

VIRGINIA LAW REVIEW ONLINE

VOLUME 109

APRIL 2023

1–16

FOREWORD

WE HAVE ONLY BEGUN TO FIGHT

*Kimberly Jenkins Robinson**

INTRODUCTION

This story begins with one parent who took his demands for equal educational opportunity for his children all the way to the highest court of our land. Demetrio Rodriguez served our nation in World War II and the Korean War.¹ Yet, back in Texas, his children were in subpar and inferior schools when compared with other schools in San Antonio. Following a student walkout in spring 1968 that protested the subpar and inferior school facilities at Edgewood High School, Rodriguez organized other Mexican American parents in the Edgewood School District.² He and his fellow parents obtained legal counsel and challenged the school funding disparities between Edgewood and nearby Alamo Heights under the

* Professor of Law, University of Virginia School of Law, Professor of Law, Education and Public Policy at the Frank Batten School of Leadership and Public Policy, Professor of Education, School of Education and Human Development. Many thanks for Madeline Daniel for excellent research assistance and to the exceptional staff at the University of Virginia Law Library.

¹ Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson, Introduction: The Enduring Legacy of *San Antonio Independent School District v. Rodriguez*, in *The Enduring Legacy of Rodriguez: Creating New Pathways to Equal Educational Opportunity* 1, 3 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015).

² *Id.*

Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.³

The parents convinced a federal court in the Western District of Texas to strike down the Texas funding system as a violation of equal protection.⁴ The court noted that despite the Edgewood district's higher tax rate, the lower property wealth of their district yielded only \$21 per pupil while a lower tax rate in Alamo Heights yielded \$307, and that the state had failed to close this funding gap.⁵ The lower court applied strict scrutiny to the funding system and found that the system harmed a fundamental interest and did not advance the local control of schools that the state had alleged justified the system.⁶

In *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court overturned that decision in a 5-4 ruling that reaffirmed the primacy of state and local authority over education.⁷ The Court held that the federal constitution neither explicitly nor implicitly guarantees a right to education and rejected the families' arguments that the close connection between education and the right to vote and to the First Amendment right to free speech served as sufficient justification for recognizing a fundamental right to education.⁸ The Court emphasized the importance of deference to states in how they raise and distribute public revenue.⁹ The Court highlighted the establishment and increase of state aid, as well as Texas' decision to grant localities the ability to tax and spend on education as "an effort to *extend* public education and to improve its quality" that warranted due regard to the rights that the Constitution reserves to states.¹⁰ Rational basis review, rather than strict scrutiny, was appropriate given the Court's tradition of deference to a state legislature's decision on how to distribute state and local tax revenues.¹¹

The Court further justified its decision to apply rational basis review by disclaiming any expertise on the education debates at the heart of the

³ Id. at 3–4.

⁴ *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 285 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973).

⁵ Id. at 282.

⁶ Id. at 282–85.

⁷ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58–59 (1973).

⁸ Id. at 35–37.

⁹ Id. at 40–41.

¹⁰ Id. at 39.

¹¹ Id. at 40–41.

lawsuit regarding whether money matters for educational quality and the aims of public schools.¹² The Court leaned heavily on federalism as a justification for its decision and emphasized the tradition of local control of education. Indeed, the Court could not imagine a decision with more potential to impact federalism, because the case ultimately pressed the Court “to abrogate systems of financing public education presently in existence in virtually every State.”¹³ In other words, the widespread nature of the problem was one of several reasons why the Court stayed its hand. The Court upheld Texas’ approach to funding schools as rationally related to its interest in local control of schools and the flexibility it provides localities to design education in ways that best serve local interests.¹⁴ According to the Court, this local control further permits “experimentation, innovation, and a healthy competition for educational excellence” in ways that are analogous to the freedom of states within our federal system of government.¹⁵

The Court’s refusal to recognize education as a fundamental right in *Rodriguez* closed the federal courthouse doors to parents and students who are experiencing harmful funding disparities that hinder the quality of their educational opportunities and the primary mechanism to become college and career ready, as well as engaged citizens. Fortunately, parents, students, and the lawyers who represent them were undeterred by the Supreme Court’s rejection of their claims. They continued their battles in state courts, and these battles continue to yield victories for students and families today. The effectiveness and persuasiveness of these cases has been buttressed by the standards and accountability movement that gave courts a clearly defined legislative goal for education and concrete evidence of when that goal was not being met.¹⁶ Despite important victories, these efforts have not been able to secure a high-quality and

¹² *Id.* at 42–43.

