WHAT HAPPENS TO A DREAM DEFERRED?[1]: CLEANSING THE TAINT OF *SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ*

IAN MILLHISER

INTRODUCTION

Half a century ago, the Supreme Court recognized the crucial role of public education in opening the doors of opportunity to all Americans.[2] In its famous decision declaring school segregation unconstitutional, the Court proclaimed that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education,"[3] and yet that same Court, repopulated by the fruits of President Richard Nixon's "Southern Strategy,"[4] turned its back on education just nineteen years later.[5]

---

1. Langston Hughes, *Harlem (Montage of a Dream Deferred)*, *in* THE COLLECTED POEMS OF LANGSTON HUGHES 426 (Arnold Rampersad & David Roessel eds., Alfred A. Knopf 1994) (1951).

2. *See* Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 493 (1954) ("[E]ducation is . . . . a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.").

3. *Id.*

4. The "Southern Strategy" refers to a Republican campaign strategy to appeal to conservative white voters through a thinly veiled message of anti-black racism. Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 2000 (2000).

For an insider's view of President Nixon's battle to stack the Court with opponents of civil rights, see generally JOHN W. DEAN, THE REHNQUIST CHOICE (2001). One of then-Assistant Attorney General William Rehnquist's first assignments at the Department of Justice was to provide legal advice to the White House's successful campaign to intimidate liberal Justice Abe Fortas into retirement. *Id.* at 4–12. In replacing Fortas and other departing Justices, Nixon actively sought "strict constructionist" judges, described by Rehnquist as those who "will generally not be favorably inclined toward claims of either criminal defendants or civil rights plaintiffs." *Id.* at 16.

5. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (refusing to recognize a fundamental right to education). All four of President Nixon's appointees, Chief Justice

In *San Antonio Independent School District v. Rodriguez*,[6] the Court upheld a public education funding system in Texas that provided fewer funds per student in poorer school districts than in wealthier ones.[7] In reaching this decision, the Court announced a two-part holding: first, that poverty is not a suspect class entitled to strict scrutiny in discrimination cases,[8] and second, that education is not a fundamental right for the purposes of the Equal Protection Clause.[9] *Rodriguez* is significant for its devastating impact on low income children, but it is equally significant because of the philosophical shift it marked in the Court's jurisprudence.

The *Rodriguez* decision foreshadowed a turning point in American law. Prior to this decision, the Warren-era Justices were willing to cure social injustices poorly addressed by the political branches through broad equitable relief. With four Nixon-appointed Justices, however, the Court not only began to defer to the legislature but also began to view its role as increasingly limited, even when it conceded that a constitutional violation had occurred. As this Note will discuss, this trend was exacerbated as Justices appointed by Presidents Ronald Reagan and George H.W. Bush came to dominate the Court.

This Note has two purposes. First, it offers a progressive constitutional framework that includes a fundamental, affirmative right to an adequate education. Second—and just as significantly—it explains why the conservative doctrine of "judicial restraint" leaves undereducated Americans without recourse to *any* branch of government. This Note will argue that judicial deference to state legislatures is inappropriate when such deference necessarily results in continued constitutional violations.

Part I argues that the legislative branch is structurally unfit to provide educational civil rights and asserts that an affirmative right to an adequate education can only come from the courts. Part II considers the judiciary's ability to provide a meaningful remedy in educational civil rights cases. Part II concludes that the 'Far Right's

---

Burger and Justices Powell, Rehnquist, and Blackmun, voted to deny relief in *Rodriguez*. Of the pre-Nixon members of the Court, only Justice Stewart joined the majority.

6. 411 U.S. 1 (1973).

7. *Id*. at 58–59.

8. *Id*. at 29.

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

cries for "judicial self-restraint"[10] should be ignored when such restraint allows continuing constitutional violations to occur. Part III constructs a progressive method of constitutional interpretation that allows the courts to meet a changing society with appropriately expanded rights, while at the same time providing a limiting principle to prevent judges from injecting their personal opinions into the law. Under this method, an affirmative constitutional duty is imposed on the states whenever that duty is necessary to preserve a preexisting constitutional right. Part IV examines the constitutional right to vote and argues that a baseline education is necessary to uphold this preexisting right. Finally, Part V proposes seeking guidance from state curricula and assessments in defining the scope of a fundamental right to an adequate education.

I. THE NEED FOR A JUDICIAL REMEDY

The central insight of *Rodriguez* is that "the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues."[11] Such a presumption of judicial incompetence is not to be abandoned lightly, lest the Court relive the shameful history of *Lochner v. New York*.[12] But *Lochner*'s folly was not "judicial activism," as so many conservative revisionists assert.[13] *Lochner*'s folly, in the words of the decision that ended its reign, was allowing the "exploitation of a class . . . who are in an unequal position with respect to bargaining power and are thus relatively defenseless . . . ."[14] Under *Lochner*, the weakest Americans were left without a single branch of government from which to seek redress. The judiciary was quite clearly their enemy, and the

10. John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1221 (1993).

11. 411 U.S. at 41.

12. 198 U.S. 45 (1905). *Lochner* held that labor protections such as maximum hour laws were subject to the highest level of constitutional scrutiny. *Id.* at 56. This opinion is now almost universally viewed as "unprincipled judicial overreaching" into an area beyond the judiciary's competence. Neal Devins, *The Interactive Constitution: An Essay on Clothing Emperors and Searching for Constitutional Truth*, 85 GEO. L.J. 691, 693 (1997).

13. *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874–76 (1978) (criticizing *Lochner* not for "activism" but instead for forbidding the legislature to alter the "existing distribution of wealth and entitlements").

14. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937); *see also* Sunstein, *supra* note 13, at 876 (quoting same).

majoritarian branches were forbidden from acting by that very enemy.

No system of government is legitimate that leaves a class of citizens unable "to petition the Government for a redress of grievances."[15] This right to seek such redress is among the protected privileges and immunities long recognized by the Supreme Court,[16] and yet by reserving to the legislature what properly belongs to the judiciary, the Court since *Rodriguez* has denied underprivileged Americans their most basic right to seek redress. If the right to seek redress is truly a fundamental constitutional right, then every American must be able to seek relief in *some* branch of government. Accordingly, if legislatures are structurally incapable of providing meaningful relief, then another branch must possess the power to act. This is not to say, of course, that the judiciary *must* grant relief in areas in which the legislature cannot act, merely that it is improper for the judiciary to plead institutional incompetence in an area in which the elected braches are even less competent.

As this Part argues, legislatures are structurally incapable of providing an adequate education to the millions of Americans kept in ignorance by underfunded school districts. Section A explains why local legislatures are ill-suited to provide relief to the poor and undereducated. Section B then explores the proper role of the courts in the face of a reluctant state legislature.

It is also important to note what this Part will not discuss. Although this Note does argue that a fundamental right to an adequate education is implicit in the Due Process Clause, that discussion will be deferred until Parts III and IV. This first Part is concerned with a far narrower point: deference to the legislature, in and of itself, is insufficient reason to deny a constitutional right. As an alternative theory, this Part will propose that judicial deference should be the rule when the political process can effectively provide relief to aggrieved citizens, but that when the legislature is structurally unable to provide such relief, deference for its own sake is inappropriate.

---

15. U.S. CONST. amend. I.

16. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872) (listing, as among the "Privileges and Immunities" of citizenship, the rights "'to come to the seat of government to assert any claim . . . upon that government, to transact any business . . . with it, [and] to seek its protection'") (quoting Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1867)).

A. Local Funding and the Wrongness of Rodriguez

The Fourteenth Amendment plays a special role in ensuring the integrity of the political process. The Equal Protection Clause has long been understood to protect "discrete and insular minorities" against the vagaries of the political process.[17] Similarly, both the Equal Protection and Due Process Clauses have long been interpreted to forbid laws passed "without reference to [some independent] considerations in the public interest."[18] The mere fact that a law is blessed by the majoritarian process is never sufficient to render that law constitutional.[19]

Conservatives have long claimed that a broad interpretation of the Fourteenth Amendment is a judicial subversion of the democratic process.[20] But even the (conservative) *Rodriguez* Court conceded that the judiciary has a special role in protecting those "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[21] The Fourteenth Amendment is intended not to subvert, but to bolster, the democratic process against governmental structures that "curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . ."[22] As Professor Bruce Ackerman explains, *Lochner* was illegitimate because it protected those who "enjoyed ample opportunity to safeguard their own interests through the political

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

18. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973); *see also* Romer v. Evans, 517 U.S. 620, 634 (1996) (forbidding laws that exist for the sole purpose of harming a particular group).

19. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 50 (1985) ("In no modern case has the Court recognized the legitimacy of pluralist compromise as the exclusive basis for legislation.").

20. *See, e.g.*, *Declaration of Constitutional Principles*, 102 CONG. REC. 4460, 4515–16 (1956) (statement of Sen. Walter F. George, widely known as "The Southern Manifesto") ("[T]he decision of the Supreme Court in the school cases [is] a clear abuse of judicial power. It climaxes a trend in the Federal Judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people."); Antonin Scalia, *Common-Law Courts in a Civil Law System*, *in* A MATTER OF INTERPRETATION 3, 39–40 (1997) (arguing that the common law method of interpreting law is "not the way of construing a democratically adopted text"); John G. Roberts, Jr., Draft Article on Judicial Restraint (1981), http://www.archives.gov/news/john-roberts/accession-60-89-0372/doc006.pdf ("A second means by which courts arrogate to themselves functions reserved to the legislative branch or the states is through so-called 'fundamental rights' and 'suspect class' analyses, both of which invite broad judicial scrutiny of the essentially legislative task of classification.").

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

22. *Carolene Prods. Co.*, 304 U.S. at 153 n.4.

process."[23] The modern understanding of the Fourteenth Amendment, however, "accord[s] special protection to those who ha[ve] been deprived of their fair share of political influence."[24] In these cases, a "judicial conclusion that a fair democratic process would have generated outcomes systematically more favorable" to those without influence is warranted.[25]

Of course, not every minority is protected by the Fourteenth Amendment, but rather only those minorities who find it "especially difficult . . . to strike bargains with potential coalition partners."[26] In a pluralistic system, minorities are able to participate in the political process by finding allies outside of their discrete group. These may be natural allies, as when African American and Latino voters unite in support of affirmative action, or they may be more uneasy alliances, such as social conservatives and libertarians joining forces to elect a president who will ban gay marriage and cut taxes, but such alliances are an integral part of a pluralistic system.

The system of local school funding challenged in *Rodriguez* is exactly the sort of "political process" against which the Fourteenth Amendment is designed to offer protection. Under that system, school districts depend on local property taxes to fund their programs.[27] Districts in wealthy areas receive a windfall, as they draw their funding from a substantial tax base; districts in poorer areas are left out in the cold.[28] Additionally, poorer districts operating under this or similar systems almost always tax their residents at a higher rate to make up for the revenue shortfall, but these higher property taxes are rarely sufficient to bridge the wealth chasm.[29]

---

23. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 715 (1985).

24. *Id.*

25. *Id.* at 715–16.

26. *Id.* at 720. Ackerman's essay goes on to critique this pluralist understanding of the Fourteenth Amendment as insufficient to preserve civil rights in the modern era, but he concedes that this understanding is the "first insight" of the *Carolene Products* decision and the cases stemming from it. *Id.* at 740.

27. 411 U.S. at 10.

28. For an excellent discussion of this problem of school funding, see generally JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION 38–199 (1970).

29. *See Rodriguez*, 411 U.S. at 75–76 (Marshall, J., dissenting) ("[T]he poorest districts tend to have the highest tax rates and the richest districts . . . the lowest tax rates. Yet, despite the apparent *extra* effort being made by the poorest districts, they are unable even to begin to match the richest districts in terms of the production of local revenues."); COONS, *supra* note 28, at 50 (explaining that the problem of poorer districts carrying higher tax burdens and yet receiving fewer funds existed for decades before the *Rodriguez* decision).

It is this insurmountable chasm that reflects the invidiousness of the local funding system. Residents of poorer districts want adequate funding for their children's schools. They vote for greater funding for those schools, and they even agree to higher local taxes to pay for those schools. Yet, the political process gives them no recourse. So long as this localized funding is maintained, residents of poorer districts will be unable to "safeguard their own interest through the political process."[30] It is exactly this kind of powerlessness that the Fourteenth Amendment is intended to prevent.

Of course, just because localized funding prevents recourse to a local legislature does not mean that a judicial remedy is mandated by the Constitution. As previously discussed, the Constitution only requires that citizens be able to seek meaningful redress from some branch of government;[31] proving that local legislatures are incompetent to provide an adequate education does not preclude seeking relief from the state legislature. As the next Section will discuss, however, state legislatures are no better suited to provide the poor with an adequate education than are local legislatures.

B. State Legislatures and the Problem of Legislature Capture

A legislator who is "not primarily interested in reelection will not achieve reelection as often as [one] who [is so] interested."[32] As a result, the primary goal of an elected legislator is most often reelection, lest that legislator risk becoming the victim of electoral Darwinism. This reality is neither surprising nor inappropriate, as electoral accountability is one of the principal advantages of a democracy,[33] but this advantage does not come without a price. In a society with limited resources, each voter wants the biggest piece of the pie, and so the American democracy rewards those legislators who can deliver the greatest benefits to their constituents, often at the

30. Ackerman, *supra* note 23, at 715.

31. *See supra* notes 14–16 and accompanying text.

32. MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 39–40 (1977).

33. *See* THE FEDERALIST NO. 57, at 352 (James Madison) (Clinton Rossiter ed., 1961) (explaining that the purpose of "frequent elections" is "to support in the members [of Congress] an habitual recollection of their dependence on the people"); *see also* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 706 (1990) ("Though our era may not be alone in deploring the lack of mechanisms for holding candidates accountable for the votes they cast, that lack of accountability is one of the major concerns of our time.").

expense of voters in other districts.[34] Because of this motivation on the part of legislators, the minority of the electorate who reside in poorer districts with less-educated residents are often the victims of an electoral process that encourages elected officials to favor their own district above all others.

To make matters worse, many of the voters in these districts are constructively disenfranchised by their inadequate education. According to the United States Census Bureau, college graduates are nearly one and one-half times as likely to vote as high school graduates and more than twice as likely to vote as Americans with eight or fewer years of education.[35] Furthermore, even if less-educated Americans do cast ballots, they often lack the basic reading skills and civic knowledge necessary to understand just what it is they are voting for.[36] So it should come as no surprise that the political branches have proved just as inadequate in providing a baseline

34. *See* FIORINA, *supra* note 32, at 40 ("Each of us favors an arrangement in which our fellow citizens pay for our benefits.").

35. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 290 (2000), *available at* http://www.census.gov/prod/2001pubs/statab/sec08.pdf. The Census Bureau provides the following data on the correlation between education levels and voter turnout:

	Percentage of Citizens Reporting They Voted, by Year							
School Years Completed	**1980**	**1986**	**1988**	**1990**	**1992**	**1994**	**1996**	**1998**
Eight Years or Less	42.6	32.7	36.7	27.7	35.1	23.2	28.1	24.6
Some High School	45.6	33.8	41.3	30.9	41.2	27.0	33.8	25.0
Completed High School	58.9	44.1	54.7	42.2	57.5	40.5	49.1	37.1
Three Years of College or Less	67.2	49.9	64.5	50.0	68.7	49.1	60.5	46.2
Four Years of College or More	79.9	62.5	77.6	62.5	81.0	63.1	73.0	57.2

It is possible to read this chart as merely demonstrating increased apathy among less-educated voters and thus to dismiss this problem as less-educated voters simply waiving their right to vote. Even if this is the case, given the intimate connection between education and the ability to intelligently exercise the franchise discussed in Part IV, *infra*, the state should still be held accountable for a system that encourages voters in one school district to waive their rights, while encouraging the opposite in other districts. *See infra* notes 151–154 and accompanying text (explaining how modern voting rights jurisprudence protects against laws which create obstacles to the lawful exercise of the franchise).

