

## NOTES

### **The Emperor's New Clothes: Stare Decisis and the Teacher Shortage Crisis**

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#### ABSTRACT

*During the 2020-2021 academic year, the U.S. Department of Education reported teacher shortages in nearly every state, and within key subject areas, nationwide. Indeed, a recent national survey found that two-thirds of school districts report significant teacher shortages across math, science, and special education. Worse still, this labor crisis has disproportionately harmed students from low-income, racially segregated communities, where “75% of districts [have] reported a shortage.” This is a problem. As indicated by a substantial (and growing) body of social science research, a qualified teacher workforce is one of the most important factors influencing student learning and achievement.*

*In fact, the National Commission on Teaching and America's Future, in its seminal report on the relationship between teaching and learning, found that “[w]hat teachers know and can do is the most important influence on what students learn.” Perhaps more importantly, at least for the purposes of this Note, “school reform cannot succeed unless it focuses on creating the conditions in which teachers can teach, and teach well.” Despite this growing labor crisis, reform measures at both the state and federal level have largely failed to meaningfully address the poor and unequal school conditions animating the prevailing teacher shortage crisis. This Note, in response to these failings, is the first to argue that labor reformers should address the teacher shortage crisis by directly challenging the poor school conditions that drive it. As the Supreme Court continues its assault on labor protections more broadly, this indirect, education-centered approach to labor reform has much to recommend it.*

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## I. INTRODUCTION

The United States is losing its teachers. Indeed, the U.S. Department of Education has reported teacher shortages in the subjects of math, science, and special education in nearly every state.<sup>1</sup> As of December of 2020, employment figures within public schools sank to their lowest point since the 2000-2001 academic year.<sup>2</sup> This is a problem. A substantial body of social science research has identified a qualified teacher workforce as one of the most important factors influencing student learning and achievement.<sup>3</sup> In fact, the National Commission on Teaching and America's Future, in its seminal report on the integral relationship between teaching and learning, found that "[w]hat teachers know and can do is the most important influence on what students learn."<sup>4</sup> Perhaps more importantly, at least for the purposes of this Note, "school reform cannot succeed unless it focuses on creating the conditions in which teachers can teach."<sup>5</sup> These

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1. See U.S. DEP'T OF EDUC., TSA REPORT: TEACHER SHORTAGE AREAS (2020), <https://tsa.ed.gov/#/reports> (providing detail on teacher shortage areas by school year, state, subject matter, and discipline). See also Michael A. DiNapoli Jr., *Eroding Opportunity: COVID-19's Toll on Student Access to Well-Prepared and Diverse Teachers*, LEARNING POLICY INSTITUTE (Feb. 10, 2021), <https://learningpolicyinstitute.org/blog/covid-eroding-opportunity-student-access-prepared-diverse-teachers>.

2. See Valerie Bauerlein & Yoree Koh, *Teacher Shortage Compounds Covid-19 Crisis in Schools*, WALL ST. J. (Dec. 15, 2020, 11:36 AM), <https://www.wsj.com/articles/teacher-shortage-compounds-covid-crisis-in-schools-11608050176>.

3. See, e.g., Dan Goldhaber, *Teachers Clearly Matter, but Finding Effective Teacher Policies Has Proven Challenging*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 157 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015); Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 *ECONOMETRICA* 417 (2005).

4. NAT'L COMM'N ON TEACHING & AMERICA'S FUTURE, WHAT MATTERS MOST: TEACHING FOR AMERICA'S FUTURE 10 (1996), <https://files.eric.ed.gov/fulltext/ED395931.pdf>.

5. *Id.*

conditions,<sup>6</sup> and their effect on the nation's growing teacher shortage crisis, serve as the focal point of this Note's analysis.

Poor working conditions within public schools have featured prominently in both creating and fueling the teacher shortage crisis. As Linda Darling-Hammond observed, "working conditions are at least as powerful as salaries in predicting whether schools can recruit and retain teachers who have other options."<sup>7</sup> Indeed, educators have long cited poor working conditions—such as limited professional support staff and large class sizes—as central to their decision to leave the teaching profession.<sup>8</sup> Yet, "the past two decades have brought a litany of policies heavily focused on raising the bar for teacher quality rather than the conditions under which they teach."<sup>9</sup> Worse still, policymakers have often exacerbated the structural inequities undergirding such conditions by underfunding public education. Consider the following legislative measure. Following the Great Recession, public K-12 school districts nationwide lost nearly \$600 billion in funding due, in part, to significant cuts to state education budgets.<sup>10</sup> Although the American Recovery and Reinvestment Act's (ARRA) education stimulus<sup>11</sup> provided substantial federal aid to mitigate the worst effects of the Great Recession,<sup>12</sup> ARRA proved inadequate amid growing budget shortfalls at the state level.<sup>13</sup> Accordingly, once ARRA funding had been exhausted, state policymakers continued to cut education funding to cover growing budget deficits.<sup>14</sup>

These state-level budget cuts, coupled with sharp reductions in overall fiscal effort,<sup>15</sup> led to a protracted recovery in more than half the states.<sup>16</sup> Take the 2015-2016 academic year as an example. That year, nearly thirty states provided "less total school funding per student than they were in 2008."<sup>17</sup> Or consider the 2017-

6. Poor school and student learning conditions can be viewed by the reader as synonymous, at least for the purposes of this Note, with school-based teacher working conditions. Accordingly, each term will be used interchangeably throughout this Note.

7. LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 40–41 (James A. Banks ed., 2010).

8. See Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597, 1616–17 (2016).

9. See *id.* at 1612.

10. See DANIELLE FARRIE & DAVID G. SCIARRA, *\$600 BILLION LOST: STATE DISINVESTMENT IN EDUCATION FOLLOWING THE GREAT RECESSION 2* (2021).

11. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, div. A, tits. VIII & XIV, 123 Stat. 115, 181–84, 279–86 (2009).

12. See, e.g., William N. Evans et al., *The Great Recession and Public Education*, 14 EDUC. FIN. & POL'Y 1, 298, 323 (2019); CTR. ON EDUC. POL'Y, *WHAT IMPACT DID EDUCATION STIMULUS FUNDS HAVE ON STATES AND SCHOOL DISTRICTS?* 1, 3 (2012).

13. Nicholas Johnson, *The Great Recession Badly Hurt Kids' Schooling; Today's Recession Could Do Much Worse*, CTR. ON BUDGET & POL'Y PRIORITIES (May 27, 2020, 10:00 AM), <https://www.cbpp.org/blog/the-great-recession-badly-hurt-kids-schooling-todays-recession-could-do-much-worse>.

14. See *id.*

15. See FARRIE & SCIARRA, *supra* note 10, at 5.

16. See Michael Leachman et al., *A Punishing Decade for School Funding*, CTR. ON BUDGET & POL'Y PRIORITIES 1 (Nov. 29, 2017), <https://www.cbpp.org/sites/default/files/atoms/files/11-29-17sfp.pdf>.