¹³ *Id.* at 44.

¹⁴ *Id.* at 47–55.

¹⁵ *Id.* at 50.

¹⁶ See Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson, Conclusion: Creating New Pathways to Equal Educational Opportunity, *in* *The Enduring Legacy of Rodriguez: Creating New Pathways to Equal Educational Opportunity*, *supra* note 1, at 263, 266–70; Michael A. Rebell, *Rodriguez* Past, Present, and Future, *in* *The Enduring Legacy of Rodriguez: Creating New Pathways to Equal Educational Opportunity*, *supra* note 1, at 65, 70.

equitable education for every child in the United States due in large part to the inconsistent state approaches to state rights to education.¹⁷

I. SOME BATTLES WON SINCE *RODRIGUEZ*

The fiftieth anniversary of *San Antonio Independent School District v. Rodriguez* provides an opportune time to reflect on both the victories and losses that have followed in its wake. First, it is important to acknowledge the victories. One important victory from these state court cases has been the building of scholarly and judicial consensus that—not surprisingly—money spent well matters for schools. Another important victory has been confirmation that courts possess the ability to insist upon reforms that advance equity and adequacy and the capacity to competently analyze the complex educational and social science research and data at the heart of these cases. The success of courts in adjudicating these claims undermines the *Rodriguez* Court’s assertions that courts should not be deciding these challenging issues.¹⁸

Battles have been won for students in states throughout our nation where courts have held that state legislatures have denied the students’ right to an equal or adequate education, as guaranteed by state constitutions.¹⁹ Two recent rulings show the vital role that the courts play in remedying school funding inequities and inadequacies.

In 2022, the highest court in North Carolina held in *Hoke County Board of Education v. State*²⁰ that the state had to remedy the violations of the state constitutional rights of its schoolchildren to the “sound basic education” that the court had recognized in *Leandro I* in 1997²¹ and that

¹⁷ See Kimberly Jenkins Robinson, Learning Pol’y Inst., Protecting Education as a Civil Right: Remediating Racial Discrimination and Ensuring a High-Quality Education 13–15 (2021), https://learningpolicyinstitute.org/media/548/download?inline&file=Education_As_Civil_Right_REPORT.pdf [<https://perma.cc/JV3X-88YH>]; Kimberly Jenkins Robinson, Introduction: The Essential Questions Regarding a Federal Right to Education, in *A Federal Right to Education: Fundamental Questions for Our Democracy* 1, 13–16 (Kimberly Jenkins Robinson ed., 2019) [hereinafter Robinson, *The Essential Questions Regarding a Federal Right to Education*].

¹⁸ *Rodriguez*, 411 U.S. at 41–43; Rebell, *supra* note 16, at 72.

¹⁹ Appendix: School Finance Litigation Cases, in *The Enduring Legacy of Rodriguez: Creating New Pathways to Equal Educational Opportunity*, *supra* note 1, at 275 (providing a list of successful school funding decisions).

²⁰ 879 S.E.2d 193, 197–99 (N.C. 2022).

²¹ *Leandro v. State (Leandro I)*, 488 S.E.2d 249, 254 (N.C. 1997) (holding that the North Carolina Constitution guarantees a “sound basic education” to all students and that the state has an obligation to provide this education).

the court had found were being violated in its 2004 ruling in *Leandro II*.²² A trial court oversaw an eighteen-year remedial phase in which the court held many hearings and appointed a consultant, WestEd, to provide recommendations on what changes needed to be implemented.²³ The trial court found a wide array of challenges that fell short of the components needed to run an effective school system: “teacher quality and supply, principal quality and supply, resources and school funding, assessment and accountability systems, low-performing and high-poverty schools, early childhood learning and Pre-K, and alignment and preparation for post-secondary opportunities.”²⁴

In light of the constitutional violations, the court ordered the state to develop a “*Leandro* Comprehensive Remedial Plan” through discussions with the plaintiffs and then to begin implementation of the plan.²⁵ The state repeatedly refused to appropriate the funds needed to implement the Comprehensive Remedial Plan, despite the trial court ordering the state to do so.²⁶ Eventually, the trial court ordered the state to transfer from its general fund: “(a) Department of Health and Human Services (“DHHS”): \$189,800,000.00; (b) Department of Public Instruction (“DPI”): \$1,522,058,000.00; and (c) University of North Carolina System: \$41,300,000.00.”²⁷ The court criticized the state for failing to fund a sound basic education for North Carolina’s students and for “the antagonism demonstrated by legislative leaders towards these proceedings, the constitutional rights of North Carolina children, and this [c]ourt’s authority.”²⁸

