

NEVER A LOST CAUSE: EVALUATING SCHOOL FINANCE LITIGATION IN THE FACE OF CONTINUING EDUCATION INEQUALITY IN POST-RODRIGUEZ AMERICA

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This Note considers the future of school finance litigation. Specifically, the Note argues that school finance litigation should be pursued and can achieve success because education inequality is a civil rights violation. The Note begins by describing the education inequality crisis and detailing the history of failed education litigation. Drawing on this background, the Note argues that education inequality is an equal protection violation and then reconciles this conclusion with the outcomes of previous cases, including the watershed Rodriguez case. The education crisis requires a judicial solution because the legislature cannot or will not accomplish the necessary complete overhaul of the school finance system. Thus, the Note concludes that the best way to remedy the education crisis is to bring equal protection claims in both state and federal courts on the basis of wealth, with poor children established as a suspect class. Furthermore, the Note recommends that litigation be accompanied by concrete proposals for reform, as a plaintiff victory alone will not produce change.

I. INTRODUCTION

“A child’s education should not be based on where they live. [Illinois’] method of school funding is nothing more than a system of apartheid.”¹ State Senator James Meeks made this declaration when over one thousand Chicago Public School students attempted to enroll in nearby New Trier Township High School in 2008.² By state law these students would not be eligible to attend the suburban school, forcing them to resort to the public schools in their own urban communities.³ The funding and graduation rates at these respective schools are starkly different,

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1. Wendell Hutson, *Boycott Goes from Threat to Reality*, CHI. DEFENDER, Sept. 3, 2008, at 8.

2. *Id.*

3. *Id.*

considering the small geographic distance between them.⁴ These one thousand students sought only to receive what has been given to the New Trier students as a matter of birthright: going to “an academic powerhouse” and having a higher likelihood of attending college.⁵ The only difference between these students was the family they were born into. The difference between their respective schools, however, includes higher school funding, more extracurricular activities and advanced classes, better facilities, safer communities, and greater opportunity to pursue higher education.⁶

Schools in the United States are failing. More specifically, schools in low-income areas are failing.⁷ While the legally mandated racial divide that once burdened schools may be in the past, the incredible disparity between the best and worst schools remains as pronounced as ever.⁸ In the iconic Supreme Court declaration that “separate . . . [is] inherently unequal,” the equality element has yet to be achieved.⁹ The lines of separation may have shifted from race to wealth, but the equality that was sought by the Supreme Court in *Brown v. Board of Education* has remained elusive.¹⁰

For far too many students in the United States, their local public school does not provide an adequate education.¹¹ Without financial re-

4. In 2007, the property value to be assessed in the school district (known as Equalized Assessed Valuation) per pupil at New Trier was \$1,590,225, allowing for a per student operational spending rate of \$19,415 in the 2008–2009 school year. At Harper High School, a public high school in the Englewood neighborhood of Chicago, the 2007 Equalized Assessed Valuation per pupil was \$210,651, allowing a per student operational spending rate of only \$12,880 for the 2008–2009 school year. Note that these numbers apply to all high schools within Chicago Public Schools, not just Harper. These funding disparities are accompanied by outcome disparities. The graduation rate at New Trier was 99.4% as opposed to 46.5% at Harper. The average composite ACT score at New Trier was 27.2, almost seven points above the state average. At Harper the average composite ACT score was 14.3, more than six points below the state average. Notably, only 3.4% of New Trier students are low income, but 92.1% of Harper students are low income. ILL. STATE BD. OF EDUC., EREPORT CARD PUBLIC SITE, <http://webprod.isbe.net/ereportcard/publicsite/getsearchcriteria.aspx> (last visited May 28, 2012) (search “Harper High School” for the 2010 fiscal year; then follow the “Harper High School” hyperlink; alternatively, search “New Trier” for the 2010 fiscal year; then follow the “New Trier Township H S Winnetka” hyperlink).

5. See Carlos Sadovi et al., *1,000 CPS Students Go North for a Cause: Protest Takes Kids Out of Class and to the North Shore, Putting City Schools’ Money at Risk and Casting Light on Funding Disparities*, CHI. TRIB., Sept. 3, 2008, § 2, at 6.

6. See Richard D. Kahlenberg, Editorial, *Radical Idea: Open the Doors of Affluent Suburban Schools to Chicago Students*, CHI. TRIB., Aug. 22, 2008, at 25.

7. MCKINSEY & CO., THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA’S SCHOOLS: SUMMARY OF FINDINGS 12 (2009), http://mckinseysociety.com/downloads/reports/Education/achievement_gap_report.pdf (“Impoverished students . . . are roughly two years of learning behind the average better-off student of the same age. The poverty gap appears early and persists over the lifetime of a student; only 9 percent of freshmen in the nation’s 120 ‘Tier 1’ colleges . . . are from the bottom half of the income distribution.”).

8. See *id.* at 12, 14.

9. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

10. *Id.*

11. See *Study: Scores of U.S. Schools Remain “Dropout Factories,”* STAR-LEDGER (Newark, N.J.), Oct. 30, 2007, at 8 [hereinafter *Dropout Factories*]. In addition to the poor quality of education, many students face safety concerns while in school. CTRS. FOR DISEASE CONTROL & PREVENTION, *Youth Risk Behavior Surveillance—United States, 2009*, 59 MORBIDITY AND MORTALITY WKLY. REP.

sources, these students are unable to obtain an education that can prepare them for a prosperous life, further exacerbating a cycle of poverty and social injustice.¹² In contrast, a handful of public schools provide a high-quality education with ample opportunity to pursue post-secondary education.¹³

Despite this stark inequality, school finance litigation has been largely unsuccessful or ineffective at producing a more equal education system. Since the Supreme Court upheld the Texas financing system in *San Antonio Independent School District v. Rodriguez*, waves of reform efforts have either been unable to establish a civil right in equal education, or they have been ineffective at implementing remedies after such a right has been established.¹⁴ Even in the face of these frustrations, parties continue to bring litigation seeking to rectify the unequal system.¹⁵ Because of the long history of failures and the adverse Supreme Court precedent, it should be asked: Are school finance cases pursuing a lost cause? If they are not a lost cause, what is the most effective way to pursue civil rights in equal education? If litigation succeeds, what remedy should be implemented to ensure meaningful change in the school finance system?

This Note argues that school finance litigation is not a lost cause, not only because of the important interests at stake, but also because education inequality is a civil rights violation under both federal and state equal protection clauses, despite the Supreme Court ruling in *Rodriguez*.¹⁶ It further argues that state and federal equal protection claims based on wealth as a suspect class are the most effective means of pursuing successful litigation. In making this claim, it establishes that poor children in failing schools fit the historic criteria for a suspect class entitled to heightened judicial scrutiny.¹⁷ This Note also argues that these claims are appropriate because the *Brown* decision would bar the current

SURVEILLANCE SUMMARIES, No. SS-5, June 4, 2010, at 7–8. Notably, five percent of students reported staying home from school at least one day in the previous month because they felt unsafe at school or while travelling to school. *Id.*

12. See *Dropout Factories*, *supra* note 11.

13. See Kahlenberg, *supra* note 6.

14. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973); Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS L. REV. 1835, 1841 (2007).

15. See, e.g., Complaint, Campaign for Quality Educ. v. State, No. RG10524770 (Super. Ct. of Cal. filed July 12, 2010), <http://www.schoolfunding.info/states/ca/CQE%20v%20State.pdf>; Chi. Urban League v. State, No. 08 CH 30490, 2009 WL 1632604, at *1 (Cir. Ct. Cook County Apr. 15, 2009) (memorandum opinion on motion to dismiss).

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

17. See *id.* at 28 (“The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). For an overview of suspect classifications and heightened judicial review, see *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–442 (1985).

separate and unequal education system, which is segregated by school district property values.¹⁸

Part II examines the state of the education inequality crisis, as well as the history of failed education litigation. Part III evaluates the reasons for continuing to bring litigation, determining that these cases should be pursued because vast education inequality constitutes an egregious equal protection violation, which need not be barred by precedent from *Rodriguez*. Ultimately, Part IV examines education litigation going forward, recommending that state and federal litigation should still be pursued to establish poor children as a suspect class in regards to education and that courts should take a more active role in overseeing funding systems to ensure a basic, equal level of education for students across the United States.

II. BACKGROUND

To understand the gravity of the unequal education system and its prospects going forward, it is important to know how that system works and why it remains unequal. To that end, Section A provides a general overview of how public education is funded and structured in the United States. Section B explores the framework for equal protection litigation, focusing on the watershed Supreme Court decision in *Brown* and its aftermath. Section C covers the most important Supreme Court case in the area of school finance, *Rodriguez*, and the subsequent succession of cases and reforms. Finally, Section D will detail the extent of the education inequality crisis in the United States today.

A. *Current Regulation and Funding of Public Schools*

Authority for running the U.S. education system rests with federal, state, and local governments. Although education is not required by the U.S. Constitution, the federal government nonetheless provides the states with some funding for schools.¹⁹ The federal government regulates the operation of schools in exchange for federal funding, but this money totals only one-tenth of funding for primary and secondary schools.²⁰

While the federal government plays a role in the education system, public schools in the United States are ultimately the responsibility of the states.²¹ State and local governments are primarily responsible for the operation and funding of schools.²² State governments distribute funding and curriculum standards to school districts.²³ State-delegated, local

18. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); 1 JAMES A. RAPP, EDUCATION LAW § 5.01(5)(a) (2010).

19. RAPP, *supra* note 18, § 3.01(1) (2010).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* § 3.02(1), (4)(b).

school districts, however, have more specific control over schools and have the power to control budgets, academics, discipline, and other local matters.²⁴ Importantly, the primary source of school funding is local property taxes, not state funding.²⁵

While local school districts have traditionally placed an emphasis on the importance of local control, the local nature of school districts is, arguably, the cause of the funding inequality.²⁶ Property tax rates are generally higher in districts with low property values in order to make up for the lower value of the property being assessed.²⁷ In districts with high property values, property tax rates are generally lower because the property being assessed has a much higher value, so more revenue is raised by a lower rate.²⁸ For example, the taxpayers for Harper High School in Chicago would need to be charged a much higher property tax rate for the school to be able to spend the same amount per pupil as New Trier High School can while using a much lower property tax rate.²⁹ Because of the stark differences in property values between the lowest-valued districts and the highest-valued districts in a state, a school system that relies so heavily on revenue from property taxes will always produce significantly unequal school funding among districts.³⁰

B. *History of Education Equal Protection Claims*

Inequality in education has long been a subject of judicial scrutiny,³¹ beginning with the watershed case of *Brown v. Board of Education* in 1954.³² In that case, the Supreme Court held that a racially segregated school system violated the Equal Protection Clause because “separate educational facilities are inherently unequal.”³³ While the decision was about racial segregation and civil rights, the Court also emphasized the importance of education when it said, “education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if

24. *Id.*

25. Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 WASH. U. L.Q. 755, 756 (2004).

26. Laurie Reynolds, *Full State Funding of Education As a State Constitutional Imperative*, 60 HASTINGS L.J. 749, 756–59 (2009).

27. Reynolds, *supra* note 25, at 757.

28. JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* 54–55 (1991).

29. See ILL. STATE BD. OF EDUC., *supra* note 4 (noting that the EAV per pupil for New Trier’s district was \$1,590,225, more than seven times the EAV of \$210,651 for Harper’s district).

30. See KOZOL, *supra* note 28, at 54–55. Revenue from local property taxes remains within economically segregated school districts, leading scholars to argue that reliance on local revenue for schools is a significant cause of education inequality. See, e.g., Reynolds, *supra* note 25, at 757.

31. See ROSEMARY C. SALOMONE, *EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-BROWN ERA* 3–8 (1986).

32. 347 U.S. 483, 495 (1954).