17. *Id.*

2018 academic year. Although the national economy had largely recovered from the worst of the recession by this time, policymakers in several states continued adopting cost-cutting measures that significantly reduced funding for public education.<sup>18</sup> Consequently, the impact of these budget cuts on the foregoing conditions was significant,<sup>19</sup> disproportionately so within historically underserved school districts.<sup>20</sup>

The educational challenges that followed the Great Recession, though significant, have so far paled in comparison to the unprecedented destruction wrought by the COVID-19 pandemic. For the nation's school teachers, moreover, such unprecedented challenges have raised questions implicating their own physical health and safety.<sup>21</sup> Put simply, the pandemic has wreaked havoc on the U.S. education system. For example, every state in the nation has imposed recommended or mandatory school closures in an effort to mitigate the spread of the COVID-19 virus.<sup>22</sup> Yet, as fifty-five million public school children nationwide transitioned to distance learning, the prevailing disparities and structural inequities that have long-plagued public K-12 education in the United States were not only laid bare, but also exacerbated.<sup>23</sup> This is particularly true in the school funding context. As

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18. See FARRIE & SCIARRA, *supra* note 10, at 2 (“[A]t least 12 states have cut ‘general’ or ‘formula’ funding—the primary form of state support for elementary and secondary schools—by 7 percent or more per student over the last decade according to a survey we conduct using state budgets.”).

19. See C. Kirabo Jackson et al., *The Costs of Cutting School Spending: Lessons from the Great Recession*, EDUC. NEXT (Aug. 2020), <https://www.educationnext.org/costs-cutting-school-spending-lessons-from-great-recession/>; see generally Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. REV. 1385 (2019) (“Public school funding is in worse condition than it has been in decades. In real dollar terms, school funding in most states is lower today than it was before the 2008 recession.”).

20. See, e.g., Kenneth Shores & Matthew P. Steinberg, *The Impact of the Great Recession on Student Achievement: Evidence from Population Data 25* (Stan. Ctr. for Educ. Pol’y Analysis, Working Paper No. 17-09, August 2017), <https://cepa.stanford.edu/sites/default/files/wp17-09-v201708.pdf>.

21. See Dana Goldstein & Eliza Shapiro, *‘I Don’t Want to Go Back’: Many Teachers Are Fearful and Angry Over Pressure to Return*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/07/11/us/virus-teachers-classrooms.html> (“Teachers say crucial questions about how schools will stay clean, keep students physically distanced and prevent further spread of the virus have not been answered. And they feel that their own lives, and those of the family members they come home to, are at stake.”). See also Madeline Will, *Teachers are Stressed Out, and It’s Causing Some to Quit*, EDUC. WK. (Feb. 22, 2021), <https://www.edweek.org/teaching-learning/teachers-are-stressed-out-and-its-causing-some-to-quit/2021/02>; Caralee Adams, *Teachers Need Lots of Training to Do Online Learning Well. Coronavirus Closures Gave Many Just Days*, HECHINGER REP. (Apr. 17, 2020), <https://hechingerreport.org/teachers-need-lots-of-training-to-do-online-learning-well-coronavirus-closures-gave-many-just-days/>.

22. See Holly Peele & Maya Riser-Kositsky, *Map: Coronavirus and School Closures in 2019-2020*, EDUC. WK. (Oct. 30, 2021), <https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html>.

23. See U.S. DEP’T OF EDUC., EQUITY & EXCELLENCE COMM’N, A REPORT TO THE U.S. SECRETARY OF EDUCATION, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 14 (2013) (“Our education system, legally desegregated more than a half century ago, is ever more segregated by wealth and income, and often again by race. Ten million students in America’s poorest communities—and millions more African American, Latino, Asian American, Pacific Islander, American Indian and Alaska Native students who are not poor—are having their lives unjustly and irredeemably blighted by a system that consigns them to the lowest-performing teachers, the most run-down facilities, and academic expectations and opportunities considerably lower than what we expect of

the pandemic (and its education-related effects) continues to rage,<sup>24</sup> school finance scholars have predicted additional funding cuts in the coming months—cuts that are projected to far outstrip those adopted in response to the Great Recession.<sup>25</sup> Indeed, “[i]f these projections are correct, the resulting hit to education spending would be two and a half times worse than the lowest point of the last recession.”<sup>26</sup>

In light of these exigencies, this Note contends that state-level and Congressional measures have largely failed to meaningfully respond to the poor working conditions that have largely created—and continue to worsen—the teacher shortage crisis. What is more, reliance on legislative measures as the predominant avenue for addressing poor school conditions is both politically and practically imprudent. As a political matter, “legislation alone cannot guarantee long term assurance of educational funding, equity, and quality. Rather, mere legislation would leave education subject to the same political pressures that plague it now.”<sup>27</sup> From a practical standpoint, moreover, “passing new legislation, or even a constitutional amendment, would require far more political will and public outrage than what seems to currently exist.”<sup>28</sup> To meaningfully address the teacher shortage crisis, then, labor reformers should once again turn to the federal judiciary for relief, albeit in two novel and distinct ways.

First, reformers should center their legal strategy on the protection of equal educational opportunity, not education labor issues. By taking this more indirect approach to addressing teacher working conditions, future litigants can circumvent the Court's recent decision in *Janus*, which significantly weakened the ability of teachers' unions to collectively bargain to potentially improve school working conditions.<sup>29</sup> Moreover, as the Court continues to undermine labor protections more broadly,<sup>30</sup> such an approach has much to recommend it. Second, by

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other students.”); see also Michael Griffith, *The Impact of the COVID-19 Recession on Teaching Positions*, LEARNING POL'Y INST. (Apr. 30, 2020), <https://learningpolicyinstitute.org/blog/impact-covid-19-recession-teaching-positions>.

24. See Dia Bryant, *Bring back remote learning: With COVID's delta variant raging, NYC parents need the option*, N.Y. DAILY NEWS (Aug. 22, 2021, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-bring-back-remote-learning-20210822-c64mcgn4f5cgxjokroq4bwj6l4-story.html>.

25. See Erica L. Green, *Pandemic-Stricken Schools Tell Senate They Need Help to Reopen*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/us/politics/virus-schools-funding-budget.html> (“In another report released Wednesday, the National Education Association estimated that without federal relief, the education system would lose 1.9 million education jobs. The American Federation of Teachers said budget cuts had already cost local public education systems more than 750,000 jobs, twice what they lost during the recession of 2008.”).

26. Griffith, *supra* note 23.

27. Derek W. Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1348 (2010).

28. *Id.* at 1348–49.

29. See *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2483, 2486 (2018) (holding “agency shop” fees unconstitutional under the First Amendment right to freedom of association).

30. See, e.g., *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074, 2080 (2021) (holding that a law which temporarily limits a property owner's right to exclude without compensation functions as a physical taking under the Fifth and Fourteenth Amendments).

shifting their legal approach from one centering education labor rights to one centering the more general right to equal educational opportunity, future litigants should challenge the legal and factual merits of the Court's landmark school finance decision in *San Antonio Independent School District v. Rodriguez*.<sup>31</sup> However, given the composition of the current Court<sup>32</sup>—one that is predisposed against recognizing new substantive rights or classifications<sup>33</sup>—litigants should anchor such claims in a collaborative framework that modestly restructures our nation's approach to education federalism.

