discrete class than in *Plyler*, the *Gary B*. majority grounded its finding of an equal protection violation in the core reasoning advanced by the *Plyler* majority.[212] Stated another way, the *Gary B*. majority viewed the deprivation of education experienced by Detroit students as tantamount to deprivation of education experienced by the undocumented students in *Plyler*. Unlike in *Gary B.*, though, plaintiffs who petition the modern Court for such relief would not ask it to constitutionalize education. As described above, litigants who adopt RBRB (and its corresponding immutability standard) would only petition the Court to require a state to present an actual, defensible purpose for its failure to meet its affirmative constitutional duty. Consequently, if the Court invalidates a school finance regime that unduly discriminated against children from low-income households—children who, as argued above, have no control over their socioeconomic status—then it could likely do so without running afoul of the federalism concerns expressed by the majority in *Rodriguez*.[213]

Taken together, by adopting RBRB as the viable legal strategy that it is, future litigants stand a greater chance of repositioning the federal judiciary as the final guarantor of substantively equal educational opportunity that it was designed to be. Simply put, this novel doctrine requires very little of the federal judiciary. But even a little can go a long way in the quest to better protect the right to education. This is especially true for our nation's more vulnerable student populations, as "[m]ost inequalities simply lack any defensible purpose in light of the fact that the state has an affirmative constitutional duty to provide education."[214] As Kristine Bowman has observed, "rational basis with bite is . . . more than a free pass for the government."[215] And given the unacceptable conditions within many of our highest need communities,

212. *See* Gary B. v. Whitmer, 957 F.3d 616, 634–35, 637 (6th Cir. 2020), vacated en banc, 958 F.3d 1216 (6th Cir. 2020) (mem).

213. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 58 (1973).

214. Black, *supra* note 69, at 1415.

215. Kristi L. Bowman, *The Failure of Education Federalism*, 51 U. MICH. J. L. REFORM 1, 52 (2017).

"any level of serious judicial engagement with questions of educational quality is a victory for students."[216]

C. The Test for Rational Basis Review with Bite

Given the substantial body of research underscoring the causal relationship between inadequate state education funding and its effects on student outcomes,[217] litigants who challenge presumptively unconstitutional school finance regimes as "irrational" are likely to succeed even among today's conservative-leaning Court. Although several factors have been found to animate this "irrationality" test, a recent analysis[218] of all RBRB jurisprudence has been particularly instructive on this score. More specifically, scholars have discovered two recurring factors that may be more predictive of when the Court will employ this heightened form of scrutiny.[219] First, if a government classification implicates an immutable characteristic.[220] Second, if government action interferes with a *significant*—rather than fundamental—right.[221]

Today, an education litigant would likely satisfy the first factor—that is, when a government classification implicates an immutable characteristic—by employing the substantial body of evidence that demonstrates the functional immutability of childhood poverty. Indeed, recent empirical research underscores the long-lasting effects of neighborhood poverty on both our broader social systems and individual outcomes.[222] Among the more sobering findings is the compounding, intergenerational effects of concentrated childhood poverty:

216. *Id.*

217. *See* Julien Lafortune, Jesse Rothstein & Diane Whitmore Schanzenbach, *Can School Finance Reforms Improve Student Achievement?*, WASHINGTON CTR. FOR EQUITABLE GROWTH (Mar. 16, 2016), http://equitablegrowth.org/research-analysis/can-school-finance-reforms-improve-student-achievement/; *see also* BRUCE BAKER, HOW MONEY MATTERS FOR SCHOOLS, LEARNING POL'Y INST. (2017); *see generally* Kenneth Shores & Matthew P. Steinberg, *The Impact of the Great Recession on Student Achievement: Evidence from Population Data* 30 (Stan. Ctr. for Educ. Pol'y Analysis, Working Paper No. 17-09, 2017).

218. *See* Holoszyc-Pimentel*, supra* note 188.

219. *See id.* at 2072.