The North Carolina Supreme Court in 2022 affirmed the trial court’s order to the legislature.²⁹ The court noted that the North Carolina Constitution made clear that it is the state’s obligatory “sacred duty” to ensure that the fundamental right to education was protected.³⁰ The court explained that it had an obligation to provide a remedy for violations of

²² Hoke Cnty. Bd. of Educ. v. State (*Leandro II*), 599 S.E.2d 365, 390–91 (N.C. 2004) (holding that the state had not fulfilled its constitutional duty to deliver a sound basic education and that the state must remedy the constitutional violation).

²³ *Hoke Cnty. Bd. of Educ.*, 879 S.E.2d at 206–13, 246.

²⁴ *Id.* at 212.

²⁵ *Id.*

²⁶ *Id.* at 213–14.

²⁷ *Id.* at 216–17.

²⁸ *Id.* at 215.

²⁹ *Id.* at 239.

³⁰ *Id.* at 224 (citation omitted).

constitutional rights, and that it may be called upon to take action that is usually reserved to another branch to fulfil its constitutional obligation.³¹ The court acknowledged the extraordinary nature of this remedy, but explained that it was warranted because both the legislative and executive branches had failed for eighteen years to remedy the established denial of the constitutional guarantee of access to a “sound basic education.”³² The court also instructed the trial court to retain jurisdiction and expressed hope that this order would mark the beginning of a “new chapter” that moved beyond the distrust and divisions of the past and to march toward constitutional compliance with good faith collaboration.³³

Most recently, a Pennsylvania trial court agreed with a group of low-wealth districts, which regularly serve students with greater needs, that alleged that the state was not providing the “thorough and efficient” education that the Pennsylvania Constitution guarantees all students.³⁴ The court interpreted the Education Clause’s guarantee of a “thorough and efficient” education as a right for each student to receive “a *meaningful opportunity* to succeed academically, socially, and civically, which requires that *all* students have access to a comprehensive, effective, and contemporary system of public education.”³⁵ The court then examined both the inputs and outputs of Pennsylvania’s education system and found that students in low-wealth districts were both disproportionately and negatively impacted by the state’s approach to funding schools.³⁶ It explained that the system heavily relies on local taxes, which benefits wealthier districts, and that the system failed to adequately account for students’ needs given the typically higher needs of students in low-wealth districts.³⁷ The court rejected the state’s contention that local control justified the current funding approach because, despite its importance, local control was not possible for low-wealth districts that regularly faced difficult decisions regarding which programs to eliminate and which students to serve, when all needed resources.³⁸ The trial court ordered the Commonwealth to establish an

³¹ Id. at 230.

³² Id. at 242.

³³ Id. at 249.

³⁴ *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, No. 587 M.D. 2014, 2023 WL 1990723, at *354–55 (Pa. Commw. Ct. Feb. 7, 2023).

³⁵ Id. at *293.

³⁶ Id. at *312–33, 352.

³⁷ Id. at *352.

³⁸ Id. at *353–54.

education system that “does not discriminate against students based on the level of income and value of taxable property in their school districts.”³⁹

Research confirms that these types of school litigation victories can reap important benefits. Sustained reform of school funding systems that invests 10% more funding over the course of a K–12 education for children from low-income households raises the number of years that students complete in school by 0.46 and adult earnings by almost 10%, while it reduces adult poverty by 6.1%.⁴⁰ Court victories also have been shown to lead states to increase their funding for low-income districts and these “[r]eforms increased the absolute and relative achievement of students in low-income districts.”⁴¹ These results show that students and society can reap critical tangible benefits when courts require state legislatures to invest additional resources in the educational opportunities of low-income districts. They also show that some states will not make such investments unless ordered to do so by courts.

II. MORE BATTLES AHEAD

Despite these and numerous other wins and gains from state school finance litigation, far too many students continue to receive low-quality and inequitable educational opportunities, in no small part due to the Court’s decision in *San Antonio Independent School District v. Rodriguez*. The lived reality of many students, court delays and defeats, as well as data and research, confirm that fifty years after the Court’s decision in *Rodriguez*, our nation has only begun to fight for a high-quality education for every student—one that prepares them to be engaged citizens and college and career ready. Fifty years after *Rodriguez*, it is clear that many states will continue to provide students a low-quality and inequitable education unless courts or Congress order them to do otherwise. I briefly highlight here some of the stark realities of conditions in today’s schools, court delays and defeats in school

³⁹ Id. at *356.

