

*SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V.
RODRIGUEZ AND ITS AFTERMATH*

*Jeffrey S. Sutton**

IN *Brown v. Board of Education*, the Supreme Court observed that “education is perhaps the most important function of state and local governments” and held that it was a public service that “must be made available to all on equal terms.”¹ While *Brown* removed one obvious barrier to equal educational opportunities, it left in place another: the obstacle faced by poor school districts that wish to provide an education to their students “on equal terms” relative to the education offered by wealthier school districts within a State.

Nineteen years after *Brown*, the Court decided another equal-protection case, *San Antonio Independent School District v. Rodriguez*,² which gave the Court an opportunity to remove, or at least ameliorate, wealth-based barriers to equal educational opportunities as well. But the Court rejected the plaintiffs’ claims. This Essay explains what happened in *Rodriguez*, describes what happened in the States in the thirty-five years after *Rodriguez* and raises some questions prompted by the experience.

I. THE *RODRIGUEZ* LITIGATION

In 1968, a group of parents and children from San Antonio, Texas filed a lawsuit in a three-judge federal district court, challenging the constitutionality of Texas’s system for funding public schools. They filed the claim under the Fourteenth Amendment to

* Circuit Judge, United States Court of Appeals for the Sixth Circuit. A version of this essay was delivered as the Ola B. Smith Lecture at the University of Virginia School of Law on April 24, 2008. In the interest of full disclosure: I clerked for Justice Lewis F. Powell, Jr. (ret.), the author of the *Rodriguez* majority decision, as well as for Justice Antonin Scalia, from 1991–92; I represented the State of Ohio in *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997), a case challenging a state school-funding program (discussed *infra* at 1974–75); and I was a school teacher from 1985–87. Nothing in this essay means to opine on the outcome of any pending or future issues that may come before me, and the thrust of this article is not to praise or lament *Rodriguez* but to raise questions prompted by its aftermath.

¹ 347 U.S. 483, 493 (1954).

² 411 U.S. 1 (1973).

1964

Virginia Law Review

[Vol. 94:1963]

the United States Constitution, and their complaint featured two theories of unconstitutionality. One was premised on the notion that education is a fundamental right; the other was premised on the notion that wealth is a suspect class. Both theories came to the same end: If accepted, each would require the court to gauge the constitutionality of Texas's system for funding public schools based on the unforgiving demands of strict scrutiny, a test that would force the State to justify marked disparities between the quality of a public education offered to children living in property-rich and property-poor school districts.

The *Rodriguez* plaintiffs illustrated these disparities by comparing the fortunes of two San Antonio school districts: Edgewood and Alamo Heights. Located in the inner city, Edgewood educated 22,000 students in 25 elementary and secondary schools and had the lowest real-property values and family income in the metropolitan area. Even though Edgewood imposed the highest property tax rate in the metropolitan area in 1967–68, it generated the lowest amount of revenue: a total of \$356 per pupil, which consisted of \$222 guaranteed by the State (made up of state and local property taxes), \$108 in federal funds and \$26 of discretionary local property-tax revenue.³ Alamo Heights, the most affluent school district in the San Antonio metropolitan area, had an easier time of it. In 1967–68, it generated \$594 per pupil, which consisted of \$225 provided by the state guarantee, \$36 in federal funds and \$333 of discretionary local-property-tax revenue.⁴

When the *Rodriguez* plaintiffs filed their complaint, these disparities were not atypical in Texas. In the 1967–68 school year, the ten wealthiest school districts in the State raised an average of \$610 per student in additional discretionary funds from local property taxes, while the four poorest districts in the State raised an average of \$63 per student.⁵ The Texas students who had the greatest educational needs, plaintiffs argued, received the worst (or at least the lowest-funded) education. And these disparities, as the plaintiffs also pointed out, often had a racial correlation. Edgewood was 90% Hispanic and 6% African-American, while Alamo Heights

³ Id. at 11–12.

⁴ Id. at 12–13.

⁵ Id. at 74–75 (Marshall, J., dissenting).

2008] *San Antonio Independent School District v. Rodriguez* 1965

was predominantly Caucasian, 18% Hispanic and less than 1% African-American.⁶

How did this happen? As a matter of history—an abridged history—what had happened in Texas before 1968 had happened to one degree or another in most States. At the founding, there were no state-wide systems of public schools, and, if there were schools at all, they were privately run or haphazardly organized at the local level.⁷ Sparked by the virtuous (and occasionally not-so-virtuous) leadership of Horace Mann and the “Common Schools” movement he launched in Massachusetts,⁸ States in the mid-nineteenth century began to authorize their cities and counties to organize schools that would offer a free public education. To that end, they frequently amended their constitutions, requiring the legislature (in the words of many a state constitution) to create a “thorough and efficient” system of public schools.⁹

While it was the States that authorized the creation and funding of these public schools, and it was the States that retained responsibility for them, local funding and local control remained the hallmarks of the early public schools.¹⁰ Societal changes spurred by the Industrial Revolution placed the first stresses on the system.¹¹ As the country moved from a largely agrarian society to one divided into rural, suburban and urban communities, wealth disparities increased, prompting States in the early twentieth century to begin awarding “flat grants” to all school districts, usually based on a per-pupil or per-teacher figure.¹² While these grants provided considerable support to poorer communities, they did nothing to decrease property-wealth disparities because they did not vary in

⁶ Id. at 12–13 (majority opinion).

⁷ Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter?*, 53 *Vill. L. Rev.* 297, 301 (2008).

⁸ See Joseph P. Viteritti, *The Inadequacy of Adequacy Guarantees: A Historical Commentary on State Constitutional Provisions that are the Basis for School Finance Litigation*, 7 *U. Md. L.J. Race Religion Gen. & Class* 58, 73–78 (2007) (discussing the influence of Mann’s Protestant common-school model and the tensions it raised with minority religious groups).

⁹ E.g., Md. Const. art. VIII, § 1; Ohio Const. art. VI, § 2. Cf. Tex. Const. art. VII, § 1 (mandating the creation of an “efficient” system of public schools).

¹⁰ See Annette B. Johnson, *State Court Intervention in School Finance Reform*, 28 *Clev. St. L. Rev.* 325, 328 (1979).

¹¹ Id.

¹² Id.