220. *See id.*

221. *See id.* at 2073.

222. *See* PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY 118 (2013).

> It is not only that a child's neighborhood environment might affect her adult economic status, but that disadvantage (or advantage) experienced by a child is often disadvantage that is then passed on to her own children. To understand neighborhood inequality, we have to consider the accumulation of disadvantage and advantage over generations.[223]

As observed by Professor Patrick Sharkey, "[o]ver 70 percent of African Americans who live in today's poorest, most racially segregated neighborhoods are from the same families that lived in the ghettos of the 1970s."[224] This accumulation of disadvantage has led to significant harm, particularly in terms of childhood development, across generations. Indeed, "children raised by parents from poor neighborhoods score lower [on a broad reading skills test] than those raised by parents who were not from poor neighborhoods, despite the fact that the [both groups of] children did not grow up in a poor environment."[225] More concerning still, "children who have spent their own childhoods in poor neighborhoods and who also have a parent who was raised in a poor neighborhood"[226] score substantially lower on such reading tests, resulting in a "cognitive deficit that is comparable to missing somewhere between four and eight years of schooling."[227]

Moreover, recent social science research has found that, among families currently mired in entrenched poverty, escaping these conditions requires that nothing go wrong for nearly twenty years.[228] In other words, a family experiencing poverty today must suffer no substantial hardship or financial set-back for two decades, if they hope to escape such dire circumstances.[229]

The age of majority within most U.S. jurisdictions remains eighteen, which coincides with most children's total number of years within a

223. *Id.*

224. *Id.* at 9.

225. *Id.* at 119.

226. *Id.* at 120.

227. *Id.*

228. *See* PETER TEMIN, THE VANISHING MIDDLE CLASS: PREJUDICE AND POWER IN A DUAL ECONOMY 44–45 (2017) (Illustrating that, for people mired in concentrated poverty, "nothing can go wrong for twenty years.").

229. *See id.*

public K-12 educational setting. Accordingly, it may be reasonably inferred that a family experiencing poverty may not escape this circumstance before their school-aged child reaches adulthood. Indeed, nearly twelve million children within the United States today—or nearly one in six—live in poverty.[230] This overwhelming figure renders children the poorest age group in America.[231] Childhood poverty, therefore, can be aptly deemed as immutable.

In light of the foregoing evidence, then, it would be extraordinarily difficult for a state to rebut a claim challenging the constitutionality of a school finance regime that imposed such special disabilities upon indigent children. Because childhood poverty, as this Article contends, is functionally immutable, a school finance regime that imposed such barriers would likely be found to further neither a substantial state interest nor possesses a legitimate governmental purpose. As mentioned previously, the *Plyler* Court effectively confirmed as much.[232] Consequently, a plaintiff would likely satisfy the immutability factor of the RBRB doctrine.

D. Responding to Arguments Against Rational Basis Review with 'Bite'

RBRB has been criticized in two central ways. First, opponents of this heightened form of rational basis review have argued that courts "are notoriously bad at evaluating legislative and constitutional facts."[233] At the same time, these critics also lament that "full knowledge regarding legislative options is in any event extremely unlikely to be available in litigation."[234] Taken together, critics worry that relying on the political instincts of an unelected judiciary will undermine the prevailing notions of democratic legitimacy and institutional competency. These critiques of RBRB are not fatal.[235] In response to opponents' first argument—that courts do a poor job of

230. *See* THE CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN 2020 – CHILD POVERTY (2020), https://www.childrensdefense.org/policy/resources/soac-2020-child-poverty/.

231. *See id*.

232. *See* Plyler v. Doe, 407 U.S. 202, 217–18 n.14 ("[L]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests a kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish.").

233. Bhagwat, *supra* note 107, at 322.

234. *Id.*

235 *See id*. at 325.

evaluating facts—consider the Court's approach to its doctrine of Constitutional stare decisis.