This collaborative framework, which was identified and developed by Professor Kimberly Jenkins Robinson,<sup>34</sup> breaks from the traditional model of education federalism that viewed “the federal government's role [as] quite limited, and state and local authority [as] much more powerful.”<sup>35</sup> Instead, “a collaborative approach to a federal right to education” would take a more modest judicial tack, requiring only that “the federal and state governments work together to protect the right.”<sup>36</sup> The Court, therefore, would not be asked to define the substance of this federal right to education,<sup>37</sup> a prospect that worried the *Rodriguez* Court;<sup>38</sup> rather, it would position itself as the Court of last resort, interceding only when reforms at the state or federal level have failed to address rising education inequality. Given the vastly unequal conditions between the nation's highest need and highest wealth school districts, “any level of serious judicial engagement

31. 411 U.S. 1 (1973) (holding that public education is not a fundamental right protected by the U.S. Constitution and that wealth is not a suspect classification).

32. See David Leonhardt, *A Supreme Court, Transformed*, N.Y. TIMES (July 6, 2021), <https://www.nytimes.com/2021/07/06/briefing/supreme-court-donald-trump.html> (discussing the composition of the Supreme Court following the confirmations of Justice Amy Barrett, Justice Brett Kavanaugh, and Justice Neil Gorsuch); see also Melissa Murray, *Don't be fooled: This is not a moderate Supreme Court*, WASH. POST (July 1, 2021, 5:12 PM), <https://www.washingtonpost.com/opinions/2021/07/01/make-no-mistake-this-is-conservative-supreme-court-it-just-sometimes-acts-slowly/> (discussing the implications of a new “conservative supermajority” on the Supreme Court); Joan Biskupic, *The Supreme Court Hasn't Been This Conservative Since the 1930s*, CNN (Sept. 26, 2020, 6:33 PM), <https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html> (discussing the “historic transformation” of the Supreme Court with the nomination of Justice Amy Coney Barrett).

33. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) (noting that “the majority's decision [was] an act of will, not legal judgement. The right [to same-sex marriage] it announces has no basis in the Constitution or this Court's precedent”).

34. See, e.g., Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. UNIV. L. REV. 959, 1002–05 (2015). See generally Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287 (2013).

35. Kristi L. Bowman, *The Failure of Education Federalism*, 51 U. MICH. J.L. REFORM 1, 5 (2017). See generally Heather Gerken, *Our Federalism(s)*, 63 WM. & MARY L. REV. 1549 (2012).

36. Kimberly Jenkins Robinson, *Designing the Legal Architecture to Protect Education as a Civil Right*, 96 IND. L.J. 51, 99 (2020).

37. See Black, *supra* note 27, at 1393 (“[T]here is no need to look to the federal government for leadership on the substance or creation of educational rights. Rather, federal law is necessary only to ensure the enforcement of equality in already existing state rights.”).

38. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43–44, 49–50, 58 (1973) (“The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand.”).



with questions of educational quality is a victory for students.”<sup>39</sup> As this Note demonstrates, such judicial engagement will also be a victory for labor reformers looking to meaningfully address the teacher shortage crisis.

Taken together, this Note is the first to argue for the overturning of *Rodriguez* as a viable strategy for addressing the poor school conditions that continue to fuel the teacher shortage crisis. As a normative matter, moreover, it contributes to the existing literature by arguing that labor law advocates should adopt the foregoing legal strategy as a way to address the poor school conditions that continue to animate the teacher shortage crisis. Such a contribution is especially timely in light of the COVID-19 pandemic, which has only worsened school conditions.<sup>40</sup>

This Note proceeds in five Parts. Part II provides a brief overview of *Rodriguez*. Part III offers a critique of state and federal reform measures following *Rodriguez*. It then argues that these reforms have largely failed to meaningfully address the poor school conditions animating the teacher shortage crisis. Part IV looks to the doctrine of constitutional stare decisis and examines the viability of a legal challenge to *Rodriguez* under its analysis. Drawing on existing social science literature and key jurisprudential developments five decades after *Rodriguez*, this Part contends that two central premises relied upon by the *Rodriguez* majority have changed so dramatically as to supply the “special justification”<sup>41</sup> necessary to overturn *Rodriguez* as a matter of stare decisis. Part V briefly concludes.

A note on scope. This Note considers labor reform through an education law framework. Although scholars have long considered alternative approaches to addressing the teacher shortage crisis outside of this framework, the normative and empirical merits of these alternatives lie beyond the scope of this Note. Within this Note's framework, moreover, a narrower question is considered: how can establishing a federal constitutional right to education meaningfully address the teacher shortage crisis? One solution, proposed above, is through overturning *Rodriguez* as a matter of stare decisis. In so doing, the Court can exert greater influence over such poor school conditions—conditions that have driven much of the prevailing teacher shortage—by once again reentering the education reform arena as the final guarantor of equal educational opportunity that it is designed to be.<sup>42</sup>

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39. Bowman, *supra* note 35, at 52.

40. See, e.g., Nat'l Governors Ass'n, Letter to Congressional Leaders Regarding Education Funding and Local Control (Jul. 17, 2020), <https://www.nga.org/advocacy-communications/letters-nga/letter-regarding-educational-funding-and-local-control/>; David Harrison, *Recession Forces Spending Cuts on States, Cities Hit by Coronavirus*, WALL ST. J. (July 8, 2020), <https://www.wsj.com/articles/recession-forces-spending-cuts-on-states-cities-hit-by-coronavirus-11594200600>.

41. See *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (“Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification.”).

42. See Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1540 (2007) (“Precisely because state legislatures and executive agencies overseeing school districts have at times failed to ensure the effective use of education funds, and the targeting of resources to the students with greatest needs, courts need to become more, not less, active at the remedy stage of [education] litigation[.]”).

## II. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ

On May 21, 1968, nearly 400 Edgewood Independent School District (EISD) students courageously walked out of their racially-segregated, dilapidated school building in northwest Texas to protest, among other things, the substandard conditions of their educational environment.<sup>43</sup> This student activism soon transformed into a formal legal challenge. Indeed, forty days after the Edgewood High School (EHS) student protest, the Edgewood District Concerned Parents Association (EDCPA), a grassroots coalition of sixteen fellow EISD parents, filed a class-action lawsuit in the United States District Court for the Western District of Texas challenging the constitutionality of Texas's school finance system.<sup>44</sup>

Plaintiffs challenged Texas's school finance regime as presumptively suspect on two grounds.<sup>45</sup> First, the EDCPA claimed that public K-12 education was a fundamental right guaranteed by the Fourteenth Amendment of the Constitution.<sup>46</sup> Second, the EDCPA claimed that wealth-based discrimination in the provision of public education constituted a suspect classification, which would have required the district court to apply the most exacting form of judicial scrutiny to the Texas statute.<sup>47</sup> Plaintiffs' second claim was informed by the stark inter-district funding disparities, which were the result of a Texas law that required the distribution of supplemental state and federal dollars be based on assessed property values.<sup>48</sup> Due to EISD's relatively low property tax base, however, officials were only able to raise about forty percent of the tax revenue raised in the more affluent Alamo Heights School District (AHSD) that bordered EISD.<sup>49</sup> Such disparities persisted despite EISD's high tax effort. In fact, EISD residents were taxed at the highest rate in their county.<sup>50</sup>

The United States District Court for the Western District of Texas invalidated the challenged statute, finding that Texas officials had devised the state's school funding formula in such a way as to draw distinctions on the basis of wealth.<sup>51</sup> In its majority opinion, the district court reasoned that there was not a legitimate state purpose or rational relationship in creating the foregoing distinctions. "More than mere rationality is required . . . to maintain a state classification which affects a 'fundamental interest,' or which is based upon wealth."<sup>52</sup> Without a reasonable basis for such classifications, then, the district court ordered the state

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

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

45. See *id.*

46. See *id.*

47. See *id.*

48. See *id.*

49. See *id.* at 282.

50. See *id.*

51. See *id.* at 285.

52. *Id.* at 282.



of Texas to reformulate its school finance formula in such a way as to avoid “mak[ing] the quality of public education a function of wealth other than the wealth of the state as a whole.”<sup>53</sup> The state of Texas subsequently appealed to the Supreme Court.