1966

Virginia Law Review

[Vol. 94:1963]

amount depending on a school district's relative wealth.¹³ In an effort to address this problem, States in the mid-twentieth century began adopting "foundation programs."¹⁴ So long as a district imposed a state-established property tax rate on the assessed value of all property in the district, the State guaranteed each district a comparable amount of state and local funding per child. By 1965, many States funded their schools through a foundation program, with only eleven States still providing "flat grants."¹⁵ Texas proceeded through each of these stages of reform, and by 1968 it too had adopted a state-run foundation program along these lines.¹⁶

While each of these reforms sought to correct funding inequities, they had not cured them by 1968 in Texas (or elsewhere). Under the foundation program, Texas authorized school districts to fund their operations in just two ways: through local property taxes and supplemental state funding.¹⁷ Because state funding provided less than a majority of overall primary and secondary school funding, the local property tax remained a necessary cornerstone of every school district's budget. In 1970–71, for example, only 48% of an average school district's funding came from the State, while local property taxes provided 41.1% and the federal government contributed 10.9%.¹⁸ And because local property taxes were the only means by which a community could raise additional education funds, a district's property-tax base went a long way in determining the size of its budget.¹⁹

As the *Rodriguez* plaintiffs showed, Texas's heavy reliance on local property taxes affected the quality of education a property-poor district could offer, at least as measured by conventional statistics such as class size and the credentials and experience of a dis-

¹³ *Id.*

¹⁴ See *id.* at 328–29.

¹⁵ *Id.* at 329 & n.14.

¹⁶ See generally Frederick Eby, *The First Century of Public Education in Texas in Texas Public Schools Sesquicentennial Handbook* 35, 35–59 (2004); Marilyn Kuehlem, *Education Reforms from Gilmer-Aikin to Today in Texas Public Schools Sesquicentennial Handbook* 60, 60–63 (2004); Mark G. Yudof & Daniel C. Morgan, *Rodriguez v. San Antonio Independent School District: Gathering the Ayes of Texas—The Politics of School Finance Reform*, 38 *Law & Contemp. Probs.* 383, 383–91 (1974).

¹⁷ *Rodriguez*, 411 U.S. at 9–11.

¹⁸ *Id.* at 9 n.21.

¹⁹ See *id.* at 10–11.

2008] *San Antonio Independent School District v. Rodriguez* 1967

trict's teachers. In the 1968–69 school year: 100% of the Alamo Heights teachers had college degrees, while 80% of the Edgewood teachers had them; 37.17% of the Alamo Heights teachers had advanced degrees, while 14.98% of the Edgewood teachers had them; 11% of the Alamo Heights teachers depended on emergency teaching permits, while 47% of the Edgewood teachers depended on them; Alamo Heights' maximum teaching salary was 25% greater than Edgewood's maximum salary; Alamo Heights' teacher-student ratio was 1 to 20.5, while Edgewood's was 1 to 26.5; and Alamo Heights provided one counselor for every 645 students, while Edgewood provided one counselor for every 3,098 students.²⁰

In the absence of additional state (or federal) support, nothing short of alchemy would have enabled Edgewood to remove this disparity. At \$5,960 per student, the average assessed property value of the district was the lowest in the metropolitan area, and Edgewood already imposed the area's highest property-tax rate (\$1.05 per every \$100 of value). Alamo Heights, by contrast, had an average-assessed property value in excess of \$49,000 per student and a tax rate of \$0.85 per every \$100.

The fight in the Supreme Court in *Rodriguez* was not over the accuracy of these fiscal comparisons or over the lingering perception that the State ought to be able to do better. When Professor Charles Alan Wright rose to present his oral argument on behalf of the State, he started (quite wisely) by acknowledging that Texas could—and should—do better.²¹ In view of these acknowledged defects in the system, the parties devoted much of their energy to winning the standard-of-review debate. If strict scrutiny applied, the State faced the difficult task of establishing a compelling interest to justify these disparities and in establishing that it had done everything within its power to eliminate them. If rational-basis review applied, the State could seize hope from the argument that these disparities were the unfortunate, but unavoidable, conse-

²⁰ Id. at 85 & n.44, 86 & n.47, 136 app. III (Marshall, J., dissenting).

²¹ See Audio recording: Oral Argument in *San Antonio Ind. Sch. Dist. v. Rodriguez* (Oct. 12, 1972) (http://www.oyez.org/cases/1970-1979/1972/1972_71_1332/argument) (acknowledging “its imperfections”); see also Brief for Appellants at 11, *Rodriguez*, 411 U.S. 1 (No. 71-1332), 1972 WL 137565 (acknowledging “that there are still defects in” the Texas system).

1968

Virginia Law Review

[Vol. 94:1963]

quence of creating a public school system premised on local, rather than state-wide, control. The success of the parties' arguments had national implications, as the widespread reliance on local property taxes had created comparable disparities throughout the country.²²

The timing of the Supreme Court's decision in *Rodriguez* may well have affected its outcome.²³ Not long after the plaintiffs initiated the lawsuit in 1968, the district court placed the case in abeyance while the State attempted to pass legislative reforms designed to ameliorate the problems identified in the lawsuit. After two years, however, the reform efforts came up short, and the spotlight returned to the court. In 1971, the three-judge district court held the system unconstitutional. After determining that wealth was a suspect class and that education was a fundamental right, the court concluded that the State could not satisfy the rigors of strict scrutiny because it had not offered a compelling explanation for adopting a system that permitted such significant wealth-based disparities.²⁴ In the end, the three-judge court explained, the Equal Protection Clause guaranteed "fiscal neutrality" in Texas's design and implementation of a school-funding system.²⁵

The case did not reach the Supreme Court until 1972, and the Court did not decide the case until March 21, 1973. One need not be a scholar of Supreme Court history to appreciate that there were some differences between the late Warren Court of 1968 and the early Burger Court of 1973. After four appointments by President Nixon—Chief Justice Burger for Chief Justice Warren, Justice Blackmun for Justice Fortas, Justice Powell for Justice Black and Justice Rehnquist for Justice Harlan—the Court had become a different forum in which to advance the argument that education was a fundamental right or that wealth was a suspect class. The five-member majority that ultimately rejected the plaintiffs' claims in *Rodriguez*, as it turns out, consisted of the four Nixon appointees and Justice Stewart.

²² *Rodriguez*, 411 U.S. at 47–48 & n.102.

²³ See Richard Schragger, *San Antonio v. Rodriguez and the Legal Geography of the School Finance Reform*, in *Civil Rights Stories* 85, 93–102 (Myriam E. Gilles & Risa L. Goluboff eds., 2008).

²⁴ *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 283–85 (W.D. Tex. 1971).

²⁵ *Id.* at 284, 286.