⁴⁰ C. Kirabo Jackson, Rucker C. Johnson & Claudia Persico, The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms, 131 Q.J. Econ. 157, 160 (2016).

⁴¹ Julien Lafortune, Jesse Rothstein & Diane Whitmore Schanzenbach, School Finance Reform and the Distribution of Student Achievement, 10 Am. Econ. J. 1, 23 (2018).

funding litigation,⁴² as well as the research and data that confirms both inequitable and inadequate inputs and outputs from our nation's schools that establish that we have a long fight ahead of us to ensure that all students in the United States receive a high-quality education. Although the Court claimed that its involvement in school funding would have been "premature" in 1973,⁴³ fifty years after *Rodriguez* it is clear that federal intervention is now overdue.⁴⁴

Court opinions from school finance litigation teach us that far too many students within our nation are educated without access to the well-qualified teachers and administrators, resources, and facilities that they need to become college and career ready and engaged and informed civic participants. For example, when litigators returned to federal court in Detroit to argue that students were being denied a constitutional right to literacy, the opinion by the U.S. Court of Appeals for the Sixth Circuit ruling in their favor notes the shocking plaintiff allegations that the educational opportunities provided were "schools in name only," which included an eighth grader in one school teaching math for one month to seventh and eighth grade students, large numbers of teacher vacancies, combined classes that rose to as high as sixty students in a single classroom, and teaching from paraprofessionals and teachers who lacked knowledge about the subject that they were teaching.⁴⁵ The court also noted that plaintiffs described schools that were unsafe, where vermin were commonplace, and the heating and cooling systems were so poor that students sometimes passed out from heat or wore coats in school all day.⁴⁶ Finally, such basic resources as up-to-date textbooks and school libraries also were too often lacking.⁴⁷

In addition, the North Carolina Supreme Court's decision to order the state to pay more than \$1.7 billion to remedy the statewide violation of the constitutional guarantee of education relied upon compelling evidence

⁴² See also Robinson, *The Essential Questions Regarding a Federal Right to Education*, supra note 17, at 13–14 (describing some of the delays and defeats in school funding litigation).

⁴³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973).

⁴⁴ See generally Kimberly Jenkins Robinson, *A Congressional Right to Education: Promises, Pitfalls, and Politics*, in *A Federal Right to Education: Fundamental Questions for Our Democracy*, supra note 17, at 186 (examining why a federal law would be an effective and advantageous pathway for recognizing a federal right to education).

⁴⁵ *Gary B. v. Whitmer*, 957 F.3d 616, 624–25 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

⁴⁶ *Id.* at 626.

⁴⁷ *Id.* at 626–27.

that “in way too many school districts across the state, thousands of children in the public schools have failed to obtain, and are not now obtaining[,] a sound basic education as defined by and required by the *Leandro* decisions.”⁴⁸ The wide array of deficiencies to be remedied indicate that no aspect of the education system was left untouched by constitutional infirmities.⁴⁹

The Pennsylvania litigation also revealed a broad range of educational deficits, such as a high school teacher teaching upper-level French and Spanish in the same classroom; insufficient numbers of special education teachers, English language teachers, and reading specialists; and teachers teaching courses that they are not certified to teach.⁵⁰ The court also noted testimony that documented how students’ educational needs were unmet due to such deficits as large kindergarten classes, an insufficient supply of textbooks for each student, and inadequate funding due to a strong reliance on local funds for schools in low-wealth districts.⁵¹ School facility concerns included an inaccessible disability ramp due to unrepaired cracks, a lack of adequate instructional spaces, an elementary school with one bathroom for 125 students, and leaking roofs, including a classroom with water leaking into trashcans placed strategically to catch the water.⁵² In addition to the widespread deficiencies in cases finding a state constitutional violation, students themselves also have shared tales of unsafe and unsanitary conditions in their schools.⁵³

In my work teaching law students before the pandemic at the University of Richmond School of Law, I annually took my education law students into two starkly different Virginia high schools: Armstrong High School in Richmond, and Deep Run High School in Henrico County. Although dedicated and capable principals greeted me at each school, the similarities often ended there. At Armstrong High School, my students

⁴⁸ Hoke Cnty. Bd. of Educ. v. State, 879 S.E.2d 193, 209, 212, 216–17 (N.C. 2022).