The *Rodriguez* Court ultimately reversed the district court ruling.<sup>54</sup> In its narrow 5-4 decision, the Court first considered whether wealth was a suspect classification. To find for plaintiff, the Court needed to determine that the class of persons for whom the state of Texas had allegedly discriminated against met at least one of three criteria. First, the Court had to find that the state had discriminated “against ‘poor’ persons whose incomes [fell] below some identifiable level of poverty or who might be characterized as functionally ‘indigent.’”<sup>55</sup> Second, the Court had to determine that the state had discriminated “against those who are relatively poorer than others.”<sup>56</sup> Third, the *Rodriguez* Court had to conclude that the state had discriminated “against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts.”<sup>57</sup>

The Court subsequently found that the plaintiffs who constituted a class in *Rodriguez* had failed to meet any of these criteria. Indeed, in dismissing the first criterion, Justice Powell explained that the class represented in *Rodriguez* had not suffered “an absolute deprivation of the desired benefit” as classes in prior cases had.<sup>58</sup> In rejecting the second criterion, the Court reasoned that—given the dearth of empirical evidence on the positive correlation between wealth and education spending—they lacked an understanding of whether such disparities were substantive enough to factor into their constitutional analysis.<sup>59</sup> Finally, in jettisoning the third criterion, the Court found the class in *Rodriguez* to be too “large, diverse, and amorphous” to warrant strict scrutiny analysis.<sup>60</sup> Consequently, the *Rodriguez* Court rejected wealth as a suspect classification.

With the Court having rejected plaintiffs’ claim of wealth discrimination as implicating a suspect classification, the Court was now left to consider whether public K-12 education was a fundamental right protected under the U.S. Constitution. Writing for the majority, Justice Powell declared that education was neither implicitly or explicitly provided for in the U.S. Constitution, thereby preventing use of the Court’s most searching form of judicial review of the challenged legislation.<sup>61</sup> The *Rodriguez* Court also declared that, notwithstanding the nexus between education and other constitutional rights, such as speech and voting rights, it never “presumed to possess either the ability or the authority to

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53. *Id.* at 284.

54. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 6 (1973).

55. *Id.* at 19.

56. *Id.*

57. *Id.*

58. *Id.* at 23.

59. *See id.* at 25–27.

60. *Id.* at 28.

61. *See id.* at 33–34.

guarantee the citizenry the most effective speech or the most informed electoral choice.”<sup>62</sup>

This latter premise is important for two reasons. First, while effective speech and informed electoral choice in the maintenance of our democracy are important, Justice Powell considered these goals as best left to states and localities to address rather than the judiciary.<sup>63</sup> Second, the *Rodriguez* majority reasoned that, even if plaintiffs were able to prove that effective speech and informed electoral choice were conditioned on receipt of some baseline level of education, the record before the Court failed to demonstrate whether Texas’s system of public K-12 education had fallen below this threshold.<sup>64</sup> As a consequence, the *Rodriguez* Court concluded that the U.S. Constitution conferred no such right to a public K-12 education.<sup>65</sup>

### III. A CRITIQUE OF STATE AND FEDERAL TRENDS

In the wake of the *Rodriguez* decision, school finance advocates at both the state and federal levels have proposed myriad<sup>66</sup> ambitious theories of reform meant to overturn *Rodriguez*. Such reforms, however, have largely failed to deliver meaningful change. On the one hand, the unique legal and political challenges have undermined state-level theories of reform.<sup>67</sup> On the other hand, the legal reforms pursued at the federal level have proven too ambitious for the modern Court.<sup>68</sup> This subpart considers each level of reform in turn and critiques their effectiveness at addressing the underlying school conditions that have fueled the teacher shortage crisis.

#### A. State-level Trends

Although the *Rodriguez* Court left several important issues unresolved,<sup>69</sup> Justice Powell offered some measure of judicial guidance for future litigants. Writing in dicta, Powell stated that the *Rodriguez* majority’s holding should not

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62. *Id.* at 36.

63. *See id.*

64. *See id.* at 36–37.

65. *See id.* at 33–34.

66. *See* Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 961 (2016) (“Other constitutional collaterals have been proposed—the First Amendment’s Free Speech Clause, the implied right to vote, the Privileges and Immunities Clause, the Citizenship Clause, the Ninth Amendment.”).

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

68. *See* James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1256 (2008) (“Courts should set for themselves a more modest goal: ensuring the *opportunity* for an adequate education by focusing on resources that are relevant to that goal. They need not and should not be any more precise or ambitious than that. Courts should be explicit about their own institutional limitations and the end goal of school funding litigation, which should be to create the *conditions* for adequacy, not adequacy itself.”).

69. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973) (“Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the

be interpreted as “placing [the Court’s] judicial imprimatur on the status quo.”<sup>70</sup> Instead, Powell acknowledged that “innovat[ive] thinking as to public education . . . and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity.”<sup>71</sup> Paradoxically, Powell concludes by stating that “solutions must come from lawmakers . . . .”<sup>72</sup> Justice Marshall, for his part, furthered Powell’s reasoning in a footnote buried within his dissent. Marshall encouraged future litigants to view school funding inequalities as fertile soil for judicial review under state constitutions: “nothing in the Court’s decision . . . should inhibit further review of state educational funding schemes under state constitutional provisions.”<sup>73</sup> Yet, nearly fifty years later, state-level reforms have largely missed the mark.

Indeed, as of this writing, litigants have brought approximately 170 state constitutional challenges to forty-six school finance regimes nationwide.<sup>74</sup> Furthermore, all fifty states have developed wealth equalization schemes in the wake of *Rodriguez* to mitigate the prevailing funding disparities between underserved and affluent school districts.<sup>75</sup> Despite these advancements, however, courts in at least eight states—Alabama, Florida, Illinois, Louisiana, Nebraska, Oklahoma, Pennsylvania, and Rhode Island—have abstained from reviewing the merits of school finance disputes on separation of powers grounds.<sup>76</sup> Worse still, litigants in nearly half the states have never won a school finance challenge in state court.<sup>77</sup> As a result, students in these states are left to rely on the same recalcitrant legislatures that failed to remedy such poor and unequal school conditions in the first instance.

Federal courts, by contrast, “do not face a separation of powers concern between themselves and state legislatures.”<sup>78</sup> Moreover, the federal judiciary is largely immune from “the same reelection and political repercussions as state

meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.”)

70. *Id.* at 54–56 (majority opinion), 70 (White, J., dissenting).

71. *Id.* at 58.

72. *Id.* at 59.

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

74. See *The State Role in Education Finance*, NAT’L CONFERENCE OF STATE LEGISLATORS (NCSL), <https://www.ncsl.org/research/education/state-role-in-education-finance.aspx> (last visited Apr. 7, 2022).