33. *Id.*

he is denied the opportunity of an education.”³⁴ In several follow-up cases, the Court addressed integration implementation measures by states and local school districts.³⁵ The opinion precipitated a wave of civil rights litigation and eliminated the official division of schools along racial lines.³⁶

At the base of the *Brown* decision was the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, which states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”³⁷ Courts have interpreted this requirement to mean that governments may not single out a group for unequal treatment or “treat[] differently persons who are in all relevant respects alike.”³⁸ To state a claim for an equal protection violation, a party may argue that a law is facially discriminatory, that it has a disproportionate impact on a suspect class, or that the law is invalid because of its extremely discriminatory application.³⁹

In evaluating equal protection claims, there are three distinct levels of review that a court may apply to the offending law.⁴⁰ Giving due deference to legislative decisions, a classification or unequal treatment is generally valid if it is rationally related to a legitimate government purpose (commonly referred to as “rational basis review”).⁴¹ The Supreme Court in *United States v. Carolene Products*, however, signaled that greater protection may be appropriate for some disadvantaged groups or for deprivations of fundamental rights.⁴² In the much-debated footnote four of that case, the Court stated that heightened scrutiny may be warranted for laws that limit the rights of “discrete and insular minorities.”⁴³

To date, the Court has determined that race, national origin, and alienage are suspect classifications entitled to strict scrutiny, such that laws that single out these groups must be narrowly tailored to a “compel-

34. *Id.* at 493.

35. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26–27 (1971) (upholding the constitutionality of busing to precipitate racial integration in schools); *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 431, 441–42 (1968) (holding that a school freedom-of-choice integration plan did not comply with the *Brown* mandate); *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 225 (1964) (holding that dissolving the public school system and replacing it with a system of vouchers to private schools violated *Brown*); *Cooper v. Aaron*, 358 U.S. 1, 26 (1958) (announcing the obligation of states to comply with the Court’s decisions, specifically the decision in *Brown*).

36. Vincent James Strickler, *Green-Lighting Brown: A Cumulative-Process Conception of Judicial Impact*, 43 GA. L. REV. 785, 808 (2009).

37. U.S. CONST. amend. XIV, § 1; *Brown*, 347 U.S. at 495.

38. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

39. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.2, at 744 (8th ed. 2010) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

40. *Cleburne*, 473 U.S. at 439–42 (describing the three levels of equal protection judicial review).

41. *Id.* at 440.

42. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

43. *Id.* Justice Powell called it “the most celebrated footnote in constitutional law.” Lewis F. Powell, Jr., *Carolene Prods. Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982).

ling state interest.”⁴⁴ Additionally, women and children of unmarried parents are quasi-suspect classes entitled to intermediate scrutiny, which requires that laws that discriminate against them be “substantially related” to an “important government interest.”⁴⁵ Conversely, the Supreme Court has held that age and mental disability—among other classifications—are not suspect and therefore are only entitled to rational basis review.⁴⁶ These classifications, like all others, need only be “rationally related” to a “legitimate state interest.”⁴⁷ In determining which groups are entitled to heightened review, the Supreme Court has considered the immutability of the characteristic, whether there has been a history of discrimination against the class, if the group suffers from a lack of political power, and if the group has been the victim of stigma or negative stereotypes.⁴⁸ Because it is extremely difficult to pass strict scrutiny, being labeled a suspect class affords a group significant judicial protection against government discrimination.⁴⁹

C. San Antonio Independent School District v. Rodriguez

Using mere rational basis review, the Supreme Court in *Rodriguez* set new precedent by declining to establish civil rights in education funding equality.⁵⁰ In response to a claim about the Texas school funding system, the Court held that rational basis review was appropriate because the plaintiffs did not articulate a class to be granted suspect status and

44. *Cleburne*, 473 U.S. at 440; *Graham v. Richardson*, 403 U.S. 365, 371–72, 374 (1971) (identifying alienage as a suspect class entitled to heightened judicial scrutiny while invalidating the denial of welfare benefits to legal aliens); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (holding that racial classifications are “suspect” and subject to heightened scrutiny and invalidating a law forbidding members of different races to habitually share a room).

45. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (applying intermediate scrutiny to classifications based on illegitimacy while invalidating a limit on the period of time to establish paternity); *Cleburne*, 473 U.S. at 440–41; *Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing gender as a quasi-suspect classification subject to intermediate judicial scrutiny such that a law “must serve important governmental objectives and must be substantially related to . . . those objectives” while invalidating a law mandating different drinking ages by gender).

46. *Cleburne*, 473 U.S. at 442, 450 (holding that mental disability is not a suspect classification meriting any level of heightened judicial review while affirming the invalidation of a zoning ordinance forbidding a home for the mentally disabled); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14, 317 (1976) (holding that age is not a suspect classification meriting any level of heightened judicial review while upholding a mandatory retirement age for police officers).

47. *Cleburne*, 473 U.S. at 440, 442; *Murgia*, 427 U.S. at 314.

48. Marcia Pearce Burgdorf & Robert Burgdorf, Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons As a “Suspect Class” Under the Equal Protection Clause*, 15 SANTA CLARA LAW. 855, 903–05 (1975); Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 143 (1990).

49. Professor Gerald Gunther famously said that strict scrutiny was “‘strict’ in theory and fatal in fact.” Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

50. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18, 55 (1973) (denying strict scrutiny and upholding the Texas school funding system); Frank J. Macchiarola & Joseph G. Diaz, *Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez in the State Courts*, 30 VAL. U. L. REV. 551, 552 (1996).

because there was no fundamental right to education.⁵¹ Identifying local control as a legitimate government purpose that was rationally related to the funding scheme, the Court held that Texas's school funding system did not constitute an equal protection violation.⁵²

The plaintiffs alleged that the unequal funding system constituted an equal protection violation.⁵³ The plaintiffs were from the poor Edgewood Independent School District, representing minority students and students in low property-tax districts across the state.⁵⁴ Relying heavily on local property-tax revenue, the Edgewood School District spent \$356 per pupil while the wealthiest district, Alamo Heights, spent \$594 per pupil.⁵⁵ The district court found wealth to be a suspect class and education to be a fundamental right.⁵⁶ It concluded that the system was an equal protection violation because it discriminated against students on the basis of wealth with respect to that fundamental right.⁵⁷

The Supreme Court reversed the district court's holding.⁵⁸ First, the Court unequivocally rejected the existence of a fundamental right to education, thereby requiring a finding of discrimination against a suspect class in order to apply heightened review.⁵⁹ In regards to the suspect class claim, the Court criticized the way the plaintiffs defined the class, stating that "[t]he case comes to us with no definitive description of the classifying facts or delineation of the disfavored class."⁶⁰ It further stated that the class, as identified, was not suspect because of "the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education."⁶¹ As such, only rational basis review was warranted, and the Court found that the funding system met that low bar.⁶²

In response to the *Rodriguez* decision, education civil rights claims on the federal level were frustrated and proponents turned to the state level for legislation and litigation challenges, with varying levels of success.⁶³ Since the decision was handed down, there have been lawsuits in forty-five states challenging school funding schemes, primarily under state constitutional rationales.⁶⁴ Today, every state has a constitutional

51. See *Rodriguez*, 411 U.S. at 18, 40.

52. *Id.* at 49–51, 55.

53. *Id.* at 4–6.

54. *Id.* at 5.

55. *Id.* at 12–13.

56. *Id.* at 18.

57. *Id.*

58. *Id.* at 6.

59. See *id.* at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.")

60. *Id.* at 19.

61. *Id.* at 25.

62. *Id.* at 40, 44, 54–55.

63. Macchiarola & Diaz, *supra* note 50, at 552; *Litigation*, EDUC. JUSTICE, <http://www.educationjustice.org/litigation.html> (last visited May 28, 2012) [hereinafter EDUC. JUSTICE].

64. See, e.g., *Pauley v. Kelly*, 255 S.E.2d 859, 865 n.7, 878 (W. Va. 1979) (holding that education was a fundamental right under the constitution of West Virginia, and that "[e]qual protection, applied

provision about education.⁶⁵ State constitution education clauses vary widely and have been interpreted in some states to establish a civil right to adequate or equal education, while others have followed the reasoning of *Rodriguez*.⁶⁶

In addition to equality arguments, these cases have also made claims that regardless of equality, inadequate schools violate state constitutional guarantees, such as Kentucky and Texas' guarantees of an "efficient" system of public schools.⁶⁷ On various bases, education rights are still controversial and state constitution education provisions continue to be litigated in the state courts decades after *Rodriguez*.⁶⁸

D. Despite Decades of Reform Efforts, the Education Inequality Crisis Remains in the United States

While the high-profile Supreme Court education decisions may be in the past, the education needs of too many students are still not being met.⁶⁹ Whether or not it constitutes an equal protection violation, education achievement gaps fall starkly along income lines.⁷⁰ Nationally, the dropout rates for the children from low-income families are more than nine times higher than those for children from high-income families.⁷¹ This is particularly troubling because high school dropouts, on average, have lower incomes, higher unemployment rates, worse health, and higher prison and death-row rates than their counterparts with a high school diploma.⁷²

to education, must mean an equality in substantive educational offerings and results, no matter what the expenditure may be"); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 76 (Wash. 1978) (holding that the state funding system was unconstitutional and that the state constitution "imposes a paramount duty upon the State which in turn creates a correlative right on behalf of all children"); Reynolds, *supra* note 26, at 750.

65. For a comprehensive survey of state constitutional education provisions, see 7 RAPP, *supra* note 18, § T.1.

66. See, e.g., *McDaniel v. Thomas*, 285 S.E.2d 156, 167 (Ga. 1981) (following *Rodriguez* by holding that the school funding system was not an equal protection violation under the Georgia constitution because "education per se is not a 'fundamental right' and . . . the Georgia public school finance system must stand if it satisfies the 'rational relationship' test"). But see *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 951 (Cal. 1976) (evaluating claims based on the premise that "(1) discrimination in educational opportunity on the basis of district wealth involves a suspect classification, and (2) education is a fundamental interest"); see also Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1326 (1992).

67. Ky. Const. § 183, construed in *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); TEX. CONST. art. VII, § 1, construed in *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); Reynolds, *supra* note 26, at 750.

68. See Reynolds, *supra* note 26, at 756.

69. See MCKINSEY & CO., *supra* note 7, at 12.

70. See EMILY FORREST CATALDI ET AL., NAT'L CTR. FOR EDUC. STATISTICS, HIGH SCHOOL DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 2007, at 4-5 (2009), <http://nces.ed.gov/pubs2009/2009064.pdf>.

71. *Id.* (noting that in 2007, the dropout rate for low-income students was 8.8% but was only 0.9% for high-income students).

72. MCKINSEY & CO., *supra* note 7, at 17-20.

Studies have found that this achievement gap persists across several demographic measurements. The gap can be seen from primary school through higher education, meaning that early schooling is largely determinative of future prospects.⁷³ An income disparity between the best and worst schools can be seen across the country.⁷⁴ The divide manifests starkly between urban and suburban areas, with significantly higher high school graduation rates outside of the cities.⁷⁵

The disparity in achievement can be explained partially by the significant interdistrict disparity in the amount of revenue that is dedicated to education.⁷⁶ Funding schemes are important to education equality because inequity is highly connected to student poverty.⁷⁷ In turn, “[s]tudent and school poverty correlates with, and is a proxy for, a multitude of factors that impact upon the costs of providing equal education opportunity—most notably, gaps in educational achievement, school district racial composition, English-language proficiency, and student mobility.”⁷⁸

Even if for no other reason, this crisis should be a national concern because of its detrimental effect on the national economy.⁷⁹ One study estimated that “[i]f the United States had closed the income achievement gap . . . then GDP in 2008 would have been \$400 billion to \$670 billion higher, or 3 to 5 percent of GDP.”⁸⁰ The income gap is, in effect, an underutilization of human capital, which leads workers to be less skilled and less able to adapt to new technology.⁸¹ The income and racial gaps create “economic dead zones” where low-achieving schools have resulted in entire communities with low skills, high unemployment, and crime, such that they are “largely unable to participate in the greater American economy.”⁸²

The quality deficiency is particularly troubling in light of the fact that the United States has been falling behind other nations in the area of academic achievement.⁸³ As compared to other industrialized nations included in one study, the United States ranked twenty-fifth out of thirty in math scores and twenty-fourth out of thirty in science scores when

73. *Id.* at 12 exhibit 6. Only nine percent of college freshman at the top colleges belong to the lower half of the socioeconomic divide. *Id.*

74. *Id.* at 12.