⁴⁹ Id. at 212 (noting that the extensive nature of the shortcomings throughout the state included school funding, principal and teacher quality and supply, accountability, early childhood education, low-performing schools of concentrated poverty, and preparation for opportunities upon graduation).

⁵⁰ William Penn Sch. Dist. v. Pa. Dep’t of Educ., No. 587 M.D. 2014, 2023 WL 1990723, at *62, *76, *78, *99 (Pa. Commw. Ct. Feb. 7, 2023) (citation omitted).

⁵¹ Id. at *64, *79–80, *102, *313 (citation omitted).

⁵² Id. at *71, *89–90, *115, *142, *163 (citation omitted).

⁵³ See, e.g., CNN Newsource, GA High School Students Expose Mold, Crumbling Wall, Sewage Leak at School, WGXA News (Apr. 13, 2022, 2:53 PM), <https://wgxa.tv/news/local/ga-high-school-students-expose-mold-crumbling-wall-sewage-leak-at-school> [<https://perma.cc/LVM2-CJLX>].

and I were greeted with metal detectors and school security, and the facilities did not create a welcome learning environment due to signs of neglect and disrepair. Our time in classrooms revealed that many students lacked a computer, out-of-date textbooks were common, and teaching oftentimes focused on the basics. A short distance away in Deep Run High School, we entered a beautiful building where every student had access to a laptop and the teachers used technology to create a rich learning environment. These experiences confirmed those chronicled by University of Virginia President James Ryan in his book *Five Miles Away, A World Apart*, in which he documents the many ways that students in inner-city and suburban Richmond high schools are experiencing harmful disparities in their learning opportunities.⁵⁴ These disparities are too often replicated throughout our nation.⁵⁵

Furthermore, many students live in states where their state courts either refuse to adjudicate or reject claims that the state's approach to funding schools results in a violation of the state constitution. The Florida Supreme Court in its 2019 decision in *Citizens for Strong Schools, Inc. v. Florida State Board of Education* reaffirmed that the Florida Constitution's protection of education as a paramount state duty and guarantee of an efficient and "high quality" education failed to provide the court with a standard that it could administer without intruding into the legislature's authority over education, as it had previously determined in *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*.⁵⁶ Similarly, the Nevada Supreme Court in its 2022 decision in *Shea v. State* rejected plaintiffs' argument that the state was not fulfilling its constitutional obligation to provide sufficient education resources because the Nevada Constitution committed education to the legislature, rendering the claims nonjusticiable.⁵⁷ These and other losses confirm that many students lack access to a remedy for their inadequate or inequitable

⁵⁴ See generally James E. Ryan, *Five Miles Away, A World Apart: One City, Two Schools, and the Story of Educational Opportunity in Modern America* (2010) (describing the array of differences in educational opportunities, achievement, and life outcomes for students in Thomas Jefferson High School in Richmond and Freeman High School in Henrico County).

⁵⁵ Robinson, *The Essential Questions Regarding a Federal Right to Education*, supra note 17, at 3–7.

⁵⁶ *Citizens for Strong Schs., Inc. v. Fla. State Bd. of Educ.*, 262 So. 3d 127, 141 (Fla. 2019) (citing *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996)).

⁵⁷ *Shea v. State*, 510 P.3d 148, 150 (Nev. 2022).

school funding system and thus need a federal right to education to remedy the harms caused by their state's approach to funding schools.

Many other students live in states where repeated implementation delays of court orders means that years of their education can be completed without them experiencing any change in their educational opportunities. For instance, the North Carolina Supreme Court in the *Hoke County* litigation noted above upheld the extraordinary remedy of ordering the transfer of more than \$1.7 billion in state funds to implement a plan to remedy the constitutional violation because, “[f]or eighteen years, the executive and legislative branches have repeatedly failed to remedy an established statewide violation of the constitutional right to the opportunity to a sound basic education.”⁵⁸ This means that more than a generation of students entered and departed the North Carolina schools without attending schools in compliance with their right to a sound, basic education. Similarly, the Washington Supreme Court held the state in contempt for almost four years, from September of 2014 to June of 2018, for failing to comply with its constitutional obligation to provide a basic education for the students of the state and initiated a fine of \$100,000 per day in 2015.⁵⁹ In 2016, in the *Gannon v. State* litigation, the Kansas Supreme Court threatened to shut down the entire school system by June 30, 2016, if the legislature did not remedy the court's 2014 finding that a variety of wealth-based disparities in its funding of the schools were unconstitutional.⁶⁰ The Kansas legislature eventually passed a law in June 2016 that cured the violation in a special legislative session.⁶¹ Securing a constitutional school finance system and the benefits that it brings remains a long and arduous journey, even when courts declare that students are entitled to one.⁶²