2008] *San Antonio Independent School District v. Rodriguez* 1969

The author of the majority opinion, Justice Powell, was not unfamiliar with public-school policy issues. From 1952 to 1961, he had chaired the Richmond School Board, where he helped to oversee the desegregation of the school district in the aftermath of *Brown v. Board of Education*.²⁶ In explaining why education was not a fundamental right entitled to strict scrutiny, Justice Powell noted that education is not mentioned in the Constitution, precluding the possibility of granting fundamental-right status on that basis alone.²⁷ Nor, he reasoned, does an individual have a fundamental right to a governmental benefit simply because it is important or even indispensable. Otherwise, access to health care, housing and food all would be fundamental rights, and all governmental decisions in these areas would be subject to rigorous review.²⁸

In explaining why wealth was not a suspect classification, Justice Powell observed that Texas did not deny its residents a public education on the basis of wealth. The State, to the contrary, guaranteed all residents a free public education regardless of wealth. At stake was not the denial of a government benefit on the basis of wealth, but the provision of a relatively worse public benefit on the basis of wealth.²⁹ That distinction sufficed to distinguish the cases upon which the plaintiffs had relied, all of which involved the complete denial of a government benefit on the basis of wealth,³⁰ and to distinguish a later 5-4 decision authored by Justice Powell,³¹ in which the Court held that Texas could not deny the children of illegal immigrants the right to a free public education.³²

Justice Stewart concurred in full in Justice Powell's opinion, but wrote separately to acknowledge one point and to make another. Texas's system of financing public schools, like the system adopted by most States, he acknowledged, "has resulted in a system of pub-

²⁶ See John C. Jeffries Jr., Justice Lewis F. Powell, Jr. 139–60 (Fordham Univ. Press 2001) (1994).

²⁷ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

²⁸ *Id.* at 37.

²⁹ *Id.* at 38–39.

³⁰ *Id.* at 20–22 (discussing *Griffin v. Illinois*, 351 U.S. 12 (1956) (trial transcript for appeal); *Douglas v. California*, 372 U.S. 353 (1963) (court-appointed counsel); *Bullock v. Carter*, 405 U.S. 134 (1972) (primary election filing-fee requirement)).

³¹ *Plyler v. Doe*, 457 U.S. 202 (1982).

³² Cf. Audio recording: Linda Greenhouse, New York Times, Distinguished Visitors Lecture at the University of Minnesota Law School: What Would Justice Powell Do? (Oct. 22, 2007), http://www.law.umn.edu/cle/07_08lectureseries.html.

1970

Virginia Law Review

[Vol. 94:1963]

lic education that can fairly be described as chaotic and unjust.”³³ But “[i]t does not follow,” he insisted, “that this system violates the Constitution of the United States.”³⁴

The four dissenters saw things differently. Writing only for himself, Justice Brennan maintained that strict scrutiny should apply because the Texas public-financing system implicated a fundamental right expressly mentioned in the Constitution—free speech—one that has little value if States may deny their citizens the kind of education necessary to exercise that right in a meaningful way.³⁵

Justice White, joined by Justices Douglas and Brennan, took the view that the Texas system did not survive even rational-basis review.³⁶ The system, he explained, gave poor districts no opportunity to improve their lot because the property tax, the only method for raising additional funds beyond the state’s contribution, did not realistically permit a district like Edgewood to raise the same (or even close to the same) amount of funds as a district like Alamo Heights.³⁷

Justice Marshall authored the lead dissent, which Justice Douglas joined. As one of the winning lawyers in *Brown*, Justice Marshall surely appreciated the significance of the case, including the possibility that the promises of *Brown* would never be fulfilled unless the courts not only eliminated de jure segregation by race but also curbed the effects of de facto segregation by wealth. These high stakes, Justice Marshall wrote, made it imperative that education be deemed a fundamental right and wealth a suspect classification.³⁸ Nor, he added, should fundamental-right status turn solely on whether the Constitution explicitly mentions the right. The uncontested connection between education and other constitutional guarantees sufficed to subject discrimination against a “powerless class[]” to strict scrutiny.³⁹

³³ *Rodriguez*, 411 U.S. at 59 (Stewart, J., concurring).

³⁴ *Id.*

³⁵ *Id.* at 63 (Brennan, J., dissenting).

³⁶ *Id.* at 67–68 (White, J., dissenting).

³⁷ *Id.* at 64–67.

³⁸ *Id.* at 111, 115–16, 122 (Marshall, J., dissenting).

³⁹ *Id.* at 109.

2008] *San Antonio Independent School District v. Rodriguez* 1971

II. STATE SCHOOL FUNDING AFTER RODRIGUEZ

For better, for worse or for more of the same, the majority in *Rodriguez* tolerated the continuation of a funding system that allowed serious disparities in the quality of the education a child received based solely on the wealth of the community in which his parents happened to live or could afford to live. Yet even after the Court gave the States the green light to continue relying on that system, they eventually demanded change—in some instances because the political processes prompted it and in other instances because the state courts required it.

Two footnotes from the *Rodriguez* opinions foreshadowed some of what the States would do after 1973 and one explanation for why they would do it. In footnote 85 of Justice Powell's majority opinion, he observed that the plaintiffs, in urging the invalidation of the current funding system, "offer little guidance as to what type of school financing should replace it."⁴⁰ One possibility was the creation of a "statewide financing" system, which would eliminate school districts as fund-raising bodies and presumably would require all revenue to be raised by the State and to be allocated evenly by it. The other "alternative" was something called "district power equalizing," by which a "State would guarantee that at any particular rate of property taxation the district would receive a stated number of dollars" no matter how little or how much their local property taxes generated, thereby neutralizing property-wealth disparities among districts up to that rate of taxation.⁴¹

In footnote 100 of Justice Marshall's dissent, he wrote that nothing in the majority's opinion prevented the state courts from requiring their legislatures to redress these problems under their own state constitutions, as opposed to the United States Constitution. "[N]othing in the Court's decision today," he explained, "should inhibit further review of state educational funding schemes under state constitutional provisions."⁴²

In the years before *Rodriguez*, and in the thirty-five years since, most state legislatures embraced wealth-equalization formulas for funding their public schools. Most States, whether before *Rodri-*

⁴⁰ Id. at 41 n.85 (majority opinion).

⁴¹ Id.

⁴² Id. at 133 n.100 (Marshall, J., dissenting).