75. Greg Toppo, ‘Crisis’ Graduation Gap Found: Study Shows City, Suburban Rates Sharply Unequal, USA TODAY, Apr. 1, 2008, at 7D.

76. Reynolds, *supra* note 25, at 757.

77. BRUCE D. BAKER ET AL., IS SCHOOL FUNDING FAIR?: A NATIONAL REPORT CARD 7 (2010).

78. *Id.* Although equitable funding alone will not solve the education crisis, it is still a key element of building a fairer school system. *See id.*

79. MCKINSEY & CO., *supra* note 7, at 17.

80. *Id.* The study was based on raising the performance of students from homes with incomes below \$25,000 per year to that of students from homes with incomes above \$25,000 per year between the years 1983 and 1998. *Id.*

81. *Id.*

82. *Id.* at 17–18.

83. *Id.* at 7–9.

measured by a standardized test given to fifteen-year-old students.⁸⁴ Once the leader in high school and college graduation rates, the United States now ranks eighteenth and fourteenth, respectively.⁸⁵

Other nations have proven that education inequality is not inevitable.⁸⁶ Encouraging is the fact that seventeen countries have “lower income-based inequality,” meaning that achievement is not as consistently unequal between high-income and low-income students, as it is in the United States.⁸⁷ These systems prove that low income is not inextricably linked to poor education, so a better education could potentially be provided to poor students.⁸⁸

In an effort to address the education inequality crisis in the United States, numerous activists have brought lawsuits alleging various civil rights violations.⁸⁹ Because of the holding in *Rodriguez*, there have not been any successful federal claims regarding school finance.⁹⁰ In fact, there has been little attempt at litigating in the federal system to reform schools.⁹¹ Instead, there have been vigorous fights at the state level.⁹² The Supreme Court’s decision in *Rodriguez*, however, has a significant impact on the state of litigation today because it set precedent at the federal level and was hugely influential in how some state courts have interpreted equal protection and due process claims.⁹³ Despite this setback, because proponents of school finance reform remain determined, it is as important as ever to determine whether or not the endeavor is a lost cause. In spite of the numerous challenges faced by education litigants, this fight to realize the promise of *Brown* is not in vain and should continue to be pursued on the state and federal levels using equal protection

84. *Id.* at 7.

85. *Id.* at 7–8 (“[T]here is a striking gap between the performance of America’s top students and that of top students elsewhere. The United States has among the smallest proportion of 15-year-olds performing at the highest levels of proficiency in math. Korea, Switzerland, Belgium, Finland, and the Czech Republic have at least *five times* the proportion of top performers as the United States.”).

86. *See id.* at 8–9.

87. *Id.* at 8 exhibit 2. *See, e.g., id.* at 9 (“In a world-class system like Finland’s, socioeconomic standing is far less predictive of student achievement [than in the United States]. All things being equal, a low-income student in the United States is far less likely to do well in school than a low-income student in Finland. Given the enormous economic impact of educational achievement, this is one of the best indicators of equal opportunity in a society, and one on which the United States fares poorly.”).

88. *See id.* at 8–9.

89. Reynolds, *supra* note 26, at 750.

90. Reynolds, *supra* note 25, at 762–63.

91. *Id.*

92. Macchiarola & Diaz, *supra* note 50, at 552; EDUC. JUSTICE, *supra* note 63.

93. *See, e.g.,* *McDaniel v. Thomas*, 285 S.E.2d 156, 167 (Ga. 1981) (holding that education is not a fundamental right under the Georgia constitution and noting that “[w]hile the determination of the U.S. Supreme Court that education is not a ‘fundamental right’ does not bind state courts to make the same determination, the fact that education is not a ‘fundamental right’ under the U.S. Constitution provides some guidance to the states. Consistency in constitutional adjudication, though not demanded, is preferred.” (citation omitted)). Writing in 1980, the Supreme Court of Wyoming stated that arguing for a “[v]iolation of the Fourteenth Amendment of the U.S. Constitution as a ground for invalidating state systems of school finance has lost any viability since” the *Rodriguez* decision. *Washakie Cnty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 319 (Wyo. 1980).

claims arguing that wealth is a suspect class entitled to strict scrutiny in the context of unequal education.

III. ANALYSIS

School finance litigation is not a lost cause and should continue to be pursued through equal protection challenges based on wealth as a suspect class. Despite past challenges, school finance equality continues to be a worthy cause and a winnable fight for several reasons. First, the sheer importance of education equality warrants a continued effort for reform. Second, legislative efforts have been—and will continue to be—inadequate, making judicial intervention, which can only be brought about through litigation, necessary. Third, proponents of school finance reform should continue their efforts because they are correct in asserting that unequal school systems constitute an equal protection violation both at the federal and state level. Fourth, the precedent in *Rodriguez* is not an insurmountable obstacle to judicial establishment of education rights. Lastly, the history of overturned precedent proves that activists should not be deterred when their efforts are just. This pursuit will breathe new life into education reform efforts, bringing new hope for education equality.

A. *School Reform Should Be Pursued Because Education Is Among the Most Important Governmental Functions*

School finance litigation should be pursued simply because education is such an important aspect of society. Establishing and maintaining adequate education for all citizens, regardless of race or wealth, is an important state and public interest.⁹⁴ It is one of the few affirmative duties contained in every single state constitution.⁹⁵ Despite the fact that the federal Constitution does not mention the subject, education has long been a topic of national debate.⁹⁶ The Supreme Court has stated that “education is perhaps the most important function of state and local governments.”⁹⁷ Even the majority in *Rodriguez* agreed that “the grave significance of education both to the individual and to our society cannot be doubted.”⁹⁸

Beyond the moral imperative, there are various reasons to support education, including crime reduction, reducing the need for government

94. For example, the first line of the opinion in a recent Illinois case states that “[t]his case presents vitally important issues to the people and State of Illinois.” *Chi. Urban League v. State*, No. 08 CH 30490, 2009 WL 1632604, at *1 (Cir. Ct. Cook County Apr. 15, 2009) (memorandum opinion on motion to dismiss).

95. See 7-R1 RAPP, *supra* note 18, § T1.

96. 1-3 RAPP, *supra* note 18, § 3.01(2)(a).

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

98. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (internal quotation marks omitted).

welfare programs, creating an efficient and educated workforce, and maintaining a competitive advantage in the global market.⁹⁹ Because of the profound effect education has on society, efforts seeking a better system should be ceaseless.¹⁰⁰ The sheer importance of the topic warrants a continued attempt to establish a civil right to equal education for all children in the United States.

B. A Judicial Remedy Is Required to Solve the Education Inequality Crisis

The best way to solve this urgent education crisis is to establish a civil rights standard through litigation because the political process at both the state and federal levels has failed and will continue to fail to solve the crisis. As a result of *Rodriguez*, the battle over education funding and adequacy has been fought on the state level.¹⁰¹ Despite these cases, the crisis in education remains. Similar to the racial segregation crisis, the economic inequality crisis can only be solved with judicial oversight.¹⁰² Ultimately, the state and federal legislatures are failing to solve the problem and the political process is inherently unable or unwilling to address it in a meaningful way. A judicial remedy should be sought, therefore, because it is the best way to solve this crisis.

1. The State and Federal Legislatures Are Failing to Solve the Education Inequality Crisis

Legislatures at both the state and federal levels have attempted education reform with little success. The federal government defers to the states to implement and regulate education.¹⁰³ Overall, this deference has proven to be a losing strategy.¹⁰⁴ While some states have better education systems than others, income gaps exist even in the better-performing states.¹⁰⁵ Clearly, this problem is not being solved completely by any single state.

Moreover, the federal government's limited attempts at education reform through both legislation and administrative regulation have also failed to solve the crisis. Congress has accomplished little in the field of education of late, with the exception of the No Child Left Behind Act of 2001, which implemented a system of testing and accountability.¹⁰⁶ Subject to much criticism that it relies too heavily on testing and that it is insufficiently funded, this law does not address the underlying causes of

99. See MCKINSEY & CO., *supra* note 7, at 5–6.

100. *See id.*

101. Macchiarola & Diaz, *supra* note 50, at 552.

102. *See* cases cited *supra* note 35.

103. *See* 1-3 RAPP, *supra* note 18, § 3.01(1).

104. *See* MCKINSEY & CO., *supra* note 7, at 12.

105. *Id.*

106. 20 U.S.C. § 6301 (2006).

failure and inadequacy.¹⁰⁷ Further, the U.S. Department of Education is not living up to its promise of “assuring access to equal educational opportunity for every individual.”¹⁰⁸ Under the Obama Administration, the Department introduced the Race to the Top initiative, which has been underwhelming because it only affects a handful of states.¹⁰⁹ This administrative failure, in addition to legislative failures, casts doubt on the ability of any governmental body to solve the crisis.

2. *The Political Process Is Inherently Inept at Solving the Education Inequality Crisis*

Legislatures have largely failed to solve the education crisis and will continue to fail, so courts need to step in. The political unpopularity and sheer complexity of the interests at stake mean that education inequality will not be solved by the legislative process. Regulating the mass that is the public education system is so politically unpopular that the democratic process is unable to adequately reform it.¹¹⁰ Altering the balance of power that maintains state public schools is so politically unpopular that it has failed to make headway in the decades since *Rodriguez*.¹¹¹

Reforming the education system is politically unpopular because many, often powerful, citizens have a vested interest in maintaining the current system.¹¹² A parent would logically have little interest in far-away failing schools if his or her own child’s school is not failing.¹¹³ If a parent sends his or her children to one of the outstanding schools in the system, that parent would have little interest in the failing school district, but would have an interest in preserving the system in order to maintain the local well-performing schools.¹¹⁴

107. See Linda Darling-Hammond, *Evaluating “No Child Left Behind,”* NATION, May 21, 2007, at 11; *How to Fix No Child Left Behind*, TIME, May 24, 2007, <http://www.time.com/time/magazine/article/0,9171,1625192,00.html>; Editorial, *New Trier’s ‘F,’* CHI. TRIB., Nov. 11, 2010, at 18.

108. *Mission*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/overview/mission/mission.html> (last modified Oct. 20, 2011).

109. U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY 2 (2009), <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>; Michele McNeil, *Civil Rights Groups Call for New Federal Education Agenda*, EDUC. WK. (July 26, 2010, 10:00 AM), http://blogs.edweek.org/edweek/campaign-k-12/2010/07/civil_rights_groups_call_for_n.html.

110. See, e.g., Michelle Rhee & Adrian Fenty, Review, *The Education Manifesto*, WALL ST. J., Oct. 30, 2010, at C1. After instituting bold changes that improved schools in the failing school system in Washington, D.C., Mayor Adrian Fenty and Schools Chancellor Michelle Rhee left office because of the former’s reelection loss in 2010, which they attributed to the unpopularity of reforms. *Id.*

111. See *supra* Part II.C–D.

112. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 71 n.2, 123 (1973) (Marshall, J., dissenting).