75. *Id.*

76. See, e.g., *Nebraska Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 183 (Neb. 2007); *Oklahoma Educ. Ass’n v. State*, 158 P.3d 1058, 1065–66 (Okla. 2007); *Ex parte James*, 836 So. 2d 813 (Ala. 2002); *Marrero v. Commonwealth*, 739 A.2d 110, 113–14 (Pa. 1999); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1193, 1195 (Ill. 1996); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 55–56 (R.I. 1995); *La. Ass’n of Educators v. Edwards*, 521 So. 2d 390, 394 (La. 1988).

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

78. See Black, *supra* note 27, at 1394.

courts.”<sup>79</sup> Even when state courts have proven capable of vindicating a child’s state right to education—as exemplified by the *Abbott v. Burke* case, New Jersey’s two-decade-long school finance litigation<sup>80</sup>—state courts and state legislatures lack the evaluative and enforcement capacities necessary to reliably vindicate this right absent federal intervention.<sup>81</sup> These limitations have led education reformers back to the federal judiciary to challenge and reverse *Rodriguez*.<sup>82</sup> One such challenge, considered in more detail within the following subpart, was recently brought before the Court of Appeals for the Sixth Circuit as a matter of first impression.

### B. *The Curious Case of Gary B*

On September 13, 2016, seven former Detroit high school students filed a class-action lawsuit alleging, among other things, that the abhorrent conditions of their school environment deprived them of a foundational tenet of education: basic literacy.<sup>83</sup> From rat-infested classrooms and inoperable heating, ventilation, and air conditioning (HVAC) units, to outdated textbooks and inadequate supplies<sup>84</sup>—these conditions created a learning environment “in name only . . . [where students] lacked the most basic educational opportunities that children elsewhere . . . take for granted.”<sup>85</sup> The plaintiffs, as part of their 133-page complaint,<sup>86</sup> further described the conditions of their school environment in sobering detail. One of the more troubling conditions outlined in their complaint was the virtual absence of a full-time, certified teacher workforce.<sup>87</sup>

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79. *Id.*

80. *See* *Abbott v. Burke*, 960 A.2d 360, 362 (N.J. 2008) (per curiam).

81. *See* Black, *supra* note 27, at 1351.

82. *See* Ryan, *supra* note 68, at 1229.

83. *See* Class Action Compl. at 23–25, *Gary B. v. Snyder*, 313 F. Supp. 3d 852, 856 (E.D. Mich. 2018) (16-CV-13292).

84. *See id.* at 8, 54, 78–86 (describing the school conditions including both the physical environment and the educational supplies).

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

86. *See* Class Action Compl., *supra* note 83.

87. *Id.* at 75–76 (“At Hamilton, many students entered the fourth grade in the 2015-16 school year with a kindergarten-level vocabulary, yet staff were not trained to deliver literacy intervention or remediation, and no additional classroom support was provided. As a result, the teacher had to choose between leading the entire, class in an exercise that disregarded the extreme range of skillsets, and working with each student one-on-one while the other thirty-nine students worked on their own. . . . At Cody MCH, many of the students struggle when called upon to read aloud, with some stumbling over even monosyllabic words. Yet the few instructors originally designated as reading interventionists, already insufficient in number, must cover teacher vacancies in other classrooms, and there is no meaningful training in literacy intervention available, even when requested by teachers.”), 95–96 (“[I]n Plaintiffs’ schools, teachers and staff are not trained to recognize or respond to childhood trauma, and counseling is not available to support children with mental health needs. For example, after a Hamilton student was kidnapped and murdered, his classmates were not provided any opportunity to grieve. No additional counselors were, brought in, and the teachers were not offered any support or training on how to speak with the students about the tragedy.”), 99 (“In the 2015-16 school year, there were approximately 170 teacher vacancies in the nearly 100 schools that made up the DPS school system. In the 2016-2017 school year, there were up to 200 vacancies just before the start of the school year. Filling

Indeed, plaintiffs claimed they “lack[ed] the qualified teaching staff required to bring students to literacy—that is, teachers who are certificated, properly trained, and assigned to a class within the area of their qualifications and expertise.”<sup>88</sup> Nearly two years later, on June 29, 2018, the United States District Court for the Eastern District of Michigan dismissed plaintiffs’ claim, holding that plaintiff students were not guaranteed a right of access to literacy under the United States Constitution.<sup>89</sup> In dismissing the case, Judge Stephen Murphy reasoned that although “the conditions and outcomes of Plaintiffs’ schools . . . are nothing short of devastating,” the Due Process Clause of the Fourteenth Amendment “does not require a state to provide access to minimally adequate education.”<sup>90</sup>

On April 23, 2020, however, a three-judge panel of the Court of Appeals for the Sixth Circuit both affirmed and reversed in part.<sup>91</sup> Critically, by reversing the district court’s reasoning on student plaintiffs’ due process claim, the Sixth Circuit recognized a fundamental right of access to literacy for the first time.<sup>92</sup> Accordingly, the court reasoned that the state of Michigan had “deprived [plaintiffs] of an education that could provide access to literacy,”<sup>93</sup> which it described as a “limited right.”<sup>94</sup> This victory, though an important step towards federalizing the right to education, was short-lived.

The Sixth Circuit subsequently reheard the case *en banc*, an uncommon judicial procedure intended only for “the rarest of circumstances.”<sup>95</sup> Following the rehearing, an order to vacate the panel’s ruling was signed by the full Sixth Circuit.<sup>96</sup> By vacating the ruling, the court reversed the panel decision on the merits, thereby eliminating any future effort to employ the panel decision as federal precedent. The federal right of access to basic literacy was no more. Yet, the pursuit of a federal constitutional right to education has continued apace.<sup>97</sup>

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these vacancies with new teachers who possess the necessary background to achieve success in teaching literacy proves difficult or impossible. Instead, these classes are covered by non-certificated paraprofessionals, substitutes, or misassigned teachers who lack any expertise or knowledge in the course content.”).

88. *Id.* at 12.

89. Gary B. v. Snyder, 313 F. Supp. 3d 852, 856–57 (E.D. Mich. 2018).

90. *Id.* at 875.

91. See Gary B. v. Whitmer, 957 F.3d 616, 621 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem).

92. See *id.*; see also *id.* at 643–44 (noting that such substantive due process protections are “deeply rooted in this Nation’s history and traditions”) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

93. *Id.* at 661.

94. *Id.* at 660.

95. *Mitts v. Bagley*, 626 F.3d 366, 370 (Sutton, J., concurring) (internal citation omitted).

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

97. See *generally* Class Action Compl., *A.C. v. Raimondo*, No. 1:18-cv-00645 (D. R.I. Nov. 28, 2018) (arguing that poor public school conditions, sanctioned by the state of Rhode Island, led to the deprivation of students’ constitutional right to an adequate, civic-based education).