1972

Virginia Law Review

[Vol. 94:1963]

guez or after, adopted a foundation program, which represented a first step toward addressing property-wealth variations by guaranteeing a minimum amount of combined state and local funding regardless of how little money a school district contributed. By the mid-1970s, 18 States had improved on foundation programs by embracing variations on the “district power equalizing” approach advocated in *Rodriguez*.⁴³

Ohio typifies this pattern. In 1975, two years after *Rodriguez*, it implemented the following system: The State required all school districts to impose a minimum 20-mill tax on all real property in the district; the state legislature determined the minimum amount of money (in per-child, per-year spending figures) needed to guarantee an adequate education; the State guaranteed through state revenue that all school districts, no matter how little they raised through the 20-mill property tax, would have enough revenue to reach this figure through a combination of local and state funds; and the State gave school districts the option of imposing an additional 10-mill of taxation (up to 30-mill), in return for which the State would guarantee that this additional taxation would generate the same additional per-pupil revenue in each district (again without regard to how much money the district in fact raised).⁴⁴

As of today, every State has enacted a school-financing equalization scheme of one form or another.⁴⁵ And as of today, just one State—Hawaii—has adopted the other remedial option mentioned in *Rodriguez*, the elimination of school districts in favor of a state-wide funding system, though even Hawaii allows local communities to supplement the State’s funding allocations.⁴⁶

While these state legislative initiatives addressed many of the policy problems identified in the *Rodriguez* litigation, they did not address all of them. By guaranteeing a minimum level of spending for all school districts and by offering uniform incentives to increase spending, the States made progress, at least as measured by

⁴³ Johnson, *supra* note 10, at 331 n.20.

⁴⁴ See *Bd. of Educ. v. Walter*, 390 N.E.2d 813, 816–17, 821 (Ohio 1979); Johnson, *supra* note 10, at 330 n.17.

⁴⁵ See Caroline M. Hoxby, All School Finance Equalizations Are Not Created Equal, 116 Q.J. Econ. 1189, 1189–90 (2001).

⁴⁶ See John A. Thompson & Stacey E. Marlow, Hawaii, in U.S. Dep’t of Educ., Nat’l Ctr. for Educ. Stat., Public School Finance Programs of the United States and Canada: 1998–99, at 1 (Catherine C. Sielke et al. compilers, 2001).

2008] *San Antonio Independent School District v. Rodriguez* 1973

dollars spent, in improving the educational lot of those living in the poorest areas of the country. But they did little to solve the equity problem—the lingering funding gap between the richest and poorest school districts—because none of these reforms meaningfully limited the amount of revenue wealthy school districts could raise.

This continued disparity generated a raft of state-court lawsuits from 1973 to 1989. As in *Rodriguez*, the claimants targeted the gap in funding between rich and poor school districts and the difficulties that property-poor districts faced in closing the gap. But instead of relying on the United States Constitution, the claimants premised their lawsuits on equal-protection clauses or other guarantees found in their States' constitutions.⁴⁷ While some of these claims succeeded, most did not.⁴⁸ And even when the plaintiffs won, they and the courts struggled to identify realistic remedies for eliminating or meaningfully closing the equity gap—many of which seemed to require either a statewide school-funding system that precluded local school districts from supplementing state aid or what comes to the same thing: a system that imposes a floor and a ceiling on spending.⁴⁹

These obstacles led to a second wave of state-court lawsuits. From 1989 to the present, claimants targeted another problem that the earlier reforms had not resolved: the methodology for determining a State's guaranteed level of funding and the amount of that funding. At the heart of these claims was the critique that a statewide funding guarantee accomplished little if the guaranteed amount was too low. In contrast to the earlier lawsuits, these claims met with considerable success. Invoking the education clauses that appear in all state constitutions—often to the effect that the State

⁴⁷ See, e.g., *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983); *Serrano v. Priest*, 487 P.2d 1241, 1257–60 (Cal. 1971); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979); *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 333–35 (Wyo. 1980); see also Michael A. Rebell, “Educational Adequacy, Democracy, and the Courts,” in National Research Council, *Achieving High Educational Standards for All: Conference Summary* 218, 226–27 (Timothy Ready et al. eds., 2002); Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of The Public Schools*, 117 Harv. L. Rev. 1334, 1344 (2004) (“Prior to 1989, virtually every school finance case made its equity claim under a state constitution’s equal protection clause.”).

⁴⁸ See Rebell, *supra* note 47, at 227 (noting that by 1988, defendants had prevailed in fifteen of the twenty-two States in which equity suits were brought).

⁴⁹ *Id.* at 226–27.

guarantees residents access to a “thorough and efficient system of common schools”⁵⁰—they argued that the States must provide a minimum level of funding to offer an adequate education for all students.⁵¹ Since 1989, plaintiffs have won nearly two thirds of these lawsuits.⁵² All told, as of June 2008, forty-five States have faced state-constitutional challenges to their systems of funding public schools.⁵³ Plaintiffs have won twenty-eight of these challenges⁵⁴ and in the process compelled legislatures to adopt a host of additional reforms, many of which increased funding and closed equity gaps.⁵⁵

The Ohio and Texas experiences illustrate the types of reforms prompted by these lawsuits. In 1997, and again in 2000, the Ohio Supreme Court held that the State’s school-financing system violated the “thorough and efficient” clause of the Ohio Constitution.⁵⁶ Among other failings, the court faulted the system for its over-reliance on local property taxes and for failing to provide sufficient funding for the operational and building needs of the public schools.⁵⁷

In response to these decisions, the Ohio General Assembly substantially increased public school funding,⁵⁸ injecting “billions of additional dollars” into the system.⁵⁹ It developed a new formula for calculating the amount of money needed to provide an adequate education, increasing the guaranteed amount of per-pupil spending from \$4,177 in 2000⁶⁰ to \$4,814 in 2002.⁶¹ It established a “parity aid” program, dispersing additional funds to low-wealth

⁵⁰ Ohio Const. art. VI, § 2.

⁵¹ See Rebell, *supra* note 47, at 228; James E. Ryan, Schools, Race, and Money, 109 *Yale L.J.* 249, 268–69 (1999).

⁵² See Rebell, *supra* note 47, at 228.

⁵³ National Access Network, Litigations Challenging Constitutionality of K–12 Funding in the 50 States (June 2008), <http://www.schoolfunding.info/litigation/In-Process-Litigations.pdf>.

⁵⁴ National Access Network, “Equity” and “Adequacy” School Funding Liability Court Decisions (June 2008), <http://www.schoolfunding.info/litigation/equit-yandadequacytable.pdf>.

⁵⁵ See McUsic, *supra* note 47, at 1344 & n.63.

⁵⁶ *DeRolph v. State (DeRolph I)*, 677 N.E.2d 733, 747 (Ohio 1997); *DeRolph v. State (DeRolph II)*, 728 N.E.2d 993, 1020 (Ohio 2000).

⁵⁷ *DeRolph I*, 677 N.E.2d at 747; *DeRolph II*, 728 N.E.2d at 1021.

⁵⁸ *DeRolph v. State (DeRolph IV)*, 780 N.E.2d 529, 530 (Ohio 2002).

⁵⁹ *Id.* at 537 (Moyer, C.J., dissenting).

⁶⁰ *DeRolph II*, 728 N.E.2d at 1005.