113. As one commentator observed, “Illinois taxpayers care deeply about their schools. But the key words in that sentence are ‘their schools.’” Bob Sexter, *Funding Gap Splits Districts: Inequities Persist Despite Years of Calls for Reform*, CHI. TRIB., Mar. 30, 2010, at 4.

114. Justice Marshall argued in his dissent in *Rodriguez* that “[t]he strong vested interest of property-rich districts in the existing property tax scheme poses a substantial barrier to self-initiated legislative reform in education financing” and that any proposed changes to districts would be met with “inevitable opposition from significantly advantaged districts that have a strong vested interest in the preservation of the status quo.” *Rodriguez*, 411 U.S. at 71 n.2, 123 (Marshall, J., dissenting).

Further, reform is not politically popular because the people who have the strongest, most immediate interest in improving underachieving schools are the low-income parents whose low socioeconomic status consigned them to the poor district to begin with.¹¹⁵ Even if low-income students do not constitute a suspect class for equal protection purposes, reason indicates that these students and their families lack the clout and resources that are enjoyed by wealthier parents. In that sense, they are less able to improve their situation through the political process. Indeed, as the Supreme Court of Texas noted, “[p]roperty-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves.”¹¹⁶ After years of failing the education interests of children in property-poor districts because of the inherent power disparity between districts, there is no reason to believe that the political process suddenly will be able to solve the equality crisis.

As then Chicago Public Schools Chief Executive Officer, and later Secretary of Education, Arne Duncan said while endorsing a lawsuit in state court, “[w]e would certainly have preferred the system be fixed through a deliberate legislative process. . . . But for at least 30 years, we have waited expectantly, hoping for something, anything, to happen, only to be disappointed time and time again.”¹¹⁷ More definitively, in his vigorous dissent in *Rodriguez*, Justice Marshall declared the political process to be “singularly unsuited to the task of providing a remedy” for unequal education.¹¹⁸ Accordingly, when the political process fails to protect the interests of a disfavored group, the judicial system should step in to guarantee those rights.¹¹⁹ Indeed, in states where there has been a major legislative push for education reform, judicial decisions created the impetus by declaring the previous system invalid.¹²⁰

On both the federal and state levels, legislation largely and consistently has failed to solve the education inequality crisis, as evidenced by

115. *Id.*; Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909, 919–20 (2007) (“District-based schooling monopolies . . . reinforce educational inequity. Because housing markets are stratified by wealth, small, geographically compact school districts segregate the rich from the poor. Locally based funding thus allows the rich to build excellent, well-funded schools for their children, while the poor must relegate their own children, already more difficult to educate well than children of privilege, to the mediocre-or-worse schools that they are able to afford.”).

116. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989) (finding that the school funding system violated the Texas constitution).

117. Maudlyne Ihejirika, *Still 'Separate and Unequal': Lawsuit Claims Property-Tax System of Funding Education in Illinois Violates Civil Rights of Black, Latino Kids*, CHI. SUN-TIMES, Aug. 21, 2008, at 8.

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

119. *See id.* at 132 (“The possibility of legislative action is, in all events, no answer to this Court’s duty under the Constitution to eliminate unjustified state discrimination.”); *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803) (establishing the doctrine of judicial review of legislation).

120. *See, e.g., Edgewood*, 777 S.W.2d at 392. For an overview of legislation and litigation after the decision in *Edgewood*, see PAUL A. SRACIC, *SAN ANTONIO V. RODRIGUEZ AND THE PURSUIT OF EQUAL EDUCATION: THE DEBATE OVER DISCRIMINATION AND SCHOOL FUNDING* 125–32 (2006).

the fact that it is as pronounced as ever.¹²¹ Because the political process is inherently inept at solving this problem, it cannot be left to the legislatures to fix. Instead, if the crisis is to be solved, it must happen through judicial intervention, which can only occur through continued litigation efforts.

C. *The Education Inequality Crisis Constitutes an Equal Protection Violation*

Despite their political failures, school finance reform efforts should continue to be pursued because unequal funding systems constitute an equal protection violation. As the Supreme Court of Wyoming noted, “education cannot constitutionally be conditioned on wealth in that such a measure does not afford equal protection.”¹²² Even though the U.S. Supreme Court has not recognized this violation,¹²³ it exists nonetheless. Equality claims based on wealth, with poor children who receive an inadequate education constituting a suspect class, are the most effective means of using litigation to rectify this civil rights violation.

Unequal funding schemes violate equal protection guarantees because they do not pass the heightened scrutiny to which they should be subjected. Using judicial definitions of “suspect classes,”¹²⁴ poor children receiving inadequate education would certainly qualify. The Supreme Court has a long-standing tradition of recognizing that financial hardship should not deprive low-income people of their rights.¹²⁵ It has also recognized that children have a special place under the law because of their vulnerability.¹²⁶ School finance schemes, therefore, should be subject to heightened scrutiny because they discriminate against this suspect class.¹²⁷ The Court in *Rodriguez* did not recognize this reasoning,¹²⁸ but it should have—and would have—if the class had been defined better.

If this reasoning were applied, school funding schemes would fail heightened scrutiny and be declared an equal protection violation.¹²⁹ They do not pass stricter judicial review because financing schemes are merely a relic of traditional localism, rather than a solution closely related to an important government interest.¹³⁰ Further, these schemes and the inequality they cause are unconstitutional because they violate the

121. See *supra* Part II.D.

122. Washakie Cnty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 332 (Wyo. 1980).

123. *Rodriguez*, 411 U.S. at 28, 55.

124. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 472 n.24 (1985).

125. See, e.g., Griffin v. Illinois, 351 U.S. 12, 19 (1956).

126. See Bellotti v. Baird, 443 U.S. 622, 634 (1979).

127. See *supra* Part II.A, D.

128. See *Rodriguez*, 411 U.S. at 40.

129. See *id.* at 16.

130. See *infra* Part III.C.2.

very principles of education equality that the Supreme Court extolled in *Brown*.¹³¹

1. *Poor Children Are a Suspect Class Entitled to Heightened Review for Education Discrimination*

Poor children attending failing schools are a suspect class and are, therefore, entitled to heightened scrutiny.¹³² Even under a stringent federal standard for suspect classes, poor children fit the traditional definition of “suspectness.”¹³³ Additionally, their suspect nature should be recognized because the Supreme Court has a history of recognizing some claims of wealth discrimination and of protecting children based on their “vulnerability.”¹³⁴

a. *Poor Children Are a Suspect Class in Terms of Education Because They Fit the Court’s Traditional Definition*

By their very nature, poor children fit the definition of a suspect class. The traditional definition of a suspect class is one that consists of “discrete and insular minorities” who lack political power.¹³⁵ Poor children meet this standard because they are disadvantaged on two fronts.¹³⁶ First, they are children and, therefore, have no power to band with other minorities to assert their rights. Second, they come from poor families with few resources and little political power.

A specific indication of “suspectness” is being disadvantaged based on an immutable characteristic, such as race.¹³⁷ Being poor and a minor are immutable characteristics because children have no control over the family they are born into, the wealth their family has, or, importantly, the property wealth of the school district in which they live.¹³⁸ Ideally, the children’s parents would assert their rights for them, but when that fails, the government should step in to assist this suspect class by subjecting laws discriminating against them to heightened scrutiny. Children should not be deprived of an equal opportunity for education because, through no fault of their own, they have parents who are comparatively less able to assert children’s rights than are parents in property-rich districts.¹³⁹

Since the decision in *Rodriguez*, the Supreme Court has also awarded heightened scrutiny to groups, such as women and children of unwed

131. See *infra* Part III.C.3.

132. See *Rodriguez*, 411 U.S. at 16–17 (stating that suspect classes are entitled to strict judicial scrutiny).

133. See *id.* at 28 (listing the “traditional indicia of suspectness”).

134. See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

135. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

136. See *id.*

137. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472 n.24 (1985).

138. See *Rodriguez*, 411 U.S. at 123–24 (Marshall, J., dissenting).

139. See *id.*

parents, whose defining characteristic “bears no relation to ability to perform or contribute to society.”¹⁴⁰ That is clearly the case with poor children going to inferior schools. Children in property-poor school districts are not inherently inferior in their abilities as compared to other children, just as children of unwed parents are not inherently inferior in their abilities as compared to children of married parents.¹⁴¹ Under the Supreme Court’s own dividing line, therefore, children in poor school districts should be awarded heightened scrutiny in matters relating to their education because their residence bears no rational relationship to their ability to perform in school.¹⁴² Exactly like the marital status of a child’s parents, the wealth of the school district that a child lives in is merely an “accident of birth,” rather than an indicia of their abilities.¹⁴³ Indeed, the funding system that disadvantages them bears no relation to their ability to perform, as compared to the children who are advantaged by the system. To argue otherwise surely would not accord with the American value that wealth does not dictate one’s ability to achieve.¹⁴⁴ Even if poor children do not fit a wider definition of a suspect class, therefore, they should still be recognized as suspect in the area of education.

Despite the seemingly obvious merits of the argument to make poor children a suspect class, the Supreme Court in *Rodriguez* reasoned that the class as defined by the plaintiffs had “none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”¹⁴⁵ On its face, this assessment is inexplicable. Poor children are, by their very definition, politically powerless. Who is politically powerless if not a group that cannot vote and that does not have any economic power? While poor children may not have been subjected to invidious unequal treatment, they have been subjected to a long history of purposeful unequal treatment in the area of education through the maintenance of a profoundly unequal school system.¹⁴⁶ Under any reasonable framework for providing heightened scrutiny to suspect classes, poor children in property-poor districts should be included.

140. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (applying intermediate scrutiny to classifications based on gender); *see also Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (applying intermediate scrutiny to classifications based on parental marital status).

141. *Mathews*, 427 U.S. at 505.

142. *See id.*; *Frontiero*, 411 U.S. at 686.

143. *See Mathews*, 427 U.S. at 505; *Frontiero*, 411 U.S. at 686.

144. *See Plyler v. Doe*, 457 U.S. 202, 219 (1982) (“The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.”).

145. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

146. *See supra* Part II.A, D.

b. Acknowledging Discrimination in Economic Inequality Is a Recognized Doctrine in Equal Protection Jurisprudence

The Supreme Court has repeatedly recognized certain rights to economic equality. In *Griffin v. Illinois*, the Court held that a criminal defendant could not be denied a transcript from his prior trial on appeal simply because he was unable to afford one.¹⁴⁷ Based on the Equal Protection Clause, the Court held that destitute appellants must be afforded the same opportunity as those appellants with financial means because “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”¹⁴⁸

The Court addressed the decision in *Griffin* in its reasoning in *Rodriguez*, and dismissed its relevance to school funding because no argument was made that students suffered an “absolute deprivation” of a benefit.¹⁴⁹ As Justice Marshall argued in his dissent, however, there was no absolute deprivation in *Griffin*.¹⁵⁰ Only the right to have a transcript on appeal was deprived, not the right to an appeal.¹⁵¹ The Court, therefore, did not require an absolute deprivation of a right.¹⁵² Regardless, *Griffin* remains relevant as an example of impermissible wealth discrimination.

Additionally, the Supreme Court has required the appointment of an attorney for indigent criminal defendants.¹⁵³ In *Gideon v. Wainwright*, the Supreme Court held that the right to an attorney was so important that it could not be denied on the basis of affordability and, therefore, the state must pay for counsel.¹⁵⁴ The Court expanded the right to counsel regardless of wealth to juveniles in the holding of *In re Gault*.¹⁵⁵

In the context of equal protection, the Supreme Court has also invalidated financial restrictions on access to the political process, as guaranteed by the First Amendment of the Constitution.¹⁵⁶ In particularly clear language, the Supreme Court stated in *McDonald v. Board of Election Commissioners of Chicago*, that “a careful examination on our part is especially warranted where lines are drawn on the *basis of wealth* or race . . . two factors which would *independently* render a classification

147. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

148. *Id.*

149. *Rodriguez*, 411 U.S. at 20–23.