### C. School Poverty and Teacher Shortages

The teacher shortage crisis is not evenly experienced in schoolhouses across the United States. Indeed, “[s]chools serving large percentages of low-income and minority students are wildly unequal in their ability to attract, compensate, and retain quality teachers.”<sup>98</sup> This is a problem both practically and doctrinally. First, as practical matter, “even small shortages have proved problematic because their effects are often concentrated in particular districts.”<sup>99</sup> Second, as a doctrinal matter, the foregoing harms are further compounded by the unequal distribution of a state’s existing teacher workforce. In fact, “even clearer is the social science consensus that teacher quality is the most significant variable in student achievement. Thus, as class size goes up while teacher quality goes down, states threaten to exacerbate an already wide achievement gap, particularly in poorer schools.”<sup>100</sup>

This unequal distribution of quality teachers, which informs the broad teacher shortage crisis, is not beyond a state’s control. To the contrary, at least twelve state constitutions possess a distributional provision expressly prohibiting the unequal distribution of educational resources within their borders.<sup>101</sup> As Derek Black has observed, “[t]hese state constitutions mandate an “efficient” education. Courts have found that this efficiency mandate carries the normal dictionary meaning: “[P]erforming or functioning in the best possible manner with the least waste of time and effort’ and ‘satisfactory and economical to use.’”<sup>102</sup> Yet, at the time of this writing, only “nineteen states have a progressive distribution of teachers, [which equates to] at least 5% more teachers per student in high poverty districts.”<sup>103</sup> Conversely, nearly a dozen other states maintain a regressive distribution of teachers such that students experiencing poverty are assigned fewer high-quality teachers, on average, than students attending schools located in more affluent districts.<sup>104</sup> Recent research illustrates this alarming and growing trend:

The staffing fairness measure ranges from a progressive 154% in North Dakota to a regressive 75% in Florida. In other words, high poverty districts in North Dakota have, on average, 40% more teachers per 100 students than low poverty districts, potentially resulting in smaller class

98. Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 1309, 1351 (2017).

99. Black, *supra* note 8, at 1660.

100. Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Winding Commitment to Public Education*, 94 WASH. U. L. REV. 423, 426 (2016).

101. See, e.g., ARK. CONST. art. XIV, §1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; ILL. CONST. art. X, § 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; N.J. CONST. art. VIII, § 4, ¶ 1; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; TEX. CONST. art. VII, § 1; W. VA. CONST. art. XII, § 1.

102. Black, *supra* note 8, at 1661.

103. BRUCE D. BAKER ET AL., IS SCHOOL FUNDING FAIR: A NATIONAL REPORT CARD 24 (2018).

104. See *id.*



sizes, while in Florida, the poorest districts have about 25% fewer teachers per 100 students than low poverty districts. Predicted staff to student ratios, at 20% poverty, range from a high of 9.2 teachers per 100 students in North Dakota to a low of 4.4 in California.<sup>105</sup>

The foregoing national trends feature prominently in California, where nearly sixty percent of Latino students attend an “intensely-segregated” public school.<sup>106</sup> In the wake of the Great Recession, moreover, “[t]he teaching demand in California [was] 40% higher than the supply of individuals seeking teaching credentials this year. Current projections indicate the shortage will get worse before it gets better.”<sup>107</sup> Although California does not possess an express distributional principle within its constitution, the unequal distribution of high-quality teachers between low-income and affluent school districts violates enduring school finance precedent within the state.<sup>108</sup> Yet, across California, “students attending predominantly poor and minority schools are assigned to novice, unqualified, and “out-of-field” teachers at twice the rate of students in low poverty schools and predominantly white schools.”<sup>109</sup>

Given the above limitations, establishing a federal right to education is integral to remedying such poor and unequal school conditions, particularly within low-income, racially-segregated districts. For labor reformers, moreover, establishing such a right is critical to meaningfully addressing the teacher shortage crisis. Accordingly, the next part builds upon the education reform movement’s recent progress in *Gary B.* with a novel claim that labor reformers should adopt to achieve such meaningful change.

#### IV. THE POWER OF CHANGING CIRCUMSTANCES: SECURING THE FEDERAL RIGHT TO EDUCATION THROUGH STARE DECISIS

The doctrine of stare decisis counsels against overturning constitutional precedent simply because a majority of the Court disagrees with its holding.<sup>110</sup> Instead, a “special justification” is required.<sup>111</sup> When considering whether to overturn its own precedent, then, the Court has traditionally followed several

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105. *Id.*

106. See GARY ORFIELD ET AL., HARMING OUR COMMON FUTURE: AMERICA’S SEGREGATED SCHOOLS 65 YEARS AFTER BROWN 5 (2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown>.

107. Black, *supra* note 100, at 425.

108. See *Serrano v. Priest*, 5 Cal. 3d 584, 589 (1971) (“[T]he right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth.”).

109. Black, *supra* note 100, at 442.

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

111. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992) (plurality opinion) (“[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”).

“prudential and pragmatic” factors.<sup>112</sup> The purpose of these factors is to “foster the rule of law while balancing the costs and benefits of society by reaffirming or overruling a prior holding.”<sup>113</sup> Consider, for example, the “changing circumstances” factor.<sup>114</sup> Some of the most well-known constitutional precedents in Supreme Court history have been overturned using this “Changing Factors” analysis. For instance, in *Brown v. Board of Education*, the Supreme Court overturned the infamous *Plessy v. Ferguson* ruling given the *Brown* Court’s evolved understanding of the stigmatic and psychological harms wrought by racially-segregated facilities:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [inhibit] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school.<sup>115</sup>

More recently, in *Ramos v. Louisiana*, the Court overturned *Apodaca v. Oregon*<sup>116</sup>—a 1972 decision that permitted criminal convictions based on non-unanimous jury verdicts—by employing this Changing Factors analysis.<sup>117</sup> Put another way, by reversing *Apodaca*, the *Ramos* Court reasoned that the Court had failed to consider the “racist origins” of non-unanimous jury laws at the time *Apodaca* was decided.<sup>118</sup> Accordingly, then, this Part will demonstrate that the factual and legal understandings of what constitutes receipt of an equal educational opportunity have drastically changed in the half-century since *Rodriguez* was decided. Specifically, among the principal reasons explicated by the *Rodriguez* majority for upholding the challenged Texas law, at least two have changed so drastically as to justify, if not require, the Supreme Court to reverse *Rodriguez* as a matter of the Changing Factors principle of stare decisis. First, the *Rodriguez* Court reasoned that, if it had found for plaintiffs, then it would have been required to create

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112. LEGISLATIVE ATTORNEY, CONG. RSCH. SERV., THE SUPREME COURT’S OVERRULING OF CONSTITUTIONAL PRECEDENT 12 (2018), [https://www.everycrsreport.com/reports/R45319.html#\\_Toc525567243](https://www.everycrsreport.com/reports/R45319.html#_Toc525567243).

113. *See id.*

114. *Casey*, 505 U.S. at 855 (1992) (outlining the procedure of overturning precedent on whether “facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification”).

115. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

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

117. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1405–06, 1420 (2020).

118. *Id.* at 405; *see generally* Thomas Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1611–20 (2019) (noting the racist motivations for establishing nonunanimous juries).

substantive quality standards for a state benefit that it considered mere economic in nature. Second, the *Rodriguez* Court held that wealth-based disparities within and between school districts did not, by themselves, warrant the invalidation of Texas's system of school finance.<sup>119</sup> Both claims, however, no longer hold up to scrutiny, and are each considered in turn.

*A. Distinguishing Substantive Education Rights from State Economic Benefits*

The first substantial change since *Rodriguez* has been the development of state-level, substantive protections of public education. At the time *Rodriguez* was decided, only one state supreme court decision accorded any substantive, qualitative meaning to public education.<sup>120</sup> The sole educational obligation imposed onto states, moreover, was the provision of public education in accordance with its compulsory education laws. Put differently, each state legislature was required only to provide equal access to a free system of public schools. The states were not, by contrast, required to provide any measure of substantive educational quality. Furthermore, the *Rodriguez* Court possessed “no basis on which to interpret equal and quality education in state constitutions as being anything other than an aspirational goal and unenforceable right when the states themselves had gone no further.”<sup>121</sup> As a consequence, the *Rodriguez* majority viewed public K-12 education as little more than a social and economic benefit that imposed no substantive obligations onto the states.<sup>122</sup> Despite the *Rodriguez* Court's narrow construction of public education's social value, it is instructive to identify and examine the Court's logical reasoning for its holding against our society's broader conception of public education today.