The principle of stare decisis rests on the presumption that the overruling of Constitutional precedent may not occur if a majority of the Court merely disagrees with the precedent's holding.[236] To the contrary, a "special justification" is required.[237] Accordingly, when the Court has considered overruling its own precedent, it often follows several "prudential and pragmatic" factors.[238] In so doing, the Court may "foster the rule of law while balancing the costs and benefits to society of reaffirming or overruling a prior holding."[239] One such factor that the Supreme Court considers a "special justification" involves the "changing facts" surrounding a given precedent.[240] Indeed, the Supreme Court has overturned several of its landmark precedents by employing this changing facts principle. Consider, for example, the Court's landmark decision in *Brown v. Board of Education*. Here, the Supreme Court overturned *Plessy v. Ferguson* given its evolved understanding of the myriad harms caused by racial segregation:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law,

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236. *See* Stephen Wermiel, *SCOTUS for Law Students: Supreme Court Precedent*, SCOTUSBLOG (Oct. 2, 2019, 9:54 AM), https://www.scotusblog.com/2019/10/scotus-for-law-students-supreme-court-precedent/.

237. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992) (plurality opinion) ("[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."); *see also* Arizona v. Rumsey, 467 U.S. 203, 212 (1984) ("Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification.").

238. Legislative Attorney, *The Supreme Court's Overruling of Constitutional Precedent*, CONG. RSCH. SERV., https://www.everycrsreport.com/reports/R45319.html#_Toc525567243 (Updated Sept. 24, 2018).

239. *Id*.

240. *See Casey*, 505 U.S. at 864 (outlining the procedure of overruling precedent on whether "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.").

> therefore, has a tendency to [inhibit] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school [].[241]

Moreover, the Court in *Ramos v. Louisiana*[242] recently overturned *Apodaca v. Oregon*[243]—a 1972 decision that permitted criminal convictions based on non-unanimous jury verdicts—by employing this facts-based analysis. In reversing *Apodaca*, the *Ramos* Court reasoned that the Court had failed to consider "the racist origins"[244] of non-unanimous jury laws.

In response to opponents' second argument—that courts would lack an understanding of the suite of legislative options available during the litigation process—courts would not need such an expansive knowledge under RBRB. Instead, the judiciary's constitutionally-derived role as a counter-majoritarian check on democratic overreach undermines concerns around the institutional competency and capacities of courts to adjudicate such disputes. Indeed, as Frank Michelman has observed, "the courts possess a unique institutional ability and obligation to protect individual rights against majoritarian intrusion."[245] Opponents have further contended that a more searching judicial review of legislative purposes invariably undermines the principles of federalism and separation of powers.[246] Such an argument is similarly overbroad, as this heightened form of rational basis scrutiny, as mentioned above, must be "meaningfully constrained by and grounded in the Constitution itself—the one source of authority that properly trumps the decisions of democratically elected bodies."[247]

Courts are uniquely positioned to adjudicate education disputes. As observed by Michael Rebell, "[p]recisely because state legislatures and executive agencies overseeing school districts have at times failed to

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

242. *See* Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

243. *See* Apodaca v. Oregon, 406 U.S. 404 (1972).

244. *Ramos*, 140 S. Ct. at 21; *see generally* Thomas Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1611–20 (2019) (noting the racist motivations for establishing nonunanimous juries).

245. Frank I. Michelman, *The Supreme Court, 1968 Term-Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 38–39 (1969).

246. *See generally* Nachbar, *supra* note 189.