150. *Id.* at 117–20 (Marshall, J., dissenting).

151. *Griffin*, 351 U.S. at 19.

152. *See Rodriguez*, 411 U.S. at 117–20 (Marshall, J., dissenting); *Griffin*, 351 U.S. at 19.

153. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

154. *Id.*

155. 387 U.S. 1, 41, 55 (1967).

156. *See* U.S. CONST. amend. I.

highly suspect and thereby demand a more exacting judicial scrutiny.”¹⁵⁷ In a similar case, *Harper v. Virginia Board of Elections*, the Court held that a poll tax was an equal protection violation because “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored.”¹⁵⁸

Similar to its attack on *Griffin*, the majority opinion in *Rodriguez* would likely argue that *Harper* was inapplicable to education funding schemes because no “absolute deprivation” was claimed.¹⁵⁹ As in *Griffin*, the Court did not just invalidate the absolute deprivation of voting rights; it struck down the entire statute as it applied to all citizens.¹⁶⁰ For people who could afford the poll tax, the requirement constituted no deprivation at all, and yet the law was invalidated with respect to that class of people as well.¹⁶¹ The majority in *Rodriguez* was wrong to use the “absolute deprivation” argument because no complete deprivation was required in either case.¹⁶²

An argument can be made that the Supreme Court intended the decision in *Harper* to apply only to restrictions on access to the political process. Admittedly, footnote four of *Carolene Products* states that heightened scrutiny may be appropriate for restrictions on “those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”¹⁶³ Regardless, this series of cases is noteworthy as additional instances in which the government cannot make distinctions based on wealth.

Further, even under an interpretation of footnote four giving a special status to access to the political process, the current education system is a constitutional violation. As Justice Marshall argued in his dissent, the First Amendment guarantee of political rights is implicated in the issue of unequal education because education is vital to participation in the political process.¹⁶⁴ In addition to being disadvantaged, without a proper education, a person is also ill-informed and ill-equipped¹⁶⁵ to exercise her democratic rights.¹⁶⁶ This result could conceivably have a devastating effect on the democratic process.¹⁶⁷ In fact, the majority opinion in *Rodriguez* did not dispute the existence of this effect but rejected the

157. 394 U.S. 802, 807 (1969) (emphasis added) (citation omitted) (upholding the denial of absentee ballots to prison inmates because neither wealth nor race was a factor in the decision to exclude them from the classes eligible to vote absentee).

158. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666–68 (1966) (citation omitted).

159. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 117–18 (1973) (Marshall, J., dissenting).

160. *Id.* at 117–20; *Harper*, 383 U.S. at 666–68.

161. *See Harper*, 383 U.S. at 666–68.

162. *See Rodriguez*, 411 U.S. at 117–20 (Marshall, J., dissenting); *Harper*, 383 U.S. at 666–68.

163. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

164. *Rodriguez*, 411 U.S. at 113–15 (Marshall, J., dissenting).

165. In the event of illiteracy, a person would be largely unable to exercise their political rights.

166. *Rodriguez*, 411 U.S. at 113–15 (Marshall, J., dissenting).

167. *See id.*

argument on the grounds that the judiciary does not guarantee the “most effective speech or the most informed electoral choice,” and no deprivation of the basic skills needed to exercise electoral rights was proven.¹⁶⁸

The majority opinion went even further in rejecting this line of argument on the grounds that it had no logical end point and would necessitate a universal guarantee of food, clothing, and shelter because they too interfere with the exercise of First Amendment rights.¹⁶⁹ The guarantee of education to children, however, would not logically necessitate the guarantee of basic human necessities to the entire population. There is a logical distinction between providing education and providing the basic human necessities of food, clothing, and shelter to the general population. The guarantee of public education is premised on the fact that it is generally only provided to children. The creation of this guarantee, therefore, would only require a guarantee of basic human necessities to children, which already exists.¹⁷⁰ Because of the existing affirmative rights afforded to minors, there is a clear logical distinction between adults and children in determining state guarantees. The basic need of children to be educated so they may exercise their First Amendment rights should be afforded additional protections based on Supreme Court precedent barring wealth discrimination in the political process.

While these cases alone may not prove a civil rights violation, they show the seriousness of wealth discrimination and its impact. They also prove that economic inequality has been recognized by the Supreme Court in some contexts and that wealth is sometimes an unconstitutional distinction. As a result, recognizing it in the context of education would not be a radical leap.

c. The Unique Vulnerability of Children Is Settled in Supreme Court Jurisprudence

In addition to the traditional definitions, poor children are a suspect class based on a long-standing Supreme Court practice of treating children as “vulnerable” under the law.¹⁷¹ From federal aid to the “best interests” standard, children are treated differently under the law, both legislatively and judicially.¹⁷² The law treats adults as autonomous but treats children as needing special protection.¹⁷³

168. *Id.* at 35–37 (majority opinion).

169. *Id.* at 37.

170. Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 521 (1996).

171. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

172. *See* Kindred, *supra* note 170, at 528; *see generally* Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601–615 (2006) (describing AFDC as the largest national federal assistance program for families). AFDC is intended to help needy children. 3 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 31:3 (2d ed. 2005); *see also* JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 5 (1996) (discussing the doctrine of courts seeking the child’s “best interests” when determining custody matters).

173. GOLDSTEIN ET AL., *supra* note 172, at 5.

In *Bellotti v. Baird*, the Supreme Court noted that it had historically recognized a “unique” status for minors under the law.¹⁷⁴ The Court attributed this special position, in part, to children’s “inability to make critical decisions in an informed, mature matter” and their “peculiar vulnerability.”¹⁷⁵ It would seem that this vulnerability is the same as “political powerlessness” that the Court described in its definition of “suspectness.”¹⁷⁶ Logically, the Court should further recognize the vulnerability of children with respect to the deprivation of education rights, which is where their decision-making deficiencies are, arguably, most critical.

Based on their special status under the law as vulnerable beings, in addition to meeting the traditional definition of a suspect class and of suffering long-recognized economic discrimination, poor children are a suspect class with respect to education equal protection claims.

2. *Local Funding Systems Fail Heightened Scrutiny Review*

While local funding systems fail even rational basis review,¹⁷⁷ as has been held by one state court,¹⁷⁸ an argument can be made that these schemes are justified by the state’s interest in maintaining local control of schools, as was asserted by the Supreme Court in *Rodriguez*.¹⁷⁹ Even if a local funding system passes rational basis review, it fails any form of heightened scrutiny.¹⁸⁰

At the very least, a strong argument can be made that school financing schemes fail even rational basis review. In *Dupree v. Alma School District*, the Supreme Court of Arkansas held that the local funding system was an equal protection violation under the state constitution because it was not rationally related to the state’s interest in local control of school districts.¹⁸¹ The court reasoned that local control did not require local revenue sources and could be maintained without using the local property tax revenue system.¹⁸² It further posited that under the local taxing system, local control was a myth for many districts that were so

174. *Bellotti*, 443 U.S. at 633, 651 (striking down a Massachusetts law requiring parental consent for minors seeking an abortion because it did not allow an exemption for competent minors or minors who sought judicial approval, but stating that consent requirements for minors were otherwise unobjectionable).

175. *Id.* at 634.

176. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

177. *See id.* at 68 (White, J., dissenting) (arguing that the Texas school funding system did not pass rational basis review).

178. *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983).

179. *Rodriguez*, 411 U.S. at 49–50. In his dissenting opinion, Justice Marshall labeled the local control justification a “mere sham” and an “excuse . . . for interdistrict inequality.” *Id.* at 126, 130 (Marshall, J., dissenting).

180. *See id.* at 16 (majority opinion).

181. *Dupree*, 651 S.W.2d at 93 (condemning the state’s education funding system because it “only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged”).

182. *Id.* (“[T]o alter the state financing system to provide greater equalization among districts does not in any way dictate that local control must be reduced.”).

poor that they were unable to have any real choice in how they ran schools.¹⁸³ In that sense, the local funding system was not rationally related to the goal of local control.¹⁸⁴

In another case about education inequality, *Plyler v. Doe*, the Supreme Court held that a Texas law barring education to children who entered the United States illegally failed rational basis review.¹⁸⁵ While the Court held that undocumented aliens were not a suspect class because their classification was based on an illegal voluntary action, the absolute deprivation of education violated the Equal Protection Clause because it did not further a state interest, and therefore failed rational basis review.¹⁸⁶ In finding that there was no furtherance of a state interest, the Court emphasized the damaging effects that denying education would have on both the immigrants and the rest of society because it would create an uneducated underclass.¹⁸⁷ The Court also noted that the law was an “affront” to the Equal Protection Clause in that it disadvantaged children not based on merit but on an action of their parents, over which they had “little control.”¹⁸⁸

Similarly, the school finance system perpetuates a cycle of underachievement and creates an underclass.¹⁸⁹ The distinction that divides this underclass from the rest of society is not based on merit but on the actions of a child’s parent in choosing, or being forced, to live in a property-poor school district. Like the children of undocumented immigrants, education classifications placed on children in poor school districts fail rational basis review. If the deprivation of education to children who are not even citizens of the United States is an “affront” to equal protection, surely the deprivation of adequate education to America’s own children is also an equal protection violation.

Admittedly, both the Supreme Court and other state courts have held that funding systems are justified by the interest in local control of schools,¹⁹⁰ but even these courts might agree that the funding systems do not pass heightened scrutiny when a suspect class is implicated. Indeed, the majority opinion in *Rodriguez* noted that, “Texas virtually concedes that its historically rooted dual system of financing education could not withstand . . . strict judicial scrutiny.”¹⁹¹

183. *Id.* (“The notion of local control was a ‘cruel illusion’ for the poor districts due to limitations placed upon them by the [funding] system itself.”) (quoting *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 948 (Cal. 1976)).

184. *Id.*

185. *Plyler v. Doe*, 457 U.S. 202, 205, 230 (1982).

186. *Id.* at 223, 230.

187. *Id.* at 223–24.

188. *Id.* at 220–22.

189. *See supra* Part III.B.2.

190. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973); *see, e.g., Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 366 (N.Y. 1982) (“[L]ocal control of education . . . is both a legitimate State interest and one to which the present financing system is reasonably related.”).

191. *Rodriguez*, 411 U.S. at 16.

Under heightened review, local funding systems fail because they are justified only by the tradition of local autonomy for school districts, which is insufficient to meet the increased state interest and connection requirements of heightened scrutiny.¹⁹² Using the intermediate scrutiny mandated for classifications burdening women, there must be an “important government interest” which is “substantially related” to the discriminatory law.¹⁹³ In the landmark intermediate scrutiny case, *Craig v. Boren*, the Court found that maintaining traffic safety was an important state interest.¹⁹⁴ Conversely, in another gender discrimination case, *United States v. Virginia*, the Supreme Court found that the state’s interest in diversity of education through single-sex military education institutions was not an “exceedingly persuasive justification,” and, therefore, it was an equal protection violation.¹⁹⁵

The government justification employed by the majority in *Rodriguez* is inadequate to meet this heightened standard of review. First, the stated goal of maintaining local control over schools is not a sufficiently important government interest.¹⁹⁶ Like single-sex educational facilities, it is merely a political tradition and social preference rather than a proven superior strategy for education.¹⁹⁷ It is not like traffic safety from *Craig*, which is an accepted public interest and an important part of the police power exercised by the state.¹⁹⁸

Further, the funding system is not substantially related to the goal of local control. Despite using local revenues, state governments and the federal government still wield substantial control over school districts, so the existence of local control is an overstatement.¹⁹⁹ The primacy of local control over schools is perplexing considering that in all other areas, state authority is emphasized over local control.²⁰⁰ Indeed, states are ultimately responsible for education and merely delegate their authority to local school boards; therefore, it is not unreasonable to return some of that authority to the state government.²⁰¹ Additionally, as the court in *Dupree* argued, local control is reduced, not strengthened, by the unequal system

192. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–42 (1985) (describing the heightened review standards).

193. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

194. *Id.* at 199–200.

195. *United States v. Virginia*, 518 U.S. 515, 534 (1996).

196. *Rodriguez*, 411 U.S. at 49–51.

197. See *Virginia*, 518 U.S. at 556–58.

198. See *Craig*, 429 U.S. at 199–200.

199. See Bruce S. Cooper & Bonnie C. Fusarelli, *Setting the Stage: Where State Power and Education Meet*, in *THE RISING STATE: HOW STATE POWER IS TRANSFORMING OUR NATION’S SCHOOLS* 1, 2 (Bonnie C. Fusarelli & Bruce S. Cooper eds., 2009) (noting that increased federal and state regulation of schools through mechanisms like standardized tests has “eroded” local control over schools); Ben Boychuk, *Federal “Innovation” Kills Local Control of Schools*, L.A. DAILY NEWS, Oct. 8, 2009, http://www.dailynews.com/opinions/ci_13517339 (arguing that new federal funding for schools in exchange for compliance with federal programs reduced local control over schools).

200. Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 776–77 (1992).

201. See *supra* Part II.A.

of funding.²⁰² In any case, the need for local control of schools does not necessitate dependence on local financing.²⁰³ Revenue could come entirely from the state government while local school districts maintain the kind of day-to-day control that they exercise now.²⁰⁴ These arguments may have been enough to pass the deferential rational basis review because they were “reasonably related” to a “legitimate” state goal, but they are not enough to prove that the system is “substantially related” to an “important” state goal.

Because it fails intermediate scrutiny, the local revenue scheme would also fail strict scrutiny.²⁰⁵ Whether strict scrutiny or intermediate scrutiny is appropriate, local control over school revenue fails both tests.

3. *The Education Inequality Crisis Violates Brown Principles*

For the same reasons that the Supreme Court found racially segregated and unequal schools to be repugnant to the Constitution, the economic segregation and inequality of schools is also unconstitutional.²⁰⁶ The *Brown* decision forbade the maintenance of separate school systems on the basis of race, arguing that separate systems were inherently unequal in terms of education.²⁰⁷ The Court stated that when education is offered by the state, it “is a right which must be *made available to all on equal terms*.”²⁰⁸ By using the current funding system, states have undertaken to provide education but have not made it “available to all on equal terms.”²⁰⁹ Because the Court mandated that equal education be available to all, not just all races, it would also invalidate the current financing system based on the fact that it provides unequal education for children in property-poor school districts.²¹⁰

While the *Brown* decision referred to racial inequality, the language of the decision emphasized education.²¹¹ The opinion specifically stated that “in the *field of public education* the doctrine of ‘separate but equal’ has no place. Separate *educational* facilities are inherently unequal.”²¹² Based on this language, the holding of *Brown* was as much about education as it was about race, and, therefore, a separate and unequal education system based on an equally immutable characteristic would surely be a civil rights violation under *Brown*.²¹³

202. Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983).

203. See *id.*

204. See *supra* Part II.A.

205. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–42 (1985) (explaining the tests for strict and intermediate scrutiny and rational basis review).

206. See Brown v. Bd. of Educ., 347 U.S. 483, 493–495 (1954).

207. *Id.* at 495.

208. *Id.* at 493 (emphasis added).

209. *Id.*; see *supra* Part II.A, D.

210. *Brown*, 347 U.S. at 493.

211. *Id.* at 493–495.

212. *Id.* at 495 (emphasis added).

213. See *id.* at 493–95.

In explaining its reasoning in *Brown*, the Court seemed to be particularly persuaded by the societal importance of education, stating that: [E]ducation is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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.²¹⁴

The opinion also justified its reasoning on the detrimental effect that segregation can have on students in the disfavored class by creating feelings of inferiority.²¹⁵ Surely that feeling of inferiority should be a judicial concern in an economic context as well.²¹⁶ If racial segregation makes a student feel inferior, a similar effect must result from being subject to an inferior education based on the wealth of one's parents.²¹⁷ Because *Brown* forbade the maintenance of racially separate and unequal schools on the grounds of the importance of education, it would also prohibit the maintenance of economically separate and unequal schools.²¹⁸ The financing scheme, therefore, violates Supreme Court precedent by its perpetuation of unequal schools based on district property wealth.

D. Rodriguez May Be Overturned or Avoided in Establishing a Civil Right to Education

In addition to the precedent in *Brown*, the precedent of *Rodriguez* bears strongly on the school financing debate, but it is not an insurmountable barrier to successful litigation. There are several reasons why *Rodriguez* should either be overturned or why it would not foreclose an equal protection claim for poor children in regards to education. Ultimately, it should not deter future litigation aimed at improving education rights for disadvantaged children.

First, the Court's criticism of the poorly defined nature of the class to be given heightened status can be overcome.²¹⁹ A claim may be successful simply by more narrowly defining the class and providing better evidence of its connection to unequal treatment.²²⁰ In analyzing the proposed suspect class, the Court was unclear on the class to be defined and, thus, speculated:

214. *Id.* at 493.

215. *Id.* at 493-94.

216. *See id.*

217. *See id.*

218. *See id.* at 493.

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

220. *See id.* at 25 (denying the suspect classification because of "the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education").

The Texas system of school financing might be regarded as discriminating (1) against “poor” persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally “indigent,” or (2) against those who are relatively poorer than others, or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts.²²¹

The Court then rejected each of these definitions.²²² In doing so, the Court seemed to require that a class be readily identifiable in order to award it heightened protection, which seems to be far too narrow a requirement.²²³ Later in the opinion, the Court indicated that a reason for awarding suspect status was “political powerlessness.”²²⁴ Certainly, there must be classes that are politically powerless such that they should be considered suspect, and yet the group cannot be easily and rigidly defined. Under the spirit of footnote four, a group in need of judicial protection should not be denied suspect status simply because it is not susceptible to a perfect delineation.²²⁵ A class should be able to be reasonably overinclusive or underinclusive and still be awarded the additional safeguards of heightened review that it desperately needs.²²⁶

Even accepting the Court’s insistence that a clear definition must be available, however, a suspect class should still be recognized. The Court’s analysis was incomplete because it did not include the true definition of the class suffering discrimination under school funding schemes.²²⁷ In a new suit, the class should be defined even more narrowly, as children of a certain level of poverty who also reside in certain districts of a defined level of low education funding.

By defining the class more narrowly, it would avoid the criticism that the majority laid on its proposed classes.²²⁸ The majority opinion made a reasonable attack on the class simply being described as people under a certain level of poverty (the first option) or people who are relatively poorer than others (the second option) because the poorest people may not live in the poorest districts or go to the worst schools.²²⁹ The third proposed classification, namely, people in property-poor districts, is the strongest and was seen by Justice Marshall as more than adequate to

221. *Id.* at 19–20.

222. *Id.* at 22–28.

223. *See id.* at 28.

224. *Id.*

225. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

226. Classifications drawn by the government need not be a perfect fit with their intended audience and can be both overinclusive and underinclusive. *Vance v. Bradley*, 440 U.S. 93, 108 (1979). For the purpose of determining the appropriate level of equal protection review, plaintiffs should be given a similar allowance.

227. *See Rodriguez*, 411 U.S. at 19–20.

228. *Id.* at 22–28.

229. Successful charter school students often are the poorest in a community. Melinda Burns, *A’s and F’s for Charter Schools*, MILLER-MCCUNE (Oct. 23, 2010), <http://www.miller-mccune.com/education/a-s-and-f-s-for-charter-schools-24640>.

constitute a suspect class.²³⁰ It is better than the other options because it recognizes that it is the revenue of the district, not the wealth of the individuals, that is the greatest relevant government-supported disparity. Nonetheless, there may be students in these districts who are not poor themselves so they do not suffer the same powerlessness of poorer students in the same district. Students in property-poor districts, however, still suffer a significant deficit of power based on their age, so children who live in property-poor districts and are also poor are the ultimate suspect class. Using a more narrowly defined class that consists of poor children who also live in school districts with lower funding from property values, a new equal protection claim could succeed even at the federal level.

Second, even if the class of people to be given heightened status had been defined properly in *Rodriguez*, the opinion could be overturned because socioeconomic divides have evolved over the last nearly four decades such that wealth has replaced race as the new suspect class.²³¹ Wealth is the new dividing line of privilege, power, and economic opportunity.²³²

Just as the United States was racially segregated in 1954 when *Brown* was decided, it is now economically segregated.²³³ People of means move out of low-income neighborhoods and insulate themselves from urban problems, banding together to create a large tax base.²³⁴ A study by the federal government found that economic segregation is increasing in public schools, with a total of 16,000 schools and one-sixth of students in “concentrated poverty.”²³⁵ The same study found a clear correlation between level of poverty in a school district and achievement in the form of graduation rates and rate of attending college.²³⁶ Schools with less than twenty-five percent of students receiving reduced lunches had a ninety-one percent graduation rate and fifty-two percent of their students went to college.²³⁷ Schools with at least seventy-five percent of students receiving some form of reduced lunches had a sixty-eight percent graduation rate and twenty-eight percent rate of attending college.²³⁸

230. *Rodriguez*, 411 U.S. at 91 (Marshall, J., dissenting).

231. See Sheryll D. Cashin, *Drifting Apart: How Wealth and Race Segregation Are Reshaping the American Dream*, 47 VILL. L. REV. 595, 596 (2002).

232. See *id.*

233. *Id.*

234. *Id.*; Saiger, *supra* note 115, at 919–20.

235. For the purposes of the study, concentrated poverty was defined as a school with more than seventy-five percent of students receiving free or reduced-price lunches. Stacy Teicher Khadaroo, *Economic Segregation Rising in US Public Schools*, CHRISTIAN SCI. MONITOR, May 27, 2010, <http://www.csmonitor.com/USA/Education/2010/0527/Economic-segregation-rising-in-US-public-schools>.

236. *Id.*

237. *Id.*

238. *Id.* The study found a gradual decline in achievement rates. Schools with twenty-six to fifty percent of students receiving reduced lunches had an eighty-eight percent graduation rate and forty-one percent college attendance rate. *Id.* Schools with fifty-one to seventy-five percent of students receiving reduced lunches had a seventy-eight percent graduation rate and thirty-four percent college attendance rate. *Id.*

In terms of education, it is clear that the segregation the Supreme Court denounced in *Brown* has been replaced by an income segregation.²³⁹ Separation on the basis of wealth is just as debilitating for those on the losing end of the divide as racial segregation was to minorities. The *Rodriguez* decision, therefore, could be overturned simply because the social divisions of education are different today than they were when the case was decided in 1973.