⁶¹ See *DeRolph v. State (DeRolph III)*, 754 N.E.2d 1184, 1191 (Ohio 2001).

2008] *San Antonio Independent School District v. Rodriguez* 1975

districts to enable them “to spend funds on discretionary items in the same manner as wealthier districts.”⁶² It reduced reliance on local property taxes.⁶³ And it “dedicated a large amount of its budget to constructing and repairing school facilities,”⁶⁴ allocating nearly \$2.7 billion to the effort during the 1998–2002 fiscal years,⁶⁵ and over \$5.8 billion during the 2003–09 fiscal years,⁶⁶ and committing to allocate at least \$1.7 billion during the 2010–11 fiscal years.⁶⁷ By contrast, during the 1992–96 fiscal years, the State had contributed just over \$173 million to helping local school districts repair facilities and build new ones.⁶⁸ While the *DeRolph I* record in 1997 showed a public education system that was “starved for funds, lack[ing] teachers, buildings, and equipment, and [that] had inferior educational programs,”⁶⁹ the record was “very different” by 2001.⁷⁰ The plaintiffs in *DeRolph III* complained less about the absence of basic educational services and more about things like the failure of some schools to offer college-level courses in certain subjects and the lack of space for science labs in some elementary schools.⁷¹

Texas, the target of the *Rodriguez* complaint, also has made progress since 1973. The Supreme Court of Texas held that the State’s school-financing system violated the Texas Constitution in three cases in the 1980s and 1990s.⁷² In *Edgewood I* and *Edgewood II*, the court struck down the State’s school-financing system under the “efficient” clause of the Texas Constitution,⁷³ faulting the State for

⁶² Id. at 1192–93.

⁶³ Id. at 1199.

⁶⁴ Id. at 1194.

⁶⁵ *DeRolph III*, 754 N.E.2d at 1194; Ohio Sch. Facilities Comm’n Ann. Rep. 27 (2007), available at <http://www.osfc.state.oh.us/pdfs/AnnualReports/2007.pdf>.

⁶⁶ Ohio Sch. Facilities Comm’n Ann. Rep. 27 (2007).

⁶⁷ Id.

⁶⁸ See Ohio Sch. Facilities Comm’n Ann. Rep. 12 (1999), available at <http://www.osfc.state.oh.us/pdfs/AnnualReports/1999.pdf>.

⁶⁹ *DeRolph III*, 754 N.E.2d 1184, 1196 (Ohio 2001) (quoting *DeRolph I*, 677 N.E.2d 733, 742 (Ohio 1997)).

⁷⁰ Id.

⁷¹ Id.

⁷² See *Edgewood Indep. Sch. Dist. v. Kirby* (*Edgewood I*), 777 S.W.2d 391, 392 (Tex. 1989); *Edgewood Indep. Sch. Dist. v. Kirby* (*Edgewood II*), 804 S.W.2d 491, 492–93 (Tex. 1991); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.* (*Edgewood III*), 826 S.W.2d 489, 503 (Tex. 1992).

⁷³ Tex. Const. art. VII, § 1.

1976

Virginia Law Review

[Vol. 94:1963]

“concentrati[ng] . . . resources in property-rich school districts that are taxing low when property-poor districts that are taxing high cannot generate sufficient revenues to meet even minimum standards.”⁷⁴ The court required the State to craft a system that yielded a “direct and close correlation between a district’s tax effort and the educational resources available to it” and that afforded children in rich and poor districts a “substantially equal opportunity to have access to educational funds.”⁷⁵

In later cases dealing with a different component of the funding system, the same court found that the newly crafted system fully complied with the requirements of the efficiency clause.⁷⁶ And with ample reason: the legislature had “reduc[ed] the effects of the vast disparities among the more than 1,000 independent school districts [in the State of Texas],”⁷⁷ and it had reduced the ratio of taxable property wealth per student between the wealthiest and poorest districts from 700:1 in 1989 to 28:1 by 1995.⁷⁸ By 1995, the court could say that “[c]hildren who live in property-poor districts and children who live in property-rich districts now have substantially equal access to the funds necessary for a general diffusion of knowledge.”⁷⁹ And by 2005, the court could say that “standardized test scores have steadily improved over time, even while tests and curriculum have been made more difficult.”⁸⁰

Today, while the Texas funding system still contains defects, it would be difficult to premise a challenge to that system based on disparities between the funding experiences of the Edgewood and Alamo Heights school districts, the two districts featured in *Rodriguez*. In the 2003–04 school year, the Edgewood and Alamo Heights school districts both spent about \$8,600 per child.⁸¹ In fact,

⁷⁴ *Edgewood I*, 777 S.W.2d at 397.

⁷⁵ *Id.*

⁷⁶ See *Edgewood III*, 917 S.W.2d at 731; *Neely v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 792 (Tex. 2005).

⁷⁷ *West Orange-Cove*, 176 S.W.3d at 758.

⁷⁸ See *Edgewood Indep. Sch. Dist. v. Meno (Edgewood IV)*, 917 S.W.3d 717, 730 (Tex. 1995).

⁷⁹ *Id.* at 371.

⁸⁰ *West Orange-Cove*, 176 S.W.3d at 789.

⁸¹ See Richard Schragger, *supra* note 23, at 107 (observing that “over thirty years after *Rodriguez*, Edgewood’s schools are now comparatively well-funded”).

2008] *San Antonio Independent School District v. Rodriguez* 1977

that year the still-poorer Edgewood school district spent slightly more per pupil than the still-wealthier Alamo Heights.⁸²

III. LESSONS FROM *RODRIGUEZ* AND THE STATES' EXPERIENCES OVER THE LAST 35 YEARS

Rodriguez and its aftermath prompt two observations and one question. First, when “[t]he Framers split the atom of sovereignty,”⁸³ they authorized a system of government that features two sets of sovereigns, that produced 51 constitutions and that ultimately places two sets of constitutional limitations on the validity of every state (and local) law. A constitutional claimant needs to win just once, and in most cases it will matter little to the plaintiff whether he manages to invalidate the law under one constitution or the other. No State permits laws invalidated under its constitution to be enforced; and the Supremacy Clause⁸⁴ of the United States Constitution prohibits any State from enforcing laws invalidated under the Federal Constitution. An inevitable consequence of a system of dual sovereignty is that it permits dual claims of unconstitutionality. While federal judges generally are not known for offering legal advice, I have some company in pointing out that a citizen troubled by state action may look to the federal and state constitutions for recourse.⁸⁵

Second, *Rodriguez* demonstrates that there is a softer side to federalism. Whether one agrees with *Rodriguez* or thinks it a missed opportunity, the reality is that, “[w]hile the Supreme Court has tolerated continuity in this area, the democratic processes have demanded change.”⁸⁶ Right or wrong, *Rodriguez* unleashed school-funding innovation throughout the country that continues to this day. And whether one welcomes the state-court lawsuits that followed *Rodriguez* or thinks them a blight on state separation of

⁸² *Id.*

⁸³ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

⁸⁴ U.S. Const. art. VI, cl. 2.