Absent a basis upon which to interpret and define what it meant to provide a quality education, moreover, the *Rodriguez* Court effectively reduced public education to the functional equivalent of food stamps or housing vouchers.<sup>123</sup> In so

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119. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51, 54–55 (1973) (“[T]he existence of ‘some inequality’ in the manner in which the State’s rationale is achieved is not alone a sufficient basis for striking down the entire system.”).

120. See *Serrano v. Priest*, 5 Cal. 3d 584, 604 (Cal. 1971) (“We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child’s education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing.”).

121. Black, *supra* note 27, at 1396.

122. See *Rodriguez*, 411 U.S. at 29–30. See also Black, *supra* note 27, at 1396 (noting that at the time *Rodriguez* was decided, the Court possessed “no basis on which to interpret equal and quality education in state constitutions as being anything other than an aspirational goal and unenforceable right [within] the states”). Cf. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“Public education is not a ‘right’ granted to individuals by the Constitution . . . [b]ut neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.”).

123. *Rodriguez*, 411 U.S. at 36 (describing public education as little more than “social and economic legislation” that was functionally indistinguishable from “other services and benefits provided by [a] State”).

doing, public education, in the Court's view, could be provided, or withheld, at the State's discretion. Public education today, by contrast, cannot be reduced to the social and economic state benefit that the *Rodriguez* Court considered it to be. Instead, public education is now a substantive constitutional right within each state constitution.<sup>124</sup> Indeed, it can be fairly surmised that, over the course of nearly fifty years since the *Rodriguez* decision, all fifty states have rejected the foregoing reasoning by developing substantive constitutional protections of public education. Perhaps more importantly, though, this veritable explosion of state protection of public education has been continually defined and regulated by state courts following *Rodriguez*.

Accordingly, the development of such substantive rights following *Rodriguez* affords the federal judiciary something it did not have in 1973: a comparative threshold of educational quality with which to reference. Put another way, the development of the constitutional right to education at the state level would not require the Roberts Court to create or define a substantive standard of educational quality. Instead, the Court would be required only to act as the court of last resort, assessing and enforcing the abrogation of the states' constitutional obligation to provide a substantively equal educational opportunity to children within a given state. By leveraging the development of substantive quality standards established by the states in the decades after *Rodriguez*, then, future litigants have a compelling argument to challenge *Rodriguez* as a matter of stare decisis' Changing Factors principle without running afoul of federalism strictures.

### *B. School Finance, School Conditions, and the Teacher Shortage Crisis*

The second substantial change involves society's evolved understanding of school finance as a key driver of educational opportunity. At the time of the *Rodriguez* decision, the Court rejected the claim that wealth-based disparities between high- and low-income school districts constituted a violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>125</sup> The notion that "the quality of education may be determined by the amount of money expended for it"<sup>126</sup> was hardly clear to the Court in 1973: "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal

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124. See, e.g., FLA. CONST. art. IX, § 1 (noting that the state legislature must provide all students with a "high quality system of free public schools that allows students to obtain a high-quality education"); KY. CONST. § 183 (requiring the state legislature to "provide for an efficient system of common schools throughout the state"); N.C. CONST. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."); R.I. CONST. art. XII, § 1 ("The diffusion of knowledge . . . being essential to the preservation of [the people's] rights and liberties, it shall be the duty of the general assembly to promote public schools . . . and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education.").

125. See *Rodriguez*, 411 U.S. at 18.

126. *Id.* at 23–24.

advantages.”<sup>127</sup> This reasoning was coupled with perhaps the Court's most influential dicta among its education precedents.

Justice Powell suggested that “even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [speech or voting rights], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.”<sup>128</sup> To succeed on Equal Protection grounds, then, plaintiffs were required to demonstrate both that such wealth-based disparities existed and prove that these funding disparities led to such poor school conditions. Such a requirement was virtually impossible, of course, given the lack empirical evidence at the time that could demonstrate a strong relationship between quality school conditions and adequate state funding. In fact, the *Rodriguez* Court, as a result of this dearth of evidence, could only take the state of Texas at its word when it claimed that it had provided all of its students with adequate school conditions.<sup>129</sup> Consequently, plaintiffs were unable to rebut Texas's claims, leaving the Court without the evidence that, on its view, was necessary to determine whether such vast, wealth-based funding disparities led to substantively unequal school conditions that were constitutionally improper.

Today, however, the Supreme Court has access to a substantial body of empirical evidence that demonstrates the strong relationship between adequate school funding and substantively equal school conditions. In fact, recent research suggests that substantively equal school funding maintains a strong, positive relationship with important school conditions, including “smaller class sizes, additional supports, [and] early childhood programs.”<sup>130</sup> In addition, substantively equal school funding allows school districts to further address the teacher shortage crisis by offering “more competitive teacher compensation (permitting schools and districts to recruit and retain a high-quality teacher workforce).”<sup>131</sup> It is worth pausing to consider the empirical significance of substantively equal school funding.

As an empirical matter, such funding creates adequate school conditions that not only influence the teacher shortage crisis, but also affects student outcomes. Indeed, states with the most equitable school finance measures—that is to say, reforms that allocate funding according to student need rather than factors unrelated to such need<sup>132</sup>—managed to reduce the achievement gap between low-

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127. *Id.*

128. *Id.* at 36–37.

129. *See id.* at 24.

130. BRUCE D. BAKER, DOES MONEY MATTER IN EDUCATION? SHANKER INSTITUTE i. (2d. ed. 2016), <https://www.shankerinstitute.org/resource/does-money-matter-second-edition>.

131. *Id.*

132. *See, e.g.*, Derek W. Black, *Leveraging Federal Funding for Equity and Integration*, in *THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY* 227, 233–38 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015) (noting funding factors unrelated to concentrated student poverty); DANIELLE FARRIE & DAVID SCIARRA, *MAKING THE GRADE*

income and affluent school districts by twenty-five percent.<sup>133</sup> This, too, affects the teacher shortage crisis, as substantively equal education funding provides greater supports for students to excel while in school. Absent such funding and its corresponding supports, however, students often struggle, thereby creating more challenging school conditions. These conditions are subsequently forecasted to prospective teachers and also lead to significant attrition among current teachers.<sup>134</sup> Taken together, substantively equal school funding significantly influences student learning conditions, which impacts teacher working conditions.

Finally, in response to the novel coronavirus, federal officials recently passed three pieces of recovery aid legislation.<sup>135</sup> As the most substantial federal stimulus programs in U.S. history,<sup>136</sup> these stimulus packages have been a critical bulwark against the worst effects of the pandemic, especially for families experiencing poverty. In fact, recent research projects that American Rescue Plan (ARP) stimulus aid will significantly reduce the national poverty rate.<sup>137</sup> For children, moreover, the combined benefits of ARP stimulus aid were the most pronounced, reducing childhood poverty nationwide by more than eighty percent.<sup>138</sup>

In the public K-12 education context, ARP stimulus underscores our evolved, national understanding of the strong, positive relationship between substantively equal school funding and school conditions. Indeed, states and localities received more than \$120 billion dollars in total ARP stimulus aid, the largest one-time allotment of federal education aid in U.S. history.<sup>139</sup> This vast expansion of the federal role in education, therefore, provides additional support for the premise argued above: that the *Rodriguez* majority's skepticism of the foregoing relationship is now anachronistic and should thus be revisited.