Third, *Rodriguez* could be overturned because, in making its decision, the Supreme Court did not contemplate states like Illinois, where school funding is particularly dependent on local property taxes.²⁴⁰ The numbers present a much larger disparity in Illinois today than they did in Texas.²⁴¹ In the poorest school district in Texas, Edgewood, the average assessed property value per pupil was \$5,960.²⁴² In the wealthiest school district in Texas, Alamo Heights, the assessed property value per pupil exceeded \$49,000.²⁴³ By comparison, the property value for Alamo Heights was more than eight times as much as the property value in Edgewood. In Illinois in 2005, the property value per pupil in the five highest school districts “ranged from around \$1.2 million to \$1.8 million” whereas the figure for “the bottom five districts ranged from around \$7,000 to a little more than \$24,000” per pupil.²⁴⁴ As a result, the property value for the wealthiest district in Illinois was *more than 257 times* more than the property value in the poorest district, a much wider disparity than was considered in *Rodriguez*.²⁴⁵ Indeed, Illinois currently ranks forty-nine out of the fifty states in terms of the largest disparity in per-pupil funding between the lowest and highest poverty school districts.²⁴⁶ This is not surprising, considering the fact that Illinois is the most economically segregated state in the union.²⁴⁷ If the Court had been aware of these worst-case scenario possibilities becoming reality, it may have been more receptive to the equal protection argument.

Lastly, there is the possibility that a new compilation of Justices would decide the issue of school funding differently because it was such a close decision. Only five Justices sided with the majority and four Justices vigorously dissented, all using different rationales.²⁴⁸ Justice Brennan argued that there was a fundamental right to education based on its

239. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–495 (1954).

240. *Chicago Urban League v. State*, No. 08 CH 30490, 2009 WL 1632604, at *1–2 (Cir. Ct. Cook County Apr. 15, 2009) (memorandum opinion on motion to dismiss).

241. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 12 (1973).

242. *Id.* at 11–12.

243. *Id.* at 12–13.

244. *Chicago Urban League*, 2009 WL 1632604, at *2.

245. While this figure represents the extreme ends of the spectrum, the difference between the low end of the wealthiest districts, \$1.2 million, and the high end of the poorest districts, \$24,000, yields a significantly lower—but still stark—difference of fifty times. *Id.*

246. *Id.*

247. Susan E. Mayer, *How Economic Segregation Affects Children’s Educational Attainment*, 81 SOC. FORCES 153, 159 (2002).

248. *Rodriguez*, 411 U.S. at 2–3.

connection to the exercise of First Amendment rights, so the deprivation of that right in low-income areas was an equal protection violation.²⁴⁹ Justice White argued that the funding system failed a seemingly heightened form of rational basis scrutiny, so it was an equal protection violation even if poor children were not a suspect class.²⁵⁰ Justice Marshall provided the most scathing criticisms of the majority's opinion, at one point calling the lack of heightened review in this case to be "an emasculation of the Equal Protection Clause."²⁵¹ Marshall argued that there was an equal protection violation based on a "sliding scale" framework such that heightened review is not limited to explicit constitutional rights.²⁵²

In addition to the dissents, the majority opinion even expressed sympathy for changing the funding system when it noted an apparent need "for reform in tax systems which may well have relied too long and too heavily on the local property tax."²⁵³ At the very least, the entire Court recognized a need for change.²⁵⁴ Perhaps now a new Court would acknowledge that real change can only come from an adverse judicial judgment.

E. Rethinking Stare Decisis: Getting Around the Plessy v. Ferguson Problem

While *Rodriguez* is longstanding Supreme Court precedent, its mere existence should not foreclose adverse litigation because stare decisis is not insurmountable. Precedent can be, and has been, overruled.²⁵⁵ Stare decisis should not be the determining factor of whether or not a civil right exists. The Supreme Court recognized this when it overturned *Plessy v. Ferguson*²⁵⁶ in *Brown*.²⁵⁷ In the case at hand, a child's civil right

249. *Id.* at 62–63 (Brennan, J., dissenting).

250. *Id.* at 68 (White, J., dissenting).

251. *Id.* at 98 (Marshall, J., dissenting).

252. *Id.* at 102–03 ("Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly."); *see also* SRACIC, *supra* note 120, at 103.

253. *Rodriguez*, 411 U.S. at 58. One scholar interpreted this language to mean that all nine Supreme Court Justices recognized a "fundamental wrong" in unequal education spending. 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, 721 (1992). Justice Stewart went so far as to label the school finance system "chaotic and unjust." *Rodriguez*, 411 U.S. at 59 (Stewart, J., concurring).

254. *Rodriguez*, at 58–59.

255. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

256. 163 U.S. 537, 551–52 (1896) (holding that racial segregation of train cars was constitutionally valid because the cars were separate but equal).

257. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

in education should not be diminished by mindlessly adhering to the precedent of *Rodriguez*.

While Supreme Court decisions should be overturned if they are erroneous, the proponent must give a strong rationale for disregarding significant precedent.²⁵⁸ As Justice Brandeis said in a famous dissent, “*Stare decisis* is not . . . a universal, inexorable command.”²⁵⁹ He noted that it is particularly important to reconsider precedent when addressing constitutional issues because “correction through legislative action is practically impossible.”²⁶⁰

Following the spirit of this rule, the Supreme Court in *Brown* found the inequity of education segregation to be a compelling enough reason to overturn fifty-eight years of precedent.²⁶¹ An equally compelling justification exists for overturning thirty-nine years of precedent in *Rodriguez* because it also concerns the right of equal education.²⁶² Education is important because it represents not only a civil right but also an area of policy that will have a tremendous effect on the future of the nation.²⁶³

Reconsidering the decision in *Rodriguez* is particularly appropriate in light of the fact that state litigation subsequently has found a civil right in equal education.²⁶⁴ State establishment of a higher standard for education rights is like the “emerging recognition” of individual liberties in *Lawrence v. Texas* that necessitated the overturning of Supreme Court precedent in *Bowers v. Hardwick*.²⁶⁵ When circumstances change such that a formerly permissible action becomes a civil rights violation, the Supreme Court should consider that new condition.²⁶⁶ While they are not bound by precedents of state courts, the Supreme Court should recognize this consensus and consider it heavily in making its own determination of federal rights.²⁶⁷

Because of the importance of public education, precedent from *Rodriguez*, or any other state cases of similar rationale, should not deter school finance reform cases. This importance, combined with the abject

258. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.” (footnotes omitted)), *quoted with approval in Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991).

259. *Burnet*, 285 U.S. at 405–08, *quoted with approval in Lawrence*, 539 U.S. at 577.

260. *Burnet*, 285 U.S. at 405–08, *quoted with approval in Payne*, 501 U.S. at 827–28.

261. *Brown*, 347 U.S. at 495.

262. *See supra* Part III.A (noting the importance of education).

263. *See supra* Part II.D (detailing the extent of the education inequality crisis).

264. *See, e.g., Washakie Cnty. Sch. Dist. v. Herschler*, 606 P.2d 310, 333–34 (Wyo. 1980); *Pauley v. Kelly*, 255 S.E.2d 859, 865 n.7, 878 (W. Va. 1979); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 76 (Wash. 1978); *Horton v. Meskill*, 376 A.2d 359, 374–75 (Conn. 1977); *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 951 (Cal. 1976); *Robinson v. Cahill*, 303 A.2d 273, 295–96 (N.J. 1973).

265. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (*overruling Bowers v. Hardwick*, 478 U.S. 186 (1986)).

266. *See id.*

267. While state recognition of education rights would seem to alleviate the need for a federal judicial intervention, federal recognition is still needed because the states are failing to solve the education inequality. *See supra* Part III.B.1.

failure of the political process, the true merit of an equal protection claim, and the strong argument for overturning *Rodriguez*, indicates that school finance reform litigation should still be pursued.

IV. RESOLUTION AND RECOMMENDATION

In the absence of meaningful legislative action, supporters should continue to pursue equal protection claims to eliminate the pervasive unequal education funding system. While any litigation has the potential to bring about change in the broken education system, certain approaches are more promising than others. In order to bring about this change, litigation efforts should focus on equal protection claims arguing that wealth is a suspect class rather than racial claims or due process claims. This litigation should be brought at both the federal and state levels. To better ensure that a favorable judgment leads to meaningful change, litigation should also be accompanied by a concrete plan for changing local taxing schemes. These reform efforts should be overseen by state supreme courts or federal courts and must seek to increase state funding while severely restricting or eliminating local property-tax revenue for school districts.

A. *Litigation Should Focus on Wealth Equal Protection Claims*

While many approaches have been employed in the history of school finance litigation, the most strategic approach going forward is an equal protection claim with wealth as a suspect class for education. Rather than focus on racial claims, lawsuits should focus on poor children because they are a vulnerable group in need of judicial protection.²⁶⁸ By redefining the class, it can be established that poor children deserve heightened scrutiny in the context of education.²⁶⁹ Applying that heightened scrutiny, courts would have to find an equal protection violation.²⁷⁰

The equal protection approach is preferable to using a due process argument because the Supreme Court in *Rodriguez* explicitly stated that education is not a fundamental right entitled to heightened review, essentially barring such claims on the federal level.²⁷¹ It is also preferable to claims based on state education constitutional provisions, as opposed to state equal protection claims, because they vary greatly with respect to establishing explicit rights to education.²⁷² While other approaches may also be promising, an equal protection claim is the best approach to establish a right to education equality.

268. See *supra* Part III.C.1.

269. See *supra* Part III.C.1.

270. See *supra* Part III.C.2.

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

272. See *supra* notes 65–68 and accompanying text.

B. Litigation Should Be Brought at the Federal and State Levels

To strategically address unequal funding, equal protection litigation should be brought at both the state and federal levels. Federal claims are still possible, despite the Supreme Court precedent of *Rodriguez*,²⁷³ but should not be the only option. While the federal recognition of an equal protection violation would be the ultimate game changer for the education inequality crisis, state courts can produce change as well. Every day that the crisis continues, children's civil rights are being violated,²⁷⁴ so there is not time to wait for the Supreme Court to overturn itself. State claims, therefore, should be brought in addition to federal claims. State courts are, in fact, in a better position to find this violation because of their ability to protect rights more stringently.²⁷⁵

While the federal Constitution is popularly seen as the protector of civil rights, state constitutions can be even more zealous protectors of such rights. Justice Brennan noted that state courts can and should protect individual rights.²⁷⁶ He wrote that "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution."²⁷⁷ Instead, he argued that states should go beyond the minimum standard set by the federal courts.²⁷⁸

Many state courts have been more generous in their grants of education civil rights than the U.S. Supreme Court was in *Rodriguez*.²⁷⁹ One notable example is the Colorado Supreme Court.²⁸⁰ In *Colorado Department of Social Services v. Board of County Commissioners*, the court "rejected the *Rodriguez* test and held that whether rights are fundamental does not necessarily depend on whether they are guaranteed explicitly or implicitly by our state constitution, but whether they 'have been recognized as having a value essential to individual liberty in our society.'"²⁸¹ Additionally, in *Serrano v. Priest*, the California Supreme Court held that education was a fundamental right and wealth classifications regarding education funding were subject to strict scrutiny.²⁸² Both of these courts viewed the reach of equal protection more broadly than the U.S. Supreme Court did, causing them to find an equal protection violation in unequal education funding.²⁸³

273. See *supra* Part III.D–E (arguing why *Rodriguez* should be overturned).

274. See *supra* Part III.C.

275. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

276. *Id.*

277. *Id.*

278. *Id.*

279. See cases cited *supra* note 264.

280. See *Colorado Dep't of Soc. Servs. v. Bd. of Cnty. Comm'rs*, 697 P.2d 1, 14 (Colo. 1985).

281. *Id.* (quoting *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1015 n.7 (Colo. 1982)).

282. *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 951 (Cal. 1976).

283. See, e.g., *Pauley v. Kelly*, 255 S.E.2d 859, 865 n.7, 878 (W. Va. 1979) (holding that education was a fundamental right under the Constitution of West Virginia, and that "[e]qual protection, applied to education, must mean an equality in substantive educational offerings and results, no matter what

Even if a group is not considered to be a suspect class at the federal level, it may be one at the state level. Because there was at least a credible argument for an equal protection violation at the federal level in *Rodriguez*,²⁸⁴ there must be an even stronger argument at the state level, making these cases still worth pursuing. Even with a favorable judicial decision, however, the education crisis will not be solved.²⁸⁵ To ensure real change, the states must take an active role in implementing the new-found equality mandate.