36. *See infra* Part IV (explaining why an adequate education is a necessary prerequisite to the fundamental right to vote).

education to both rich and poor Americans as they were in combating Jim Crow segregation.[37]

Dissenting in *Rodriguez*, Justice Marshall highlighted the futility of seeking a state legislative solution to educational inequities:

> The District Court in this case postponed decision for some two years in the hope that the Texas Legislature would remedy the gross disparities in treatment inherent in the Texas financing scheme. It was only after the legislature failed to act in its 1971 Regular Session that the District Court, apparently recognizing the lack of hope for self-initiated legislative reform, rendered its decision.[38]

This "lack of hope" has been borne out by numerous instances of states willing to address pressing educational needs only when held at knifepoint by an active judiciary.[39]

At least nineteen state supreme courts have parted ways with *Rodriguez*, holding either that their state constitution requires equal education funding, or that their state system fails to provide an adequate education.[40] Although these state-level suits more often fail

---

37. *See* Chas. H. Thompson, *Court Action the Only Reasonable Alternative to Remedy Immediate Abuses of the Negro Separate School*, 4 J. NEGRO EDUC. 419, 422 (1935) ("[I]t is no longer a question of whether Negroes should resort to the courts as a means of removing present abuses. They must resort to the courts. They have no other reasonable, legitimate alternative."); *see also* Thurgood Marshall, *The Legal Attack to Secure Civil Rights*, *in* THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 90, 95 (Mark V. Tushnet ed., 2001). Justice Marshall viewed the United States Supreme Court as a unique bulwark against racism:

> The threats of many of the bigots in the South to disregard the ruling of the Supreme Court of the United States in the recent Texas Primary decision has not intimidated a single person. . . . Election officials in states affected by this decision will either let Negroes vote in the Democratic Primaries, or they will be subjected to both criminal and civil prosecution . . . .

Id. For an account of the NAACP's legal strategy, see generally MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (1987).

38. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 71 n.2 (1972) (Marshall, J., dissenting); *see also* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1600 (2003) ("Desegregation will not occur without judicial action . . . .").

39. *See infra* Part II.B (advocating the need for an active judiciary as a weapon against reluctant legislatures); *see also* Chemerinsky, *supra* note 38, at 1600 ("[D]esegregation lacks sufficient national and local political support for elected officials to remedy the problem.").

40. *See, e.g.*, Ala. Coalition for Equity, Inc. v. Hunt, Nos. CV-90-883-R, CV-91-0117 (Ala. Cir. Ct., Montgomery County, filed Apr. 1, 1993), *reprinted in* Opinion of the Justices No. 338, 624 So. 2d 107, 110–11 (Ala. 1993) ("[T]he system of public schools fails to provide equitable and adequate educational opportunities to all schoolchildren . . . ."); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 816 (Ariz. 1994) ("[T]he Arizona Constitution requires the legislature to enact appropriate laws to finance education in the public schools in a way that

than succeed,[41] they have become the primary vehicle for challenging educational inadequacy. They demonstrate the massive resistance that state legislatures are willing to exert when faced with a constitutional mandate to provide an adequate education. As Justice Pfeifer explained in an Ohio Supreme Court opinion overturning that state's school funding system, "[t]he General Assembly has long been aware that the current funding structure is constitutionally flawed. It has been impossible to adequately address the problem because wealthy school districts have staunchly defended the status quo. This decision rejects the status quo and requires the General Assembly to act."[42]

As an examination of one state's struggle with educational adequacy reveals, however, state courts often believe they have required a legislature to act, only to find that their decision has been ignored. The state of Arkansas's struggle with educational civil rights

---

does not itself create substantial disparities among schools, communities or districts."); DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) ("[T]he educational opportunity of the children in this state should not be controlled by the fortuitous circumstance of residence . . . ."); Serrano v. Priest (*Serrano II*), 557 P.2d 929, 951 (Cal. 1976) ("[F]or purposes of assessing our state public school financing system in light of our state constitutional provisions guaranteeing equal protection of the laws (1) discrimination in educational opportunity on the basis of district wealth involves a suspect classification, and (2) education is a fundamental interest."); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989) ("[W]e have, by this decision, declared the system of common schools in Kentucky to be unconstitutional . . . ."); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1354 (N.H. 1997) ("In this appeal we hold that the present system of financing elementary and secondary public education in New Hampshire is unconstitutional."); Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood II*), 804 S.W.2d 491, 498 (Tex. 1991) ("[W]e therefore hold as a matter of law that the public school finance system continues to violate article VII, section 1 of the Constitution."); Brigham v. State, 692 A.2d 384, 386 (Vt. 1997) (per curiam) ("[T]he current system for funding public education in Vermont, with its substantial dependence on local property taxes and resultant wide disparities in revenues available to local school districts, deprives children of an equal educational opportunity in violation of the Vermont Constitution.").

41. *See* Liz Kramer, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & EDUC. 1, 6 (2002) (noting that although *Rodriguez*-style suits have been brought in at least forty-three different states, only nineteen state courts have ruled in the plaintiffs' favor).

42. DeRolph v. State, 677 N.E.2d 733, 781 (Ohio 1997) (Pfeifer, J., concurring); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 132 (1973) (Marshall, J., dissenting) ("The Court's suggestions of legislative redress and experimentation will doubtless be of great comfort to the schoolchildren of Texas' disadvantaged districts, but considering the vested interests of wealthy school districts in the preservation of the status quo, they are worth little more.").

began in 1983 with *DuPree v. Alma School District No. 30*.[43] In *DuPree*, the Arkansas Supreme Court declared that the state's educational funding system bore "no rational relationship to the educational needs of the individual districts" and held that there was no "legitimate state purpose to support the system."[44] The court in *DuPree* found that the highest and lowest revenues per pupil in Arkansas's school districts were $2,378 and $873, respectively, and that the difference at the 95th and 5th percentiles was $1,576 and $937.[45] It blamed this disparity on the gap in property wealth, which ranged from an average of $73,773 to an average of $1,853 per taxpayer.[46]

Concurring in *DuPree*, Justice Hickman offered a prescient warning to the state legislature:

> Equality is, of course, mostly an ideal or goal, and hardly ever a reality in government. Reasons are always given for not requiring equality but they are usually no more than excuses, and I do not hesitate to point out that if the Arkansas legislature approaches its new task with anything less than the goal of equality in dispensing state funds, it risks repeating the same mistakes that brought about this situation.[47]

The Arkansas legislature did not heed this warning, and so the Arkansas courts were forced to consider this issue again more than a decade later.[48]

In the 2000 case, *Lake View School District No. 25 v. Huckabee* (*Lake View II*),[49] the Arkansas Supreme Court once again found gross disparities in funding between wealthy and poor districts. Citing

---

43. 651 S.W.2d 90 (Ark. 1983). For a helpful summary of *Rodriguez*-type litigation in Arkansas, see generally David R. Matthews, *Lessons From* Lake View*: Some Questions and Answers from* Lake View School District No. 25 v. Huckabee, 56 ARK. L. REV. 519 (2003).

44. 651 S.W.2d at 93.

45. *Id.* at 92.

46. *Id.*

47. *Id.* at 96 (Hickman, J., concurring).

48. *See* Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View III*), 91 S.W.3d 472, 477 (Ark. 2002) ("On November 9, 1994, then-chancery judge Annabelle Clinton Imber found that the school-funding system did not violate the United States Constitution, but that it did violate the Education Article (Article 14, § 1) and the Equality provisions (Article 2, §§ 2, 3, and 18) of the Arkansas Constitution."). Judge (now Justice) Imber's original opinion is unpublished.

49. 10 S.W.3d 892 (Ark. 2000). *Lake View I* was a 1996 Arkansas Supreme Court decision dismissing an appeal for lack of a final judgment. *See* Tucker v. Lake View Sch. Dist. No. 25, 917 S.W.2d 530, 533 (Ark. 1996) (dismissing an appeal from the Pulaski County Chancery Court for lack of a final order).

numbers similar to those in *DuPree*, the court in *Lake View II* found that the wealthiest Arkansas school districts were spending almost twice as much per pupil as the poorest districts.[50] Two years later, in *Lake View School District No. 25 v. Huckabee* (*Lake View III*),[51] the court once again held that the Arkansas education system violated the state's constitution.[52] In so holding, the court looked beyond mere numbers to see the tangible costs of unequal funding: poorer districts languished under a "barebones" curriculum, while the wealthiest districts offered courses such as "German, fashion merchandising, and marketing."[53] Furthermore, even such basic necessities as "rainproof buildings, sufficient bathrooms, computers for its students, and laboratory equipment that function[ed]" were often lacking in the poorest districts.[54] Nineteen years after the Arkansas Supreme Court's holding in *DuPree*, the state legislature had done practically nothing to correct a constitutional violation.