Data and research on opportunities to learn as well as student achievement complete the compelling portrait of state education systems

⁵⁸ *Hoke Cnty. Bd. of Educ. v. State*, 879 S.E.2d 193, 242, 267 (N.C. 2022).

⁵⁹ For the litigation in Washington, see *McCleary v. State*, No. 84362-7, at 4 (Wash. Sept. 11, 2014) (order); *McCleary v. State*, No. 84362-7, at 2 (Wash. Aug. 13, 2015) (order); *McCleary v. State*, No. 84362-7, at 4 (Wash. June 7, 2018) (order).

⁶⁰ For the litigation in Kansas, see *Gannon v. State*, 368 P.3d 1024, 1061–62 (Kan. 2016); *Gannon v. State*, 319 P.3d 1196, 1204 (Kan. 2014).

⁶¹ Julie Bosman, Kansas Lawmakers Pass Bill in Bid to Stop Court from Closing Schools, *N.Y. Times* (June 24, 2016), <https://www.nytimes.com/2016/06/25/us/kansas-lawmakers-pass-bill-in-bid-to-stop-court-from-closing-schools.html> [<https://perma.cc/Z5QG-7S7V>].

⁶² Robinson, *The Essential Questions Regarding a Federal Right to Education*, *supra* note 17, at 13 (“[R]esistance to successful school finance litigation is often fierce, protracted, and effective in limiting the scope of reforms.”).

that are not providing students high-quality and equitable educational opportunities nor preparing them effectively to be college and career ready. First, social scientists agree that students in districts with higher poverty concentrations need additional funding for their educational, family, and social support to compete on anything close to a level playing field with their peers.⁶³ Data confirms that a majority of states in the United States provide either the same or less funding to students who need the most funding. A recent school funding analysis found that when all districts are divided into quintiles, on average the highest poverty districts spend 13% less than adequate spending levels and the lowest poverty districts spend 32% above adequacy, a 45% age point opportunity gap between these districts.⁶⁴ Even more troubling is the pervasive nature of these gaps in opportunity throughout each of the states, with the size of the gap varying significantly.⁶⁵

Second, states also are disadvantaging the educational opportunities of the majority of students, with a disproportionate burden inflicted on our students of color. More than half (52%) of students in our nation attend schools that are below adequate funding to reach the modest aim of average U.S. test scores.⁶⁶ Even more troubling is the fact that 71% of Latinx and 75% of African American students, along with 55% of American Indian and Alaskan Native students, attend such schools.⁶⁷ In contrast, just over a third (35%) of white students and 44% of Asian students attend schools that are inadequately funded.⁶⁸ African American students experience the largest average funding inadequacies at 17%, and Latinx students receive the next largest at 11% below adequate funding.⁶⁹ White students on average attend schools that receive approximately 22%

⁶³ See generally Richard Rothstein, *Why Children from Lower Socioeconomic Classes, on Average, Have Lower Academic Achievement than Middle-Class Children*, in *Closing the Opportunity Gap: What America Must Do to Give Every Child an Even Chance* 61 (Prudence L. Carter & Kevin G. Welner eds., 2013) (explaining how concentrated socioeconomic disadvantage depresses academic achievement and discussing possible social and economic reforms).

⁶⁴ Bruce D. Baker, Matthew Di Carlo & Mark Weber, *The Adequacy and Fairness of State School Finance Systems* 4 (5th ed. 2022), <https://files.eric.ed.gov/fulltext/ED625887.pdf> [<https://perma.cc/T35U-558X>].

⁶⁵ Danielle Farrie & David G. Sciarra, Educ. L. Center, *Making the Grade: How Fair is School Funding in Your State?* 16 (2022), <https://edlawcenter.org/assets/files/pdfs/publications/Making-the-Grade-2022-Report.pdf> [<https://perma.cc/FL73-ZCEM>].