⁸⁵ See, e.g., *Ohio v. Robinette*, 519 U.S. 33, 42–45 (1996) (Ginsburg, J., concurring in the judgment); *Rodriguez*, 411 U.S. at 133 n.100 (1973) (Marshall, J., dissenting); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489, 491 (1977).

⁸⁶ *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007).

1978

Virginia Law Review

[Vol. 94:1963]

powers, the *Rodriguez* coda puts the lie to the notion that the federal courts have a monopoly on progressive decision-making.

All of this prompts a provocative question: is it possible that the *Rodriguez* plaintiffs ultimately won by losing? In one sense, the answer is surely no. While States like Texas and Ohio eventually made considerable progress in improving the adequacy and equity of their school funding systems after *Rodriguez*, these advances did little for the plaintiffs who filed the case in 1968. It took time for these innovations to take root, and as a result at least a half generation, if not a full generation, of students failed to reap the benefits of the reforms.

In another sense, however, the answer may be yes, or at least it is worth considering whether the answer is yes. In the context of institutional litigation, the question is not just what the claimants can do for themselves in the near term; it also what they can do for other children and for other States in the long term. Viewed from this vantage point, the *Rodriguez* story suggests some of the ways in which the claimants potentially gained by losing.

A. Rights and Remedies for One Jurisdiction or Fifty

The *Rodriguez* plaintiffs faced two daunting tasks in urging the Court to establish that education is a fundamental right or that wealth is a suspect class. They not only had to convince the Court to break new ground in embracing untested theories of constitutional law, but they also had to convince the Court to define a right and create a remedy that it could apply uniformly to 50 sets of state laws, 214 million people in 1974 (300 million today) and over 16,000 school districts in 1974 (over 14,000 today).⁸⁷ In addressing the plaintiffs' arguments, the Court did not lose sight of the risks of

⁸⁷ See Monique Oosse, Evaluation of April 1, 2000 School District Population Estimates Based on the Synthetic Ratio Method 53 tbl. 10 (U.S. Census Bureau, Population Div., Educ. & Soc. Stratification Branch, Working Paper No. 74, 2004), available at <http://www.census.gov/population/www/documentation/twps0074/twps0074.pdf>; National Center for Education Statistics, Number and Enrollment of Regular Public School Districts, By Enrollment Size of District: Selected Years, 1979–80 through 2005–06, http://nces.ed.gov/programs/digest/d07/tables/dt07_084.asp (last viewed Sept. 29, 2008); U. S. Census Bureau, USA Quickfacts, <http://quickfacts.census.gov/qfd/states/00000.html> (last viewed Sept. 29, 2008); United States Census Bureau, Historical National Population Estimates, <http://www.census.gov/popest/archives/1990s/popclockest.txt> (last viewed Sept. 29, 2008).

2008] *San Antonio Independent School District v. Rodriguez* 1979

imposing one solution to such a difficult policy problem on the entire country. Justice Powell noted that the creation of a school-funding system required “expertise and . . . familiarity with local problems,”⁸⁸ that “[t]he very complexity of the problems of financing and managing a statewide public school system suggests that ‘there will be more than one constitutionally permissible method of solving them,’”⁸⁹ and that the Court under these circumstances needed to be wary of imposing “inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions” to difficult policy problems.⁹⁰

Many of these constraints did not apply to the state courts or at least did not apply to the same degree. Compare the situation of a state supreme court faced with a similar claim under state law. The justices would face one funding system, not 50; as residents of the State, they likely would have considerable familiarity with the funding system at issue as well as with its strengths and weaknesses; if they chose to identify an enforceable right and remedy, they would do so for just one jurisdiction and a small fraction of the number of people; and any unforeseen consequences of their ruling could be modified far more easily.

In a case like *Rodriguez*, the United States Supreme Court faced institutional-capacity challenges that the state courts simply do not. And if these challenges influenced the *Rodriguez* Court in rejecting all claims for relief, they surely would have influenced the *Rodriguez* Court had it granted some relief. From the plaintiffs’ perspective, then, while a victory in the Supreme Court would have had the virtue of being uniformly enforceable nationwide, it would have been accompanied by the vice that the Court almost certainly would have applied a “federalism discount”⁹¹ to its articulation of the constitutional right and remedy. The more, in short, a litigant asks of a court in a complex setting like this one, the less it may be able to expect if the court has nationwide jurisdiction.

⁸⁸ *Rodriguez*, 411 U.S. at 41.

⁸⁹ *Id.* at 42 (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546–47 (1972)).

⁹⁰ *Id.* at 43; see also Lawrence Gene Sager, *Fair Measure: The Legal Status of Un-enforced Constitutional Norms*, 91 *Harv. L. Rev.* 1212, 1218 (1978).

⁹¹ Jamison E. Colburn, *Rethinking Constitutionalism*, 28 *Rutgers L.J.* 873, 898 (1997) (book review).

1980

Virginia Law Review

[Vol. 94:1963]

B. Accountability

A victory for the *Rodriguez* plaintiffs not only might have been diluted by the courts' institutional constraints, but it also would have prevented accountability over educational funding from shifting to the States. If there is one thing that the last 35 years have shown, it is that when *Rodriguez* indicated that solutions to the country's public-school funding problems would have to come from state courts (or legislatures), the political pressures at the state level increased—to considerable effect. One can fairly wonder whether the reforms developed by 50 state legislatures and required by 28 state supreme courts over the last 35 years would have been as far-reaching if the *Rodriguez* Court had not shifted the spotlight on this issue to the States.

C. Unintended Consequences

Had *Rodriguez* applied strict scrutiny to educational spending, taxing and policy decisions, as the plaintiffs requested, the decision almost certainly would have spawned a host of unintended consequences. The most obvious risk is that strict scrutiny would have presented too blunt an instrument to manage the calibrated policy choices that States and school districts must make in running a public school system. If education were a fundamental right entitled to skeptical review, imagine the next generation of constitutional challenges: Strict scrutiny over curriculum choices? Class size? Class schedules? Advanced Placement classes? Membership on a sports team? The possibilities are limitless.