Despite the legislature's recalcitrance, the court in *Lake View III* stayed its decision until January 1, 2004, to give "the General Assembly an opportunity to meet in General Session and the Department of Education time to implement appropriate changes."[55] Now faced with the real possibility of a mandatory injunction requiring the state treasurer to fund education adequately,[56] the Arkansas legislature finally took action to obey its state's constitution. In 2004, more than two decades after its decision in *DuPree*, a divided 4–3 court released jurisdiction over the *Lake View*

50. *See* 10 S.W.3d at 894 ("[D]isparities in per pupil expenditures in the 1992/93 school year ranged from $4,064 spent per pupil in the Little Rock School District to $2,270 spent per pupil in the Mountain View School District.").

51. 91 S.W.3d 472 (Ark. 2002).

52. *See id.* at 495 ("[T]he State has not fulfilled its constitutional duty to provide the children of this state with a general, suitable, and efficient school-funding system. Accordingly, we hold that the current school-funding system violates the Education Article of the Arkansas Constitution . . . ."). The court's holding in *Lake View III* went beyond that of their holding in *DuPree*. Although *DuPree* merely held that public school students have an equal protection right to equal funding regardless of district, 651 S.W.2d at 93, *Lake View III* held both that "the current school-funding system violates the equal-protection sections of the Arkansas Constitution," 91 S.W.3d at 500, and that "the State has an absolute duty under our constitution to provide an adequate education to each school child," *id.* at 495.

53. *Lake View III*, 91 S.W.3d at 497.

54. *Id.* at 498.

55. *Id.* at 511.

56. *See* Matthews, *supra* note 43, at 540 ("A mandatory injunction ordering the State Treasurer to 'adequately' fund the education system seems a likely prospective remedy.").

matter.[57] Although the majority cited "laudable" progress in areas such as "accounting and accountability,"[58] it also issued a stern warning to the state legislature:

> The resolve of this court is clear. We will not waver in our commitment to the goal of an adequate and substantially equal education for all Arkansas students; nor will we waver from the constitutional requirement that our State is to ever maintain a general, suitable, and efficient system of free public schools. Make no mistake, this court will exercise the power and authority of the judiciary at any time to assure that the students of our State will not fall short of the goal set forth by this court. We will assure its attainment.[59]

In dissent, Justice Corbin went even further, declaring a total lack of confidence in the legislature:

> I also do not agree with the majority that we should simply presume that government officials are going to do what they say they will do. Government officials have been saying that they would remedy the public school system of this state since this court's opinion in *Dupree v. Alma Sch. Dist. No. 30*. Twenty-one years later we are still faced with the dilemma that our education system is unconstitutional. Today, however, we have the opportunity to ensure that another twenty-one years do not pass before a remedy is devised, funded, and implemented.[60]

The lesson of *DuPree* and *Lake View* is that a state legislature cannot be trusted to ensure the proper education of all students. For twenty-one years, the Arkansas legislature ignored a constitutional mandate, acknowledging its duty only after decades of effort by an active judiciary. Nor is Arkansas's case an isolated one. The New Jersey Supreme Court held that state's education funding scheme unconstitutional in 1973.[61] Yet in 1997, that court again reached the same holding while simultaneously expressing its lack of faith in a

---

57. *See* Lake View Sch. Dist. No. 25 v. Huckabee (*Lake View IV*), No. 01-836, 2004 Ark. LEXIS 425, at *40 (Ark. June 18, 2004) ("[W]e release jurisdiction of this case and the mandate will issue.").

58. *Id.* at *35.

59. *Id.* at *40–41 (quotation omitted).

60. *Id.* at *66–67 (Corbin, J., dissenting) (citation omitted).

61. Robinson v. Cahill, 303 A.2d 273, 294 (N.J. 1973) ("A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command.").

political solution.[62] In 2003, the Supreme Court of Nevada was forced to enjoin its own legislature after that body unconstitutionally refused to fund education entirely in order to avoid raising taxes.[63] Perhaps the most egregious example of legislative hostility to educational civil rights occurred in Alabama. When that state's supreme court declared Alabama's education funding scheme to be unconstitutional,[64] the legislature voted to amend the state constitution to overturn the court's decision.[65]

The *Rodriguez* Court's assertion that "fundamental reforms with respect to state taxation and education are matters reserved for the legislative process[]"[66] is as naive as it is cruel. Legislatures, by design, are hostile to minority interests; they cannot be trusted to provide educational civil rights without the closest supervision from the courts. By abdicating their responsibility to provide a meaningful forum to address educational adequacy, the courts ensure this basic civil right will never be attained.

II. LIABILITY IS NOT ENOUGH: THE NEED FOR A MEANINGFUL REMEDY

In order for the courts to be a meaningful forum for educational civil rights cases, they must be able to provide effective remedies. Yet

---

62. The New Jersey Supreme Court held:

> Our Constitution requires that public school children be given the opportunity to receive a thorough and efficient education. . . .
>
> . . . .
>
> It is against that backdrop, and the inescapable reality of a continuing profound constitutional deprivation that has penalized generations of children, that one must evaluate an alternative, "wait and see" approach. . . . In light of the constitutional rights at stake, the persistence and depth of the constitutional deprivation, and in the absence of any real prospect for genuine educational improvement in the most needy districts, that approach is no longer an option.

Abbott v. Burke (*Abbott IV*), 693 A.2d 417, 445 (N.J. 1997).

63. *See* Guinn v. Legislature of Nev., 71 P.3d 1269, 1276 (Nev. 2003) ("The Legislature must resume its work of funding education and selecting appropriate methods of revenue generation to balance the state's budget.").

64. *See* Ala. Coalition for Equity, Inc. v. Hunt, Nos. CV-90-883-R, CV-91-0117 (Ala. Cir. Ct., Montgomery County, filed Apr. 1, 1993), *reprinted in* Opinion of the Justices No. 338, 624 So. 2d 107, 110–11 (Ala. 1993) ("[T]he system of public schools fails to provide equitable and adequate educational opportunities to all schoolchildren . . . .").

65. *See* ALA. CONST. amend. DLXXXII ("No order of a state court, which requires disbursement of state funds, shall be binding on the state or any state official until the order has been approved by a simple majority of both houses of the Legislature.").

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

the Burger and Rehnquist Courts, at the urging of conservative Presidents, have rolled back important precedents that previously ensured educational civil rights judgments would be meaningfully enforced. In *Swann v. Charlotte-Mecklenburg Board of Education*,[67] the Warren Court held that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad . . . ."[68] Fifteen years later, the Reagan administration published the *Guidelines on Constitutional Litigation* ("*Guidelines*"), which required federal government attorneys to utilize a narrow, conservative methodology when litigating constitutional cases.[69] According to these Reaganic verses, broad equitable relief violates Article III of the Constitution when it affects people other than "the parties immediately involved in the litigation."[70] In other words, the *Guidelines* encouraged federal attorneys to argue that courts are powerless to provide certain remedies, even when those remedies are essential to eliminating a continuing constitutional violation. The *Guidelines*' reasoning was instrumental to a decision three years after its publication that effectively ended meaningful school desegregation.[71]

This Note rejects the reasoning of the *Guidelines*, and will argue that the Court was wrong to reject the broad view of equitable relief captured in *Swann*. This broad view grew out of the Court's frustration with "[d]eliberate resistance" on the part of states subject to desegregation orders.[72] In the seventeen years between *Brown v. Board of Education* (*Brown I*)[73] and *Swann*, the Court learned that broad equitable remedies were an essential part of breaking the campaign of "massive resistance" that grew out of opposition to integration. As this Part argues, the Court was right to adopt such a viewpoint when the alternative was allowing states to flout the Constitution. Similarly, the broad view of equity advanced in *Swann* is as essential to educational equity as it was to school desegregation.

---

67. 402 U.S. 1 (1971).

68. *Id.* at 15.

69. U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POL'Y, GUIDELINES ON CONSTITUTIONAL LITIGATION 3 (Feb. 19, 1988) [hereinafter GUIDELINES] ("[G]overnment attorneys should advance constitutional arguments based only on [the] 'original meaning.'").

70. *Id.* at 118.

71. *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 247 (1991) (holding that previously segregated schools were free to resegregate once a moment of integration was achieved).

72. 402 U.S. at 13.

73. 347 U.S. 483 (1954).

By adopting the conservative stance on equitable relief, the courts ensure that educational adequacy will always remain a dream deferred.