247. Bhagwat, *supra* note 107, at 325.

ensure the effective use of education funds, and the targeting of resources to the students with greatest needs, courts need to become more, not less, active at the remedy stage of [education] litigation[]."[248] The judiciary's role in adjudicating education disputes, therefore, is not to undertake elaborate policy determinations that fall more within the ambit of state legislatures; rather, courts are well-equipped to "review and enforce effective accountability measures in order to ensure that education funds stemming from adequacy cases are used in a cost-efficient, productive, and targeted manner."[249]

E. Political & Judicial Support for Rational Basis Review with Bite

The Court's use of RBRB will allow future education rights litigants to avoid the foregoing legal and political challenges through a judicial compromise of sorts.[250] In terms of the political considerations associated with this novel doctrine, RBRB has engendered growing political support across partisan divides. Indeed, "progressives value the rational basis test because of its heroic role in the gay marriage cases. Conservatives and libertarians have grown [to have] respect for the rational basis test because it has been used in the last few years to strike down questionable economic regulations."[251] Such bipartisan political support is not shared by all, of course.[252] These recent objections notwithstanding, this Article maintains that RBRB should be adopted as the most politically feasible, judicially manageable legal theory with which to better protect the state right to education within federal forums.

In terms of judicial manageability, the federal judiciary—relative to state courts—possesses fewer institutional barriers to support the protection of the right to education. That is, unlike state courts, federal courts "do not face a separation of powers concern between themselves

248. Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1540 (2007).

249. *Id.* at 1541.

250. *See* James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. L. REV. & SOC. CHANGE 183, 278–79 (2003).

251. Bambauer & Massaro, *supra* note 15, at 284.

252. *See* Nina Totenberg, *Justices Thomas*, *Alito Blast Supreme Court Decision on Same-Sex Marriage Rights*, NPR (Oct. 5, 2020), https://www.npr.org/2020/10/05/920416357/justices-thomas-alito-blast-supreme-court-decision-on-gay-marriage-rights.

and state legislatures,"[253] and are largely immune from "the same reelection and political repercussions as state courts."[254] On the rare occasion that a state court has proven capable of reliably meeting its constitutional charge—as evinced in the *Abbott v. Burke* litigation, New Jersey's decades-long school finance dispute[255]—state courts simply lack the evaluative and enforcement capacities that are needed to fulfill their constitutional duty. "Neither litigants nor courts are designed to be perpetual monitors [of compliance with court orders]. Yet state constitutional cases have asked this of courts."[256]

Finally, with five decades of state-level jurisprudence defining the scope of the education right, a litigant's embrace of RBRB would not require the Court to define its parameters. As mentioned above, this heightened form of rational basis review is principally concerned with assessing the means and ends of legislation.[257] The Court, therefore, would only concern itself with the rationality of the challenged government action at issue rather than substantive dimensions of the right, thereby avoiding potential federalism concerns.[258] Furthermore, a strict adherence to adjudicative—rather than policy-based—determinations would allow the Court to once again serve as the final guarantor of constitutional enforcement that it was designed to be. Indeed, as Derek Black observed, "[t]here is no need to look to the federal government for leadership on the substance or creation of educational rights. Rather, federal law is necessary only to ensure the enforcement of equality in already existing state rights."[259]

IV. CONCLUSION

Taken together, RBRB serves as the most politically feasible, judicially manageable legal theory with which to reenter federal forums to challenge presumptively suspect school finance regimes. Furthermore, by assuming a more direct remedial role in school finance litigation—rather than a policy-oriented one—this heightened form of rational basis review creates the potential for the federal judiciary to

253. Black, *supra* note 69, at 1394.
254. *Id.*
255. *See* Abbott v. Burke (Abbott XIX), 960 A.2d 360, 362 (N.J. 2008) (per curiam).
256. *Id.*
257. *See* Bowman, *supra* note 215, at 21.
258. *See id.* at 49.
259. Black, *supra* note 69, at 1393.

reengage such education reform without running afoul of existing Court precedent or the strictures that it created.[260] Perhaps more centrally, however, applying this more searching review to constitutionally-questionable state action allows the federal judiciary to re-establish itself as the counter-majoritarian check on majority abuse within the province of education rights. Given the widening educational disparities described in this Article, the establishment of a more equal and equitable playing field within our system of public K-12 education would come none too soon.[261]

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260. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1972).
261. *See* Koski, *supra* note 103, at 1297.