The Court, sure enough, might have drawn lines between categories of educational policy that warranted strict scrutiny and those that did not, or it might have diluted strict scrutiny. But that would have generated a tangled web of line-drawing and difficult-to-apply hybrid levels of review. Strict scrutiny and education policy in the end often will be hard to reconcile, which may be why the lion's share of successful state constitutional challenges in this area have turned not on state-law equal-protection theories but on the state courts' interpretations of their constitutions' education clauses.

2008] *San Antonio Independent School District v. Rodriguez* 1981

D. Revenue and Taxes

A shortage of money drives many of these education disputes. Yet even the most aggressive decisions of the United States Supreme Court have stopped short of compelling States to raise taxes.⁹² State courts no doubt face similar challenges in encouraging, or even trying to compel, legislatures to raise money.⁹³ But it is far easier for a court to work with, or at worst play cat and mouse with, one state legislature than it is to do so with 50 of them. If the problem at the heart of many of these cases is a revenue-driven one, a state court is more likely to have success in prodding dollars out of one legislature than the United States Supreme Court would have with 50 legislatures.

E. The Complexity of the Underlying Policy Issues

Perhaps the biggest constraint on the United States Supreme Court, had it been willing to grant relief for the *Rodriguez* plaintiffs, would have been the utter indeterminacy of the policy issues underlying these disputes, which do not naturally lend themselves to one-size-fits-all solutions. How, for example, would the Court have determined an adequate amount of money for a State to spend on a child's education? Even a State committed to funding an adequate education still must develop a method for determining how much that costs. All kinds of approaches have been tried—from different methods for defining the costs of the various inputs into a good education to output-based approaches that identify high-performing school districts and simply average out the cost of the education they provide.⁹⁴ Once a State has decided what an adequate or even a good education costs, it also must decide how to pay for it and how to neutralize the advantages of wealth while preserving long-held customs of local control over a community's schools. If there is an incontrovertible answer to all of these questions, it remains well hidden, and if the Supreme Court had taken on the task of answering these questions, it almost certainly would

⁹² See *Missouri v. Jenkins*, 515 U.S. 70 (1995).

⁹³ See, e.g., *DeRolph I*, 677 N.E.2d 733, 747 (Ohio 1997); *DeRolph II*, 728 N.E.2d 993, 1020–22 (Ohio 2000); *DeRolph III*, 754 N.E.2d 1184, 1200–01 (Ohio 2001).

⁹⁴ See John G. Augenblick et al., *Equity and Adequacy in School Funding*, 7 *Future Child*. 63, 64–66 (Winter 1997).

have been forced to demand less rather than more. Some imperfection, I fear, is something we have to live with in this area. But 50 imperfect solutions—each grounded in constitutional guarantees the States have chosen for themselves, crafted to meet the peculiar needs of each State and implemented by accountable state officials—are almost certainly superior to one imperfect solution.

The equity problem is no less vexing. Unless a State takes the path of becoming one school district for funding purposes, as just Hawaii has done,⁹⁵ and unless that State prevents cities and counties from supplementing state aid, as Hawaii no longer does,⁹⁶ any policymaker or court that wants true equity must establish not just a rational floor of adequate school-district spending but a ceiling as well. True equity, indeed, requires the floor and the ceiling to be the same, or at least close to the same after accounting for cost-of-living differences within a State. But a ceiling requires capping of some sort, and the States that have tried it have gotten nowhere. Whether it was California, Washington, Colorado or Vermont, all either lacked the political will to enforce the ceiling or slipped too many loopholes into the capping laws to establish meaningful equity.⁹⁷

Nor is it self-evident that capping is a policy that the citizens of this country or any one State ought to be forced to accept. What

⁹⁵ Michael Heise, *Litigated Learning and the Limits of Law*, 57 *Vand. L. Rev.* 2417, 2438 (2004).

⁹⁶ *Haw. Rev. Stat.* §27-1 (2008).

⁹⁷ See Rebell, *supra* note 47, at 226–27; William H. Clune, *New Answers to Hard Questions Posed By Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 *Conn. L. Rev.* 721, 732 (1992); McUsic, *supra* note 47, at 1347–54; Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 *Wash U. L.Q.* 755, 782 (2004) (noting that “[i]n spite of [Colorado’s experiment with spending] caps . . . district property wealth remains extremely relevant”); *id.* at 786–87 (noting that despite Washington’s experiment with revenue redistribution from richer to poorer districts, “funding disparities . . . are returning to their pre-1978 inequality” due to political pressures); *id.* at 793–94 (describing the “vehement opposition” by residents of wealthy districts to Vermont’s redistributive plan, leading to an amendment that removed caps for all but the highest spending districts); Hanif S. P. Hirji, *Note and Comment, Inequalities in California’s Public School System: The Undermining of Serrano v. Priest and the Need for a Minimum Standards System of Education*, 32 *Loy. L.A. L. Rev.* 583, 600 (1999) (noting that California voters responded to a court-imposed system of spending caps by passing Proposition 13, which severely limited the State’s ability to use local property tax revenues to equalize educational spending).

2008] *San Antonio Independent School District v. Rodriguez* 1983

court or legislature is willing to tell a family that it is free to buy another expensive car or a second home, but if it spends an extra dime on its child's public education it has violated state law? At any rate, if floor-and-ceiling equity is a policy worth trying, it would seem prudent to try it State by State over time, not by the United States all at once.

A State worried about monetary inputs into a public school system also is apt to care about educational outputs.⁹⁸ Accountability tends to follow money, at least in a democratic system of government. The more a State spends on education, the more its citizens will care about ensuring that these resources produce results. But how do you measure the output: proficiency tests, graduation rates, attendance or some other measure? I know of no comprehensive answer, and if you ask three teachers you will get at least three answers. Efforts to measure the success of additional expenditures, like so many other facets of the education-policy puzzle, turn on difficult questions on which reasonable minds can disagree.

So far, everything I have said assumes that there is a positive correlation between the quality of an education and the level of education funding. But to what extent is that true? While there undoubtedly is some connection between the two, no one seriously maintains that money is the only indicator of a quality education.⁹⁹ One suspects that most students would learn more in the long run if they were the product of a supportive, two-parent, educated family than if they graduated from a high-spending school district. The literature, at any rate, is all over the map, and a nationwide Supreme Court willing to announce a ruling based on one side of this complex debate would be brave indeed.¹⁰⁰

⁹⁸ See *Neely v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 752–53, 787–88 (Tex. 2005).

⁹⁹ See *DeRolph I*, 677 N.E.2d 733, 792–93 (Ohio 1997).