A. The Slow Death of Equity

Just one year after its famous decision declaring school segregation unconstitutional, the Court engaged in an equally famous act of hedging. In *Brown v. Board of Education* (*Brown II*),[74] the Court decreed that desegregation need only move forward with "all deliberate speed,"[75] and the South was jubilant. One Louisiana state legislator called *Brown II* "the mildest decree the Supreme Court possibly could have handed down."[76] A Florida politician announced that the Court had "realized it made a mistake in May and is getting out of it the best way it can."[77] Numerous Southern lawmakers suggested that desegregation would not be "feasible" for another fifty or one hundred years.[78]

The *Brown II* decision was motivated far more by politics than by a belief in constitutional limitations. Far from adopting the 'vision of judicial restraint that would later be voiced in the *Guidelines*, *Brown II* expressly acknowledged that courts enjoy "practical flexibility in shaping . . . [equitable] remedies," even when such remedies apply broadly.[79] Instead, *Brown II* was intended largely as a "peace offering to white southerners," born of the hope that by exercising less than its full power, the Court could encourage swifter desegregation.[80]

Within months, it became clear that *Brown II*'s narrow remedy was a miscalculation.[81] "White Citizen's Councils," emboldened by the Court's cravenness, formed to use all methods short of violence to resist integration. Several states passed "interposition" resolutions claiming that *Brown I* was an "illegal encroachment."[82] Eighty-one

74. 349 U.S. 294 (1955).

75. *Id.* at 301.

76. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 319 (2004).

77. *Id.*

78. *Id.*

79. 349 U.S. at 300.

80. KLARMAN, *supra* note 76, at 319.

81. *See id.* at 320 ("That *Brown II* was a mistake from the Court's perspective was quickly apparent.").

82. *Id.*

Southern members of Congress signed a "Southern Manifesto" pledging "to use all lawful means to bring about a reversal of this decision."[83]

In 1955, it was possible for the Justices, in a good faith effort to desegregate public schools, to stay their hands and hope for voluntary compliance from the states.[84] By the time that Richard Nixon became president, however, it was readily apparent that *Brown II*'s remedy resulted in "entirely too much deliberation and not enough speed."[85] Nevertheless, upon the confirmation of their third and fourth numbers to the Supreme Court, President Nixon's Justices began dismantling the judiciary's ability to provide meaningful remedies in educational civil rights cases.

The Nixon Justices' first attack on *Brown I* came in the first *Milliken v. Bradley*.[86] Joined by Justice Stewart, the Nixon four held that a federal court could not integrate the unconstitutionally segregated Detroit school district by busing students across state-drawn district lines.[87] Moreover, the Court reached this holding despite the fact that a low minority population in Detroit meant that cross-district busing was the only available means to desegregate the Detroit schools.[88] In a subsequent proceeding, the Court held that although actual desegregation was not available as a remedy, a district court could provide "remedial education programs" to compensate the victims of discrimination.[89] The pre-*Brown* Court had a name for this kind of remedy: "separate but equal."[90]

Supreme Court hostility to civil rights only grew through the Reagan and George H.W. Bush presidencies. Perhaps the final nail in *Brown*'s coffin came with the Rehnquist Court's holding in *Board of*

---

83. *Declaration of Constitutional Principles*, *supra* note 20, at 4460.

84. *See* KLARMAN, *supra* note 76, at 320 ("To say that *Brown II* was misguided is not to say that the justices calculated foolishly.").

85. Griffin v. County Sch. Bd., 377 U.S. 218, 229 (1964).

86. Milliken v. Bradley (*Milliken I*), 418 U.S. 717 (1974).

87. *Id.* at 746–47 ("Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit District to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so.").

88. *See id.* at 747 n.22 ("[T]he constitutional principles applicable in school desegregation cases cannot vary in accordance with the size or population dispersal of the particular city, county, or school district as compared with neighboring areas.").

89. Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 279 (1977).

90. Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

Education v. Dowell.[91] The Court in *Dowell* held that "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination,"[92] and thus a momentarily desegregated district, one which had achieved "unitary status,"[93] was free to recreate segregated neighborhood schools.[94] Moreover, in reaching this decision, the Court implicitly adopted the *Guidelines*' position that once a constitutional "violation is remedied, the court's jurisdiction ceases."[95]

The effects of this holding have been as disastrous as they were predictable. On the day *Brown I* was decided in 1954, only 0.001 percent of African American students in the South attended majority white schools.[96] This percentage increased every year it was measured until 1991, reaching a peak of 43.5 percent in 1988.[97] In the wake of *Dowell*-style resegregation, however, this progress is slowly being lost. The number of Southern black students attending majority white schools has declined every year since *Dowell* and is now at its lowest point since 1970.[98]

The speed with which resegregation occurs once the courts abdicate their role in maintaining integration is demonstrated by one Texas district. Once the Austin Independent School District was declared unitary in 1983, the federal district court relinquished jurisdiction in 1986, and the local board redrew attendance zones to

---

91. 498 U.S. 237 (1991).

92. *Id.* at 247.

93. *Id.* at 244.

94. *See* GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 19 (1996) ("A court-supervised district that has never been declared unitary is obligated under the law to avoid actions that create segregated and unequal schools. But after a declaration of unitary status, the courts presume any government action creating racially segregated schools to be innocent . . . .").

95. GUIDELINES, *supra* note 69, at 120.

96. ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 37 tbl.10 (2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.

97. *Id.* Although the Supreme Court first allowed a "unitary" district to be resegregated in 1991, the process began five years earlier with the Fourth Circuit's decision in *Riddick v. School Board of Norfolk*, 784 F.2d 521 (4th Cir. 1986). *Riddick* was the first federal court case to allow a school district, once declared unitary, to return to segregated neighborhood schools. *See id.* at 535 ("[O]nce the goal of a unitary school system is achieved, the district court's role ends."); ORFIELD & EATON, *supra* note 94, at xxiii (explaining that *Riddick* was the first federal case to allow a unitary school district to dismantle its desegregation plan).

98. FRANKENBERG ET AL., *supra* note 96, at 37 tbl.10.

create segregated neighborhood schools.[99] In 1991, almost one-third of the elementary schools had minority (nonwhite) enrollments of more than 80 percent, even though a majority of the district's students were not minorities.[100] When the case reached the Fifth Circuit, the court was obliged to follow *Dowell*,[101] even though the student reassignments created the segregation in fourteen of the nineteen imbalanced schools.[102] In a special concurrence, Judge John Minor Wisdom opined that the disparities between white and minority schools were so great that they would be unconstitutional even under *Plessy v. Ferguson*.[103]

Professor Jack Balkin has observed that "[i]t is often said that no theory of constitutional interpretation is sound if it cannot explain and justify *Brown v. Board of Education*,"[104] and yet the Supreme Court has constructively overturned this iconic decision, allowing schools to resegregate after only a moment of integration. As the Austin example demonstrates, elected school boards and state legislatures cannot be trusted to maintain *Brown*'s legacy. Integration must come from meaningful judicial remedies, or it will not come at all.

B. What Should Have Been Done

One purpose of the Constitution is to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[105] Accordingly, when a state flouts its proper role, routinely abridging the constitutionally granted rights of its citizens, the courts must enjoy broad latitude in restoring these rights.[106] As both the battle over desegregation and the state of Arkansas's struggle with educational civil rights demonstrate, the courts cannot be shy in exercising this power. The Arkansas

---

99. ORFIELD & EATON, *supra* note 94, at 20.

100. Price v. Austin Indep. Sch. Dist., 945 F.2d 1307, 1322 (5th Cir. 1991) (Wisdom, J., specially concurring).

101. *Id.* at 1313–14.

102. ORFIELD & EATON, *supra* note 94, at 20.

103. *Price*, 945 F.2d at 1322 (Wisdom, J., specially concurring).

104. JACK M. BALKIN, WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID x–xi (2001).

105. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

106. *See infra* Part III (describing the courts' power to impose affirmative duties upon states violating the Constitution).

legislature ignored its constitutional duties for over twenty years, only reluctantly taking action when a firm deadline was imposed by the courts.[107] Regrettably, the United States Supreme Court was equally slow to learn the importance of swift and certain judicial action.