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2020: HOW FAIR IS SCHOOL FUNDING IN YOUR STATE 8 (2020) (finding that only sixteen states provide fair school funding by contributing additional state funding to high-poverty school districts).

133. See Julien Lafortune et al., *Can School Finance Reforms Improve Student Achievement?*, WASHINGTON CTR. FOR EQUITABLE GROWTH (2016), <http://equitablegrowth.org/research-analysis/can-school-finance-reforms-improve-student-achievement/>; see also Bruce Baker, *How Money Matters for Schools*, LEARNING POL'Y INST. (2017), <https://learningpolicyinstitute.org/product/how-money-matters-report>.

134. See Christopher Redding, *Teacher Turnover is a Problem – here's how to fix it*, THE CONVERSATION (Sept. 7, 2018, 6:43 AM), <https://theconversation.com/teacher-turnover-is-a-problem-heres-how-to-fix-it-101584>.

135. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021); Coronavirus Aid Relief and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

136. See Carl Hulse & Emily Cochrane, *As Coronavirus Spread, Largest Stimulus in History United a Polarized Senate*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/us/coronavirus-senate-stimulus-package.html>.

137. See Laura Wheaton et al., *2021 Poverty Projections: Assessing the Impact of Benefits and Stimulus Measures*, URB. INST. (July 28, 2021), <https://www.urban.org/research/publication/2021-poverty-projections-assessing-impact-benefits-and-stimulus-measures>.

138. See *id.*

139. 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>.



At the same time, the legislative priorities outlined in all three aid packages suffer from the same challenges that felled prior federal legislative reforms.<sup>140</sup> Indeed, as states search for effective budget measures to avoid an impending fiscal cliff,<sup>141</sup> researchers predict that such legislative reforms will ultimately prove insufficient to meet the mounting financial challenges facing the states.<sup>142</sup> In fact, since March of 2020, several states have made significant cuts to their education budgets—cuts that closely track those made in the wake of the Great Recession.<sup>143</sup> As a consequence, schools nationwide saw a 6.9 percent employment reduction of school professionals, including teachers,<sup>144</sup> between September 2019 and September 2020.<sup>145</sup> Perhaps more importantly, however, the pandemic-related harms have exacerbated poor school conditions, particularly within our most underserved schools and districts.<sup>146</sup> Since teacher conditions are student working conditions,<sup>147</sup> as this Note contends, a more capacious federal judicial role in education is needed. By achieving as much, labor reformers will ultimately succeed in their effort to meaningfully address a teacher shortage crisis that seems to only worsen by the day.

While some commentators have argued that the composition of the current Supreme Court counsels against reversing *Rodriguez*,<sup>148</sup> these concerns, though

140. See Griffith, *supra* note 23.

141. Matt Barnum, *Across U.S., Schools' Worst Budget Fears Have Been Avoided. No One's Celebrating Yet.*, CHALKBEAT (Dec. 4, 2020, 12:47 PM), <https://www.chalkbeat.org/2020/12/4/22153539/schools-budget-covid-congress>.

142. See Andrew Ujifusa, *K-12 Schools Get \$57 Billion in COVID-19 Deal; No Relief for State and Local Governments*, EDUC. WK. (Dec. 21, 2020), <https://www.edweek.org/policy-politics/k-12-schools-get-57-billion-in-covid-19-deal-but-no-state-and-local-government-relief/2020/12>.

143. See Moriah Balingit, *Schools Get a \$54 Billion Lifeline In Stimulus Package – But The Money Won't Last for Long*, WASH. POST (Dec. 28, 2020), [https://www.washingtonpost.com/education/schools-get-a-54billion-lifeline-in-stimulus-package-but-the-money-wont-last-for-long/2020/12/28/dfd22f62-4956-11eb-839a-cf4ba7b7c48c\\_story.html](https://www.washingtonpost.com/education/schools-get-a-54billion-lifeline-in-stimulus-package-but-the-money-wont-last-for-long/2020/12/28/dfd22f62-4956-11eb-839a-cf4ba7b7c48c_story.html); see also Michael Griffith & William Berry, *COVID-19 and State Education Budgets: The Story Behind the Numbers*, LEARNING POL'Y INST. (Sept. 24, 2020), <https://learningpolicyinstitute.org/blog/covid-state-education-budgets-story-behind-numbers>.

144. See Balingit, *supra* note 143.

145. See Barb Rosewicz & Mike Maciag, *Nearly All States Suffer Declines in Education Jobs*, PEW CHARITABLE TRUSTS (Nov. 10, 2020), <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/11/10/nearly-all-states-suffer-declines-in-education-jobs>.

146. See Sarah Reber & Nora Gordon, *How Congress Can Equitably Allocate COVID-19 Education Aid to States*, BROWN CTR. CHALKBOARD (June 15, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/06/15/how-congress-can-equitably-allocate-covid-19-education-aid-to-states/>; see generally Crystal Grant, *COVID-19's Impact on Students with Disabilities in Under-Resourced School Districts*, 48 FORDHAM URB. L.J. 127 (2020).

147. See Barnett Berry, Kevin C. Bastian, Linda Darling-Hammond & Tara Kini, *The Importance of Teaching and Learning Conditions: Influences on Teacher Retention and School Performance in North Carolina*, LEARNING POL'Y INST. (Jan. 4, 2021), <https://learningpolicyinstitute.org/product/leandro-teaching-and-learning-conditions-brief>.

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

valid, would have little effect on the central thesis that this Note advances. As mentioned in the introduction, using *stare decisis* to reverse *Rodriguez* would not position the Court to define the substance of this federal right to education, a prospect that worried the *Rodriguez* Court. Instead, since the substance of the right to education is already well-defined in all fifty states, the current Court would serve as the court last resort, interceding only when reforms at the state level have failed to address rising education inequality within and between states. Given the Court's recent appetite for overturning its own precedents, moreover, this Note's central thesis becomes more compelling.<sup>149</sup>

#### V. CONCLUSION

Teacher working conditions are inextricably tied to broader school conditions. To meaningfully address these conditions, then, labor reformers should adopt the Changing Factors principle of *stare decisis* to overturn *Rodriguez* and establish a federal constitutional right to education. In so doing, our nation's educational system will not only provide children with more substantively equal school conditions, but also meaningfully address the teacher shortage crisis as a consequence. And, given the widening educational disparities in opportunity and achievement that existed prior to the advent of the COVID-19 pandemic, providing a more substantively equal educational opportunity within our national system of public K-12 education would come none too soon.

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149. See Tejas N. Narechania, *Certiorari in Important Cases* (Aug. 9, 2021), COLUM. L. REV. (forthcoming 2022) (manuscript at 10), <http://dx.doi.org/10.2139/ssrn.3931162> (describing the Roberts Court's recent appetite for granting review in such cases "seems to favor granting review in cases that invite the Court to overturn precedent").