¹⁰⁰ See Julian R. Betts, *Is There a Link Between School Inputs and Earnings? Fresh Scrutiny of an Old Literature*, in *Does Money Matter? The Effect of School Resources on Student Achievement and Adult Success*, 141 (Gary Burtless ed., 1996); James S. Coleman et al., *Equality of Educational Opportunity* (1966); Eric A. Hanushek, *Assessing the Effects of School Resources on Student Performance: An Update*, 19 *Educ. Evaluation & Pol'y Analysis* 141 (1997); Molly McUsic, *The Use of Education Clauses in School Finance Reform*, 28 *Harv. J. on Legis.* 307, 316 (1991); McUsic, *supra* note 47, at 1355.

1984

Virginia Law Review

[Vol. 94:1963]

Many reform proposals in this area push for centralization of educational school policy—most at the state level, some at the national level.¹⁰¹ While centralization, as opposed to local control, may make considerable sense as a way of resolving equity issues, it is far from clear that it amounts to good educational policy. The key question is this: will centralization of educational policy breed better schools or just similar schools?

The point of identifying these policy issues is not to take sides on them. It is to demonstrate that they defy easy solution and to suggest the difficulties the Supreme Court would have faced had it decided to define what the state legislatures could and could not do in this area. In the final analysis, the policy issues implicated by *Rodriguez* seem more amenable to fifty imperfect solutions than one imperfect solution, particularly if (as I suggest) a one-solution approach would have faced so many remedy-limiting constraints.

Nor is this a story confined to the world of school funding or equal protection. Fallout from the Supreme Court's recent decision in *Kelo v. City of New London*¹⁰² illustrates the capacity and willingness of state courts and legislatures to protect—or at least thoughtfully to consider protecting—other individual rights when the Supreme Court declines to do so. In *Kelo*, the Court upheld a city's development plan for property acquired through eminent domain because it amounted to a "public use" within the meaning of the Takings Clause, a decision that dispirited property-rights advocates. Yet, over the last several years, through state legislation, state constitutional amendments and state-court decisions, property-rights advocates have made considerable gains—perhaps obtaining as much as, if not more than, a favorable *Kelo* decision could have offered them. As of today, most States have enacted legislation addressing issues of public use and eminent domain.¹⁰³ Seven States have limited the public purposes for which eminent domain is acceptable.¹⁰⁴ Nine States have enacted laws expressly

¹⁰¹ See generally Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. Rev. 2044 (2006).

¹⁰² 545 U.S. 469 (2005).

¹⁰³ See Steven J. Eagle & Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 Real Prop. Prob. & Tr. J. 799, 803 (2008).

¹⁰⁴ See *id.* at 805–07 (Arizona, Georgia, New Hampshire, Iowa, Minnesota, Montana, and Wyoming).

2008] *San Antonio Independent School District v. Rodriguez* 1985

limiting the States' power to exercise eminent domain.¹⁰⁵ Five others have adopted variations on these themes.¹⁰⁶ Some States have sought to reduce the potential abuse of eminent domain by developing procedural changes, requiring state agencies to make stronger showings of public use, requiring agencies to create redevelopment plans, and setting notice and offer requirements to prevent "stealth" condemnation.¹⁰⁷ In other States, court rulings prompted the changes. In 2006, the Ohio and Oklahoma Supreme Courts extended their state constitutional protections against eminent domain beyond the federal baseline by holding that economic benefit alone does not constitutionally justify the exercise of eminent domain.¹⁰⁸ Only a handful of States have not enacted legislation in the wake of *Kelo*.¹⁰⁹

CONCLUSION

Let me conclude by putting these remarks in context. While state legislatures and courts have made considerable strides in addressing the problems underlying the *Rodriguez* litigation over the last thirty-five years, no one could maintain with a straight face that they have solved them. Equity, adequacy and accountability problems remain, and there are few policy issues more deserving of attention and more indicative of the country's commitment to ensuring an equal start in life than this one. Nor do I mean to say that state-court litigation is the best way, or even necessarily an appropriate way, to meet these challenges. All else being equal, the States are more likely to address these problems effectively through legislative and executive-branch initiatives. Just as federal courts face institutional limitations in defining rights and creating remedies in an area like this one, so do state courts, and most of those limitations do not restrict conventional policymakers. Neither is the value of a nationwide solution to a nationwide problem

¹⁰⁵ See *id.* at 807–08 (Alabama, Colorado, Connecticut, Michigan, Nebraska, North Dakota, Pennsylvania, Tennessee, and South Dakota).

¹⁰⁶ See *id.* at 808–09 (Alaska, Georgia, Kentucky, Minnesota, and West Virginia).

¹⁰⁷ See *id.* at 823.

¹⁰⁸ See *City of Norwood v. Horney*, 853 N.E.2d 1115, 1123 (Ohio 2006); *Bd. of County Comm'rs of Muskogee County v. Lowery*, 136 P.3d 639, 652 (Okla. 2006).

¹⁰⁹ See *Eagle et al.*, *supra* note 103, at 830–45 (Arkansas, Hawaii, Massachusetts, Mississippi, New Jersey, New York, Oklahoma, and Rhode Island).

1986

Virginia Law Review

[Vol. 94:1963]

lost on me. Yet the question is whether the problem at issue in a given case is uniform in nature and, if it is, whether it is susceptible to a uniform solution, particularly if a nationwide solution runs the risk of curbing effective local innovation.

As with all efforts to play with history, it is of course unknowable whether the *Rodriguez* plaintiffs gained more in the long run by losing their case than they stood to gain by winning it. Enough has happened in the last thirty-five years, however, to make the question worth asking.

What is it about the issues underlying *Rodriguez* (or for that matter *Kelo*) that prevented glaring Supreme Court defeats from becoming the death knell of the claimants' objectives and instead spurred equally promising, if not more promising, state and local initiatives? Is it simply a matter of distinguishing politically functional from politically dysfunctional issues, with education and property-rights issues resonating more effectively with state-elected legislators and judges than, say, a criminal-law issue might? Perhaps. Is it a function of the complexity of the problem and the absence of a single answer? Perhaps. Does accountability make a difference, as when the United States Supreme Court shifts the spotlight from the national to the local stage? Perhaps.

Whatever the answer to these questions, one thing remains clear: in *Rodriguez*, the United States Supreme Court said the States could stick with the status quo and yet they did not—and in the process perhaps did more than the Supreme Court ever could have done for the claimants' cause. For an originalist, none of this may matter. If the Constitution does not mention a right to an education and if it does not contain a wealth-redistribution clause, there is not much to argue about. But for a pragmatist, all of this presumably makes a difference. What pragmatic jurist wants to constitutionalize an area of policy when the end result may be self-defeating or worse? As the *Rodriguez* story suggests, the answer to the pragmatist judge's question—"What happens if we do nothing?"—is not invariably that the States will do nothing, and it occasionally may be that the States will do more for a given cause than the federal courts ever could have done.