When the Court displayed its tragic "lack of firm resolve" in *Brown II*, Southern resistance to desegregation was "inevitable"[108] and came in the form of disingenuous "freedom-of-choice plans"[109]—efforts by states to "interpose" their own authority against that of the Constitution[110]—and, of course, famous resistance from Southern governors like George Wallace and Orval Faubus.[111] Although the Court eventually reversed course, declaring, sixteen years after *Brown I*, that courts may take "affirmative action . . . to achieve truly nondiscriminatory assignments,"[112] by then it was too late. Richard Nixon was already president; the Court had squandered its liberal majority, and it has yet to regain its historic concern for civil rights.[113]

---

107. *See supra* notes 52–60 and accompanying text (chronicling the Arkansas legislature's defiance of a court order).

108. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED 124 (2004); *see also* Chemerinsky, *supra* note 38, at 1604 ("One must ask whether it would have made a difference had the Supreme Court in *Brown II*, or [in] a case soon thereafter, imposed timetables and detailed remedies for desegregation.").

109. *See* OGLETREE, *supra* note 108, at 125 ("[F]reedom-of-choice plans emerged as the most common response to *Brown*. These plans repeatedly failed to yield any significant desegregation."). Freedom-of-choice plans allowed black children to choose to attend historically white schools, but did not mandate integration. *See* Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (per curiam) (upholding South Carolina's freedom-of-choice plan). Shortly after *Brown*, many federal district courts engaged in tenuous legal arguments to justify their constitutionality. *See, e.g.*, *id.* ("[N]o violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches."). These plans were eventually declared unconstitutional where they failed to effectively bring about integration. Green v. County Sch. Bd., 391 U.S. 430, 440 (1968) ("'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end . . . . If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end.'" (quoting Bowman v. County Sch. Bd., 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring) (footnote omitted))).

110. *See* OGLETREE, *supra* note 108, at 130 (describing the Southern interposition movement, which claimed that states had the authority to protect their citizens from unjust actions by the federal government).

111. *See id.* at 128–29 (describing the two governors' use of segregation as the focal point of their election strategy). As Professor Ogletree explains, both Wallace and Faubus "began as moderates on race issues, but later found that the key to success lay in vehemently opposing integration." *Id.* at 128. When Wallace lost his 1960 bid for the Democratic gubernatorial nomination in Alabama, he famously "declared that he would never be 'outniggered' again." *Id.*

112. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971).

113. *See* Chemerinsky, *supra* note 38, at 1601 ("Four Justices appointed by President Richard Nixon are largely to blame for the decisions of the 1970s . . . .").

In the field of public education, the doctrine of judicial restraint has no place. The courts can depend neither on the goodwill of legislatures[114] nor on the integrity of their own membership in the face of appointees hostile to civil rights. Furthermore, if education truly is the "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment,"[115] then each minute that children are denied their right to an adequate education can only drive them deeper into a hole from which they may never recover. A responsible court cannot gamble with these lives. It must demand timely action through rigid deadlines backed by injunctions.[116] Doing otherwise will ensure its decisions will never be meaningfully enforced.

III. THE SUPREME COURT AND AFFIRMATIVE CONSTITUTIONAL RIGHTS

Having taken a stance against what conservatives call "judicial restraint"—deferring to the legislative branches even when such deference encourages states to defy the Constitution—this Note proposes an alternative method of constitutional interpretation and demonstrates how that method could be used to provide the educational civil rights denied in *Rodriguez*. As the majority of this Note has focused on philosophical questions about the proper role of courts, it is tempting to view the remaining three Parts as little more than an afterthought. This structure is intentional, however, because it is necessary to call attention to just how broad an impact the Court's institutional competency jurisprudence has on Americans unable to seek redress through the political process. The contraction of educational civil rights is merely a symptom of a larger disease, and so this Part will focus on curing this greater malady.

It is hardly a revolutionary idea that the Constitution places an affirmative duty on the states to act in accordance with its mandates.[117]

---

114. *See supra* notes 42–65 and accompanying text.

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

116. *See* Chemerinsky, *supra* note 38, at 1620 (suggesting that if the Court had provided more aggressive remedies in the years between *Brown* and *Swann*, desegregation might have occurred more quickly).

117. *Cf.* Green v. County Sch. Bd., 391 U.S. 430, 437–38 (1968) ("School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.").

Nor is it particularly radical to claim that the courts have an affirmative duty to ensure that this mandate is met.[118] Yet the dominant conservative view of the Constitution is that the courts should defer to branches that are structurally incapable of providing certain rights, or worse, that courts should hear a case, find a constitutional violation, but refuse to remedy the violation.[119] Such a proposition is, in the words of Chief Justice Marshall, "too extravagant to be maintained."[120]

Nevertheless, it is one thing to argue that the courts have a duty to hear pleas for redress of grievances,[121] and another thing altogether to suggest that a particular right—for example, the right to an adequate education—is among those protected by the Constitution. This Part attempts to build a progressive constitutional framework from which such a right can emerge. Like the first two Parts of this Note, this framework's methodology is rooted in the notion that the Constitution cannot be read both to grant a right and to deny the very tools which give that right meaning. Accordingly, this Part argues that when a new right becomes essential to the maintenance of a preexisting constitutional right, that new right must also be protected by the Constitution, even if this imposes an affirmative duty on the states.

Although the Court has yet to embrace this methodology fully, it has been used in several constitutional cases. In *Gideon v. Wainwright*,[122] for example, the Supreme Court recognized an affirmative constitutional right to appointed counsel for indigent criminal defendants in state cases.[123] The Court recognized that "'[assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights

---

118. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . arising under this Constitution . . . ."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

119. *See supra* notes 86–103 and accompanying text (explaining that Court's refusal to grant meaningful remedies in the *Bradley* and *Dowell* cases).

120. *Marbury*, 5 U.S. (1 Cranch) at 179.

121. *See supra* notes 15–16 and accompanying text (arguing that the courts should remain active in areas that cannot be effectively governed by the other branches).

122. 372 U.S. 335 (1963).

123. *See id.* at 344 (holding that a fair trial cannot be achieved "if the poor man charged with crime has to face his accusers without a lawyer to assist him").

of life and liberty'";[124] accordingly, a mere right to be free from interference in seeking assistance from counsel was held insufficient to preserve the rights of the poor.[125]

Criminal defendants enjoy numerous affirmative rights under the *Gideon* principle. In *Ake v. Oklahoma*,[126] the Court extended *Gideon* to include a right to state-funded psychiatric assistance for indigent defendants invoking an insanity defense.[127] In so holding, the Court reaffirmed its commitment to imposing affirmative duties on the states when such duties are necessary to preserve constitutional rights. "[W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding," wrote Justice Marshall for the Court, "it must take steps to assure that the defendant has a fair opportunity to present his defense."[128] Similarly, in *Miranda v. Arizona*,[129] the Court held that because "the threshold requirement for an intelligent decision as to [a right's] exercise"[130] is knowledge of the right's very existence, states have an affirmative duty to inform criminal defendants of their rights while in custody.[131]

Affirmative constitutional rights are not limited to the criminal context. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[132] the Court held that there is an affirmative right to sue federal officers for violations of constitutional rights.[133] In a famous concurrence, Justice Harlan highlighted the necessity of such an

---

124. *Id.* at 343 (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)).

125. *Id.* at 344.

126. 470 U.S. 68 (1985).

127. *See id.* at 74 ("[W]hen a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.").

128. *Id.* at 76.

129. 384 U.S. 436 (1966).

130. *Id.* at 468.

131. *Id.* at 467–74. Admittedly, the constitutional status of *Miranda* has fluctuated. In *Michigan v. Tucker*, 417 U.S. 433 (1974), the Court held that *Miranda* warnings "were not themselves rights protected by the Constitution," but rather were designed "to provide practical reinforcement for the right against compulsory self-incrimination." *Id.* at 444. In *Dickerson v. United States*, 530 U.S. 428 (2000), however, the Court reaffirmed that *Miranda* was "constitutionally based." *Id.* at 440.

132. 403 U.S. 388 (1971).