⁶⁶ Baker et al., *supra* note 64, at 35.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

more funding than is needed to attain adequacy, while Asian students receive about 15% more funding than is needed to attain adequacy.⁷⁰

In addition, EdBuild found in a 2019 report that districts in which more than 75% of students are nonwhite receive a startling \$23 billion less than districts in which more than 75% of students are white, even though they educate the same number of students.⁷¹ On average, nonwhite districts received about \$2,200 less per student than predominantly white districts.⁷² No child in our nation should be disadvantaged by such state underinvestment in education, and such disadvantages are more egregious when they are disproportionately inflicted on traditionally underserved students of color.

Third, our national test scores and other research confirm that we are not preparing students well for college and career or to be engaged citizens. Recent results from the National Assessment of Educational Progress (“NAEP”) found that more than one third (37%) of fourth grade students performed below NAEP Basic and 29% performed at NAEP Basic in reading, which means fully two-thirds of fourth graders in our nation are not acquiring the fundamental reading skills that they will need for future schooling.⁷³ The 37% who scored below NAEP Basic represent the largest percentage below NAEP Basic of all prior assessments, dating back to 2005.⁷⁴ At eighth grade, more than two-thirds of students also are at or below basic in reading, with 30% below NAEP Basic and 39% at NAEP Basic.⁷⁵ The 30% of eighth graders below NAEP Basic represent the largest percentage of students at this level from all prior assessments, which began in 1998.⁷⁶ Hispanic, Black, and Native American students performed below their White and Asian peers, with Asians attaining the highest achievement levels.⁷⁷

⁷⁰ Id.

⁷¹ EdBuild, \$23 Billion 4 (2019), <https://edbuild.org/content/23-billion/full-report.pdf> [<https://perma.cc/G2VH-2WDB>].

⁷² Id. (finding that white school districts receive \$13,908 and nonwhite districts receive \$11,682 per pupil).

⁷³ Nat’l Ctr. for Educ. Stat., NCES 2022-126, 2022 Reading Assessment Highlighted Results for the Nation, States, and Districts at Grades 4 and 8 (2022), <https://www.nationsreportcard.gov/highlights/reading/2022/> [<https://perma.cc/S4D4-Y3TU>].

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id.

Turning to math, in 2022, 25% of fourth graders scored at the below basic level and 39% performed at the basic level in math on NAEP.⁷⁸ NAEP Basic is defined as an achievement level that “denotes partial mastery of prerequisite knowledge and skills that are fundamental for proficient work at each grade,” while NAEP Proficient “represents solid academic performance” and “demonstrate[s] competency over challenging subject matter.”⁷⁹ This means that almost two-thirds of fourth graders are not successfully mastering the mathematical foundations that will enable them to succeed at higher level math in later grades. In addition, the percentage of students who performed below Basic was larger than all prior NAEP test scores since 2003.⁸⁰ Even larger percentages of students were below NAEP Basic (38%) and at NAEP Basic (35%) by eighth grade, which places almost three quarters of students at this low level of math performance.⁸¹ White and Asian students similarly outperformed their Hispanic, Black, and Native American peers on these assessments, with Asian students performing the best of all students.⁸²

History confirms that although our nation’s founders and the architects of common schools created public schools to enable students to one day fulfill their civic duties, schools have been failing to serve this function for many years.⁸³ Evidence of this failure can be found in the last administration of the NAEP civics assessment, which found that only one in four students in eighth grade were proficient in civics in 2018.⁸⁴ One cause for this low performance has been the emphasis on reading and

⁷⁸ Nat’l Ctr. for Educ. Stat., NCES 2022-124, 2022 Mathematics Assessment Highlighted Results for the Nation, States, and Districts at Grades 4 and 8 (2022) [hereinafter 2022 Mathematics Assessment Highlighted Results], <https://www.nationsreportcard.gov/highlights/mathematics/2022/> [https://perma.cc/F8F8-E89E].

⁷⁹ Nat’l Ctr. for Educ. Stat., NCES 2010-468, An Introduction to NAEP: National Assessment of Educational Progress 13 (2010), <https://nces.ed.gov/nationsreportcard/pdf/parents/2010468.pdf> [https://perma.cc/H7M7-U3FK].

⁸⁰ 2022 Mathematics Assessment Highlighted Results, *supra* note 78.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See Michael A. Rebell, *Flunking Democracy: Schools, Courts, and Civic Participation* 2–5 (2018); Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 *Stan. L. Rev.* 735, 765–816 (2018).