C. Litigation Should Focus on Changing the Local Taxing Schemes and Be Accompanied by Concrete Recommendations for Limiting Local Taxing Revenues

While proponents should continue to bring lawsuits against unjust education systems, simply bringing these cases will not be enough to bring about substantial and long-lasting change. Even a plaintiff victory has proven insufficient in many cases.²⁸⁶ These efforts, therefore, must also be accompanied by a plan for remedying the equal protection violation. To that end, this Note recommends greater state control over school funding with little to no focus on local revenues. Only such a fundamental change in the taxing system will eliminate the persistent inequality in education funding. Implementation of these reforms should be overseen by state supreme courts or federal courts.

1. States Must Take Control of Education Financing and Eliminate or Severely Limit Local School Revenues

To establish an equalized funding system, state taxes must replace local property taxes as a main source of school revenue. Increased state funding for schools should serve to redistribute otherwise segregated tax wealth to schools across the state.²⁸⁷ To ensure the system remains equal, states should either eliminate or severely limit the ability to raise local revenue.²⁸⁸

State taxes should provide the necessary level of funding to ensure that every school meets a certain level of adequacy. That level includes a competitive salary for teachers so that superior teachers will consider working at schools in lower-income areas.²⁸⁹ The state-mandated funding

the expenditure may be"); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 76 (Wash. 1978) (finding the funding system to be unconstitutional because of a constitutional "paramount duty upon the State which in turn creates a correlative right on behalf of all children").

284. See *supra* Part III.C.

285. See Reynolds, *supra* note 14, at 1841.

286. *Id.*

287. See Reynolds, *supra* note 26, at 792.

288. See *id.* at 751–52.

289. For example, in 2010, teachers at New Trier were paid an average annual salary of \$98,304 while teachers at Harper were paid an average annual salary of \$68,679. ILL. STATE BD. OF EDUC., *supra* note 4.

level should also ensure a basic level of facilities, school supplies, and equipment. The level should be enough to maintain schools that give students a reasonable opportunity to learn basic skills like reading, writing, and math, and to graduate from high school and be accepted to a four-year college. Admittedly, foundational levels are already set in many states, but these levels have proven insufficient when they are not accompanied by comprehensive reform and limits on local revenue.²⁹⁰

While some may argue that this proposed system should be disfavored because it eliminates the tradition of localism in schools, localism is to blame for this crisis.²⁹¹ Because reliance on local property-tax revenue for schools caused the problem of unequal education funding, reform must include an end to the local revenue system.²⁹² Localism allows wealthier people to concentrate themselves in the suburbs and pool together high property values to fund their children's education while insulating themselves from the problems of urban and rural areas with concentrated poverty.²⁹³ To break this cycle, states have to end the local property-tax revenue system and redistribute taxes to schools across the state. Nonetheless, local control over the operation of schools could still be maintained; it is the funding of schools that must change.²⁹⁴

Along with setting higher state funding levels, local property-tax revenues to schools should be prohibited altogether.²⁹⁵ Under this system, politically and economically powerful parents will be motivated to lobby to raise the state spending level for schools because it will benefit the schools their children attend. At the same time, because the state level will be uniform for all children in the state, lobbying efforts will also benefit the poorest children.

The potential downside to this proposal is that wealthier districts may be able to find loopholes to fund their schools or may just send their children to private schools. Rich families have an advantage in the current system not only because they can send their children to excellent schools, but also because they can send their children to schools that are relatively better than the schools that other children attend.²⁹⁶ Parents, therefore, may not be wholly satisfied with a well-funded school system for their children; they would also want to use wealth and power to send

290. See Reynolds, *supra* note 26, at 761.

291. See *supra* Part II.A.

292. See Saiger, *supra* note 115, at 919–20.

293. See *id.*; Cashin, *supra* note 231, at 596; Reynolds, *supra* note 14, at 1840.

294. See Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) (arguing that the Arkansas school-funding system was not justified by the interest in local control because equalizing funding did not automatically diminish local control of schools).

295. See Reynolds, *supra* note 26, at 751–52 (noting that without a restriction on local revenue, full state funding of education will fail because wealthy districts have an incentive to keep state funding levels low).

296. See KOZOL, *supra* note 28, at 65–67.

their children to comparatively better schools so that their own children are better prepared than children who will be their future competition.²⁹⁷

To address this scenario, the full ban on local property-tax revenues for schools could be eased. A compromise position would allow a small amount of additional school revenue to be raised by local property taxes. This revenue would only supplement the required state level of funding so that the minimum level never falls below an amount sufficient to guarantee decent schools for all children in the state.

The potential unpopularity of this proposal only highlights the need for school finance reform litigation rather than legislation alone. To ensure that these reforms are properly carried out and maintained, a specific plan for implementation must be established.

2. *Courts Should Oversee the Implementation and Maintenance of Equal Funding Systems*

To bring about meaningful change, state or federal courts should take an active role in implementing an equal system, building upon the Supreme Court's actions after *Brown*.²⁹⁸ Whether or not the judgment is found at the federal or state level, courts should ensure that uniformity of funding across the state is paramount. In accordance with jurisdiction, state supreme courts will only oversee violations based on state equal protection claims. For federal equal protection claims, the Supreme Court should remand violations to the lower federal courts to oversee implementation, as it did after *Brown*.²⁹⁹ Because the entire funding system constitutes an equal protection violation, the entire system is within the realm of the courts to remedy and can be addressed as a whole.³⁰⁰

Under this proposal, courts should implement guidelines for equalizing school funding and oversee a commission that will definitively set the required level of funding for each pupil in the state. The state legislature would be able to increase—but not decrease—the minimum funding level set by the commission. The funds will then be distributed to schools based on the number of pupils attending the school, with consideration for any special needs. The commission should take into account different costs of living across a state, with higher levels of funding to cities. It should adjust the level every year, accounting for inflation and other economic and budgetary considerations. The independence of these commissions should be ensured by appointing people from diverse perspectives including school boards, unions, and political parties.

297. *See id.*

298. *See* cases cited *supra* note 35.

299. *See* *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299–300 (1955) (assigning federal district courts to evaluate the “good faith” of desegregation efforts).

300. This is analogous to the Supreme Court striking down the entire poll tax in *Harper* even though it only served to disadvantage some citizens. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666–68 (1966).

Additionally, if the violation is found at the federal level, the federal government can take an advisory role in the reform process. The Department of Education should advise states on the minimum levels of funding and quality. The federal government should provide incentives for meeting these standards, but not sanctions, so that schools are not injured as a result of state failures.

While this is a more active role than the Supreme Court took after *Brown*,³⁰¹ it is justified by the continued inequality. There, the Court issued opinions in response to integration attempts, elaborating on the *Brown* mandate by either upholding or invalidating the method.³⁰² Now, courts should do more than respond, they should actively oversee the implementation of an equal education system. That oversight should not have a foreseeable end date so that it will not be easy to return to the old system. While judicial involvement in school finances need not be permanent, reform efforts should entail such a significant overhaul that no firm end date can be set.

Some may argue that involving courts in this way is undemocratic, ill-advised, and against the separation of powers doctrine because it is outside the role of the judiciary to implement such a plan.³⁰³ The urgency of this crisis and the abject failure of the political system, however, necessitate an exception to this rule.³⁰⁴ Admittedly, a truly responsive legislature may be better equipped to impose reforms, but the legislatures are precisely the bodies who have perpetuated this system for decades.³⁰⁵ These concerns are also overblown because of the limited role prescribed to the courts of overseeing equal funding implementation. Beyond the mandate for full state funding, the courts will only determine whether equality has been carried out by reviewing the constitutional requirement, not the precise details of how it is carried out. While they will not take on full legislative functions, it should be a more active review than the Supreme Court employed for racial integration.³⁰⁶ Additionally, a change of this magnitude would be hugely unpopular, which means that the courts must do it, not the legislatures.³⁰⁷ The political process cannot be trusted to remedy this equal protection violation so the judiciary, with help from the commission, is the only governmental body suited to implement this remedy.³⁰⁸

301. See *Brown II*, 349 U.S. at 299–300; see also cases cited *supra* note 35 (detailing significant post-*Brown* cases regarding racial integration of schools).

302. See *Brown II*, 349 U.S. at 299–300; see also cases cited *supra* note 35.

303. Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1624 (2003) (recounting the criticisms that were levied against judges for their role in school desegregation).

304. See *supra* Parts II.D, III.B.

305. See *supra* Part III.B.1.

306. See cases cited *supra* note 35.

307. See *supra* Part III.B.2.

308. See *supra* Part III.B.

While some argue that history has proven litigation does not bring about a more equal education system,³⁰⁹ that does not justify failing to assert education rights. It is true that the education system has yet to equalize in some states where finance reform was successfully litigated.³¹⁰ It is also true that statistics have shown a positive effect of successful litigation through a general increase in school funding.³¹¹ As the proverb says, “Rome was not built in one day.”³¹² The unequal system was created, and perpetuated, over several decades so it is reasonable for the process of reform to be lengthy as well.³¹³

Just because it will take significant time to implement, does not mean school finance litigation is not worth pursuing. The promise of school finance reform litigation is not to produce the change but to force the process of bringing about change. For example, after *Brown*, schools were not integrated overnight.³¹⁴ It took several years after *Edgewood*, but the school finance system in Texas has now undergone significant equalizing measures.³¹⁵ Results of litigation can also be seen in Kentucky and Arkansas.³¹⁶ Regardless of the success rate and lag time for meaningful reform, education inequality claims are still worth pursuing for their potential to solve one of the nation’s greatest crises.

Only a significant overhaul of the school funding system can achieve education equality. While this proposal may seem bold, it is justified by the gravity of the interests at stake. In order to achieve such a result, equal protection litigation with wealth as a suspect class should continue to be brought at both the state and federal levels. More than fifty years after *Brown*, the judiciary is again called to remedy the legislative failure of education inequality, which remains the great injustice of American society.

V. CONCLUSION

The Supreme Court in *Brown* framed its decision around the concern that, “[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of educa-

309. See Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL’Y 569, 585 (2004).

310. See Reynolds, *supra* note 26, at 750.

311. Obhof, *supra* note 309, at 584.

312. J. RAY, A COMPLETE COLLECTION OF ENGLISH PROVERBS 104 (1818).

313. See Reynolds, *supra* note 14, at 1840.

314. See Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1338 (2004) (noting that racial segregation of schools was not eliminated in the southern states until the 1970s).

315. See RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 504–06 (7th ed. 2009); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 461–62 (1999).

316. See BRIFFAULT & REYNOLDS, *supra* note 315, at 492, 506–07.

tion.”³¹⁷ That is still the issue facing the nation’s public schools as state funding systems continue to perpetuate education inequality. The unequal school funding system that dominates education in the United States constitutes an equal protection violation for those children who are subject to extreme educational disadvantages based on the property values of their local public school district. To remedy this crisis, activists continue to bring lawsuits alleging that the inadequate and unequal education financing system is a civil rights violation.

Despite its long and often frustrating history, school finance litigation, like the children it seeks to help, is not a lost cause. The best way to remedy the civil rights violation of the education inequality crisis is through equal protection claims on the basis of wealth, with poor children established as a suspect class in regards to education. Accompanied by concrete and substantial changes to revenue schemes, school finance litigation is the best hope of living up to the educational opportunity promises of *Brown* and producing a more equal education system in the United States. This Note is not arguing for a government-guaranteed egalitarian utopia; it is merely arguing for the government to fulfill its obligation from *Brown* that when it undertakes to provide education, it must be “made available to all on equal terms.”³¹⁸

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

318. *Id.*