133. *Id.* at 391–92; *see also* Carlson v. Green, 446 U.S. 14, 17–18 (1980) (holding a right to sue to be implicit in the Eighth Amendment); Davis v. Passman, 442 U.S. 228, 248–49 (1979) (holding a similar right to sue to be implicit in the Fifth Amendment).

affirmative right to the vindication of Bivens' preexisting constitutional rights:

> Putting aside the desirability of leaving the problem of federal official liability to the vagaries of common-law actions, it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit. Finally, assuming Bivens innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.[134]

Although conservative appointments have led to broad exceptions to the *Bivens* doctrine, these exceptions only highlight the Supreme Court's insistence that an affirmative constitutional right arises when such a right is necessary to the preservation of other preexisting constitutional rights. In *Bush v. Lucas*,[135] the Court denied a *Bivens* suit to a government employee who was demoted after speaking out against his employer.[136] Because Congress had already provided a regulatory scheme allowing federal employees to seek relief, an additional right to sue was not deemed necessary.[137] Similarly, in *Schweiker v. Chilicky*,[138] the Court denied a *Bivens* remedy to plaintiffs who had been unconstitutionally denied their Social Security benefits because the Social Security Act provided an administrative remedy.[139] In both cases, the Court did not hold that a right to sue in federal court was guaranteed because it did not view such a right as *necessary* to the vindication of preexisting constitutional rights.

---

134. *Bivens*, 403 U.S. at 409–10 (Harlan, J., concurring in the judgment).

135. 462 U.S. 367 (1983).

136. *Id.* at 368, 370.

137. *See id.* at 388 ("The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system . . . should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.").

138. 487 U.S. 412 (1988).

139. *See id.* at 424–29 ("Congress is . . . charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program. Congress has discharged that responsibility to the extent that it affects the case before us, and we see no legal basis that would allow us to revise its decision." (citation omitted)).

Perhaps the most famous example of the Court's imposing an affirmative duty on a state to preserve a preexisting constitutional right is itself an educational civil rights decision. In *Green v. County School Board*,[140] the Court, frustrated by Southern refusal to obey its decision in *Brown I*, declared that local school boards were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[141] Shortly thereafter, the Court gave sharp teeth to this assertion, upholding, in *Swann v. Charlotte-Mecklenburg Board of Education*,[142] a district court's imposition of several highly restrictive affirmative duties on the school board, including mandatory busing to achieve integration.[143]

Significantly, the textual basis for the new right in each of these cases is the same as that of the preexisting right. Thus, the affirmative right to counsel in *Gideon* stems from the Sixth Amendment, and the right to integration through mandatory busing stems from the Equal Protection Clause. In *DeShaney v. Winnebago County Department of Social Services*,[144] however, the Court held that the purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected them from each other."[145] The Court's holding stems from the belief that "[t]he Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes."[146] It is tempting to read *DeShaney* as precluding new rights from being found implicit in preexisting due process rights, but the *DeShaney* opinion also admitted that "in certain limited circumstances the Constitution imposes upon the State

140. 391 U.S. 430 (1968).

141. *Id.* at 437–38.

142. 402 U.S. 1 (1971).

143. *See id.* at 29–31 (1971) (upholding mandatory busing of white students to traditionally black schools and black students to traditionally white schools).

144. 489 U.S. 189 (1989).

145. *Id.* at 196.

146. *Id*. Professor Steven Heyman, in an article published shortly after the Court's decision in *DeShaney*, argues that Chief Justice Rehnquist mischaracterized history in asserting that affirmative rights are inconsistent with the Framers' intent. *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 509 (1992) ("[T]he congressional debates on the Fourteenth Amendment show that establishing a federal constitutional right to protection was one of the central purposes of the Amendment."); *see also Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 113 (1987) (statement of Judge Bork) ("Any judge who thought today he would go back to the original intent really ought to be accompanied by a guardian rather than be sitting on a bench.").

affirmative duties of care and protection with respect to particular individuals."[147] "[T]he Eighth Amendment's prohibition against cruel and unusual punishment," for example, "requires the State to provide adequate medical care to incarcerated prisoners."[148] Similarly, the "Fourteenth Amendment's Due Process Clause requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their 'reasonable safety' from themselves and others."[149]

DeShaney is not a good case for proponents of meaningful access to education, but these exceptions suggest that even the conservative Rehnquist Court was reluctant to discard the notion of constitutional necessity. The Court's opinion explained that the exceptions to *DeShaney* were necessary "because the prisoner is unable by reason of the deprivation of his liberty [to] care for himself, [so] it is only just that the State be required to care for him."[150] Once again, the state assumes an affirmative constitutional duty necessary to preserve a preexisting constitutional right—when a state deprives incarcerated individuals of the ability to meet their own basic needs, it is required by the Eighth Amendment to ensure that those needs are met.

IV. EDUCATION AND THE CONSTITUTIONAL RIGHT TO VOTE

Although state legislatures may, under some circumstances, limit the franchise to certain individuals, once the franchise has been granted, it may not be diluted with respect to an eligible voter.[151] In other words, under the right circumstances, a state legislature can deny the vote entirely,[152] but, once granted, the right to vote must

147. 489 U.S. at 198.

148. *Id*.

149. *Id.* at 199.

150. *Id.* (quotations omitted).

151. *See* Bush v. Gore, 531 U.S. 98, 104 (2000) ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."); Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."); Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

152. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (allowing a state to disenfranchise convicted felons); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53–54 (1959) (allowing a state to disenfranchise individuals who fail a literacy test).

remain intact. In this sense, the fundamental right to vote is unusual. This Part argues that an affirmative right to an adequate education[153] is essential to preserving an intact right to vote. Furthermore, because a state's right to deny the franchise based on a literacy test or device has been stripped by federal statute,[154] the only remaining option is for states to provide an education adequate to allow voters to exercise their franchise effectively.

The idea of an essential link between education and voting is hardly a new one. President James Madison argued that "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[155] Senator Horace Mann, whom Justice Frankfurter credited as one of the fathers of the modern, secular, public school,[156] echoed Madison's sentiment: "[I]t seems clear that the minimum of this education can never be less than such as is sufficient to qualify each citizen for the civil and social duties he will be called to discharge;—such an education . . . is necessary for the voter in municipal affairs . . . ."[157] Senator Mann designed the Massachusetts compulsory school system to match his understanding that "schooling was necessary to preserve republican institutions and to create a political community."[158] Indeed, the Supreme Court itself has acknowledged this necessary connection between education and democracy. In *Wisconsin v. Yoder*,[159] the Court recognized, "as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve

153. An "adequate education" as used here is defined as an education which provides those skills necessary to the intelligent exercise of the franchise. Part V, *infra*, provides a methodology for determining which skills fit this criteria.

154. Voting Rights Act of 1965, 42 U.S.C. § 1973aa(a) (2000) ("No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.").

155. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* THE COMPLETE MADISON 337 (Saul K. Padover ed., 1953).

156. *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 214–15 (1948) (Frankfurter, J., concurring) (describing the birth of the secular public school and Horace Mann's role in its inception).

157. HORACE MANN, THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN 63 (Lawrence A. Cremin ed., Teachers Coll. Press 1957) (1846).

158. Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 174 (1996).

159. 406 U.S. 205 (1972).

freedom and independence."[160] And yet, the Court has never met its own mandate to ensure that this elusive "degree of education" is provided.

The *Rodriguez* plaintiffs argued that "a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed."[161] The plaintiffs' argument correctly rested on the notion that voting is not merely juggling levers in a booth, but rather involves making an intelligent connection between the votes cast and the voter's goals in advancing a particular form of government. The American political system "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,"[162] but if voters do not understand what they are voting for, they will be ill-equipped to engage in such interchange. Like all constitutional rights, the right to vote cannot be interpreted as a mere formality. Being allowed to cast a ballot is not enough; voters must be able to understand just what it is they are voting for. Accordingly, an adequate education is one that prepares the incipient voter to navigate effectively the ocean of magazines, newspapers, and television programs upon which all modern voters depend for information.[163]

Ironically, some of the best judicial support for this view of the right to vote stems from a decision upholding the right of states to

---

160. *Id*. at 221.

161. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973).