⁸⁴ Nat’l Ctr. for Educ. Statistics, NCES 2020-017, 2018 Civics Report Card at Grade 8 (2020) [hereinafter 2018 Civics Report Card], <https://www.nationsreportcard.gov/civics/results/achievement/> [https://perma.cc/G2F7-MH22].

math skills,⁸⁵ despite the lackluster NAEP scores in those areas as well. Like school funding, this democracy gap has a racial dimension, with white students possessing greater knowledge of and skills in civics than students of color and students from low-income households.⁸⁶

Finally, prior to the pandemic, research shows that students lost \$600 billion in state and local funding of public schools from 2008–2018 due to states' refusal to return their fiscal effort to the levels that existed before the Great Recession.⁸⁷ This means that schools entered the pandemic with a deficit that the pandemic then exacerbated by placing unprecedented new demands on students, staff, and teachers. Generous federal funding through the three pandemic relief laws that together resulted in approximately \$3,720 in additional funding per student is beginning to empower states and districts to address the harms inflicted by the pandemic.⁸⁸ However, diminished educational opportunities before the pandemic hit mean that some of these funds will inevitably be diverted to get schools and staffing back to the funding levels that they were at before the Great Recession, rather than for the remediation that the funds were distributed to address. Recent achievement data shows great cause for concern about the impact of the pandemic on students, particularly those who were already further behind.⁸⁹

⁸⁵ The shift away from a focus on civics education occurred in the second part of the twentieth century. Rebell, *supra* note 83, at 17.

⁸⁶ 2018 Civics Report Card, *supra* note 84.

⁸⁷ Danielle Farrie & David G. Sciarra, Educ. L. Center, \$600 Billion Lost: State Disinvestment in Education Following the Great Recession 2 (2020), [https://edlawcenter.org/assets/\\$600%20Billion/\\$600%20Billion%20Lost.pdf](https://edlawcenter.org/assets/$600%20Billion/$600%20Billion%20Lost.pdf) [<https://perma.cc/H2TN-6KF3>].

⁸⁸ American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2001(b), 135 Stat. 4, 19; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. M, tit. III, §§ 311(b)–312, 134 Stat. 1182, 1924–29 (2020); Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); see Michael Griffith, An Unparalleled Investment in U.S. Public Education: Analysis of the American Rescue Plan Act of 2021, Learning Pol’y Inst. Blog (Mar. 11, 2021), <https://learningpolicyinstitute.org/blog/covid-analysis-american-rescue-plan-act-2021> [<https://perma.cc/5KNG-6JRG>]; Chad Aldeman, Best- and Worst-Case Scenarios for How Stimulus Dollars Will Be Spent, Thomas B. Fordham Inst. (Mar. 26, 2021), <https://fordhaminstitute.org/national/commentary/best-and-worst-case-scenarios-how-school-stimulus-dollars-will-be-spent> [<https://perma.cc/4W3A-6K4R>]; see generally Kimberly Jenkins Robinson, Strengthening the Federal Approach to Educational Equity During the Pandemic, 59 Harv. J. on Legis. 35 (2022) (documenting the educational harms inflicted by the pandemic and critiquing the strengths and weaknesses of the federal approach to K–12 education during the pandemic).

⁸⁹ Sarah Mervosh, The Pandemic Erased Two Decades of Progress in Math and Reading, N.Y. Times (Sept. 1, 2022), <https://www.nytimes.com/2022/09/01/us/national-test-scores-math-reading-pandemic.html> [<https://perma.cc/JB4Z-C8SE>].

CONCLUSION

The enduring nature of low-quality and inadequate public schools confirm that the fiftieth anniversary of *San Antonio Independent School District v. Rodriguez* provides an occasion to launch a more fulsome attack on the funding systems and political inertia that enable inequitable and inadequate educational opportunities to persist that impact far too many students and that disproportionately impact students from low-income families and children of color. Evidence abounds of the need to increase our fight for our students' education, our democracy, and our economy. Our nation must expand and energize the fight for the right of every student to receive a high-quality education that prepares students for civic engagement, as well as college and career. We must fight for equitable and excellent schools with even more determination than those who engaged in and continue to fight for our civil rights. Until our nation reaches the point when low-quality and inequitable educational opportunities are a thing of the past, the fight that Demetrio Rodriguez began more than fifty years ago must not only be continued, but it must be amplified to a national scale.