162. Roth v. United States, 354 U.S. 476, 484 (1957).

163. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 52 (1959) (arguing that the ability to understand "newspapers, periodicals, books, and other printed matter" may be essential to exercising the franchise). A recent University of Maryland study highlights the crucial import of training voters to select from the cacophony of news sources. *See* STEVEN KULL ET AL., PROGRAM ON INTERNATIONAL POLICY ATTITUDES, MISPERCEPTIONS, THE MEDIA AND THE IRAQ WAR 7, 12–20 (2003), http://www.pipa.org/OnlineReports/Iraq/Media_10_02_03_Report.pdf (2003). The Kull study asked respondents whether they believed in the veracity of three false statements: (1) "Evidence of links between Iraq and al-Qaeda have been found"; (2) "Weapons of mass destruction have been found in Iraq"; and (3) "World public opinion favored the US going to war with Iraq." *Id.* at 7. Although only 23 percent of persons who were primarily informed by PBS or NPR believed one or more of the (incorrect) statements, 55 percent of CNN and NBC watchers were victims of misinformation, and 80 percent of FOX News viewers were misinformed regarding the Iraq war. *Id.* at 13. These misperceptions had a strong correlation with respondents' political preference. Although supporters of President Bush had a 45 percent chance of believing each of the false statements, supporters of the Democrats had only a 17 percent chance of believing each false statement. *Id.* at 18. This data suggests that some news sources better inform their consumers than others, and that those consumers must possess a baseline of knowledge to distinguish between good, bad and intentionally misleading journalism.

deny the franchise. In *Lassiter v. Northampton County Board of Elections*,[164] the Supreme Court upheld a state law that required voters to pass a literacy test. In doing so, the Court held that because of the role that "newspapers, periodicals, books, and other printed matter" play in educating voters, it was reasonable to conclude that "only those who [were] literate should exercise the franchise."[165] *Lassiter* was overturned by the Voting Rights Act of 1965, which forbids states from restricting the franchise on the basis of a literacy or other test,[166] but that does not mean that *Lassiter* was a decision without any wisdom whatsoever. Literacy and similar skills *are* essential to meaningful exercise of the franchise, and a meaningful right to vote must encompass a meaningful right to education.

In *Reynolds v. Sims*,[167] the Supreme Court made the seemingly obvious point that "[i]t would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once."[168] Yet this vote inflation is effectively what states engage in by providing a superior education to some districts, while denying that opportunity to others. As poorly-educated voters are substantially less likely to vote than well-educated voters,[169] denying an adequate education to some school districts while providing one to others ensures that certain voters will be constructively disenfranchised for no other reason than geography. Even worse, without an adequate education, those who do cast a ballot often will not understand just what they are voting for.

V. THE SCOPE OF THE CONSTITUTIONAL RIGHT TO AN ADEQUATE EDUCATION

So far, this Note has found little wisdom in *Rodriguez*, but Justice Powell's majority opinion does make one fair critique of a fundamental right to an adequate education: "Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of

164. 360 U.S. 45 (1959).
165. *Id.* at 52.
166. 42 U.S.C. § 1973aa(a) (2000).
167. 377 U.S. 533 (1964).
168. *Id.* at 562.
169. *See supra* note 35 and accompanying text.

[preexisting constitutional rights], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short."[170] It is not unreasonable for the Court to ask, "Why literacy and not golf?"[171] Accordingly, if *Rodriguez*-style plaintiffs are to be successful at the federal level, they must be able to define just what skills are required to be taught under the Constitution. Fortunately, the fifty states have already made this determination.

Justice Brandeis famously wrote that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[172] The purpose of this laboratory, however, is not to engage in a mindless exercise of federalism for its own sake, but instead to weigh various methods against one another as part of a quest for the ideal. The "laboratory of the states" is how American policymakers separate the wheat from the chaff, and when consensus emerges among the several states to scrap one policy in favor of another, such consensus should not be lightly ignored.[173] Accordingly, the Supreme Court has correctly deferred to this consensus, acknowledging it three times in the last four terms. In striking down antisodomy laws in *Lawrence v. Texas*,[174] the Court noted that "[o]ver the course of the last decades, States with same-sex prohibitions have moved toward abolishing them."[175] Similarly, in *Atkins v. Virginia*,[176] the Court forbade executions of the mentally retarded largely because of the growing

---

170. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36–37 (1973).

171. This question was originally posed as, "Why education and not golf?" in Professor Frank Michelman's seminal article on the Constitution and the poor. Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 59 (1969).

172. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

173. Professor Cass Sunstein argues that the very purpose of the Due Process Clause is to prevent radical actions by single states:

> From its inception, the Due Process Clause has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures. The clause has therefore been associated with a particular conception of judicial review, one that sees the courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history.

Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

174. 539 U.S. 558 (2003).

175. *Id.* at 570.

176. 536 U.S. 304 (2002).

consensus among the states that such executions were intolerable.[177] The Court used the same reasoning to invalidate executions of juveniles just three years later.[178]

A similar deference is called for in defining the scope of a constitutional right to an adequate education. Under the No Child Left Behind Act of 2001, each state receiving federal education grants must establish statewide standards[179] and assessments[180] for math, reading, and the language arts. Unsurprisingly, the states generally agree as to which skills should be included in these mandatory standards and assessments. When a particular skill is required by all fifty states, such consensus should be highly persuasive to a federal court that this skill is necessary to achieving an adequate education. Accordingly, the best starting point for determining the scope of a fundamental right to education is the states themselves.

Providing even the most disadvantaged children with an adequate education is not only constitutionally mandated but also wholly attainable. Several models already exist that prove that any child can learn, given the right school environment.[181] The lesson of

---

177. *See id.* at 315–16 ("[T]he large number of States prohibiting the execution of mentally retarded persons . . . provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.").

178. Roper v. Simmons, 125 S. Ct. 1183, 1194 (2005) ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment."). Admittedly, *Roper* and *Atkins* provide less support for the argument that the Court should seek guidance from the states in educational civil rights cases than does *Lawrence* because the Eighth Amendment has long been interpreted to consider "'evolving standards of decency.'" *Id.* at 1190 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1985)).

179. *See* 20 U.S.C. § 6311(b)(1)(C) (Supp. I 2001) ("The State shall have . . . academic standards for all public elementary school and secondary school children . . . [and such standards] shall include the . . . knowledge, skills, and levels of achievement expected of all children.").

180. *See id.* § 6311(b)(2)(A) ("Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system . . . ."). Statewide standards and assessments were common in many states long before No Child Left Behind became law. *See* Jennifer R. Rowe, *High School Exit Exams Meet IDEA—An Examination of the History, Legal Ramifications, and Implications for Local School Administrators and Teachers*, 2004 BYU EDUC. & L.J. 75, 89–95 (chronicling the history of high school exit exams from the 1970s to the present).

181. *See* Jaime Escalante & Jack Dirmann, *The Jaime Escalante Math Program*, 59 J. OF NEGRO EDUC. 407, 407–08 (1990) (explaining the success of the "Escalante Math Program," which teaches calculus to nearly two hundred inner city students each year); Peter H. Gibbon, *A Teacher's Tough Model*, WASH. POST, Oct. 12, 2004, at A23 ("[The teacher] . . . . moved to Hobart Elementary School in Los Angeles to teach students who lived in poor neighborhoods and knew little English. . . . His students read '*The Adventures of Huckleberry Finn*' and *The*

these successful models, however, is that such achievement among disadvantaged students only comes through extra effort on the part of the school. It is not enough, as the *Rodriguez* plaintiffs did, to demand equality of resources to each district and expect all children to receive an adequate education. If the educational adequacy mandated by the Constitution is ever to become a reality, it will only be achieved by providing disadvantaged youth with additional resources, superior instruction, and above all additional instruction time. This is the model used by highly successful programs such as KIPP, the Escalante Math Program, and the Hobart Shakespearians,[182] and it is the model states must adopt to meet their constitutional obligations to underprivileged youth.

CONCLUSION

Justice Thurgood Marshall understood that educational civil rights can only be granted by an active judiciary. Years of right-wing appointments, however, have buried this understanding under a pile of "Impeach Earl Warren" bumper stickers. It would be naive to think that civil rights of any kind will experience a renaissance as long as conservative presidents continue to push the Court further to the right, but this does not mean that progressives should ignore their duty to provide an alternative vision of the law. When conservatives were dissatisfied with desegregation orders and other cases that expansively interpreted the Fourteenth Amendment, they responded with a comprehensive vision for a right-wing Constitution—the very vision captured by the Reagan-era *Guidelines*.[183] This narrow vision can be defeated, but it can only be defeated by demanding meaningful rights instead of empty formalism.

Crucible. They play Vivaldi, perform *King Lear* and outperform other students on standardized tests."); Lynn Rosellini, *Getting Young Lives in Line*, U.S. NEWS & WORLD REP., Mar. 22, 2004, at 87 ("Most KIPP students are poor and enter with reading and math skills well below grade level. Yet the schools have consistently taken disadvantaged children and dramatically boosted their academic achievement.").

182. *See supra* note 181 and accompanying text.

183. *See supra* notes 69–71 (describing the *Guidelines*' view of equitable relief).