# THE LEGACY AND IMPLICATIONS OF SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ

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## I. INTRODUCTION

The Supreme Court's school desegregation case law has been a confusing maze of fits and starts. In 1954, a unanimous Court declared in Brown v. Board of Education[1] that education "must be made available to all on equal terms."[2] Yet, less than 20 years later, the Court found a Texas education financing plan that allowed for significant differences in funding between school districts to be constitutional.[3] This Article examines that decision, San Antonio Independent School District v. Rodriguez,[4] in more detail. It also discusses the case's legacy and numerous unresolved issues that still impact the Latino community today.

Part II of the Article deals with the case itself, including the dissent penned by Justice Thurgood Marshall. This Part also discusses the evolving recognition of a unique Latino identity demonstrated by a comparison between Rodriguez and the earlier Ninth Circuit case of Westminster School District of Orange County v. Mendez.[5] It further discusses the implications on the case's holding of the shift from the Warren Court to the Burger Court.

Part III discusses the case's legacy. This includes the possibilities for future school desegregation and funding litigation suggested by the Court's language and how advocates for equalization of school funding have proceeded in the forty years since Rodriguez. It also briefly deals with the current status of education in Edgewood, Texas, what has become of the Rodriguez plaintiffs, and how the Latino community has developed since the litigation concluded. This part concludes by considering the continuing problem of the disparity between public safety spending and education spending and the implications of the Development, Relief, and Education for Alien Minors (DREAM) Act[6] for the Latino community, with a special emphasis on the Act's possible impacts regarding education.

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[1] Brown v. Board of Education, 347 U.S. 483 (1954).
[2] Id. at 493.
[3] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 6 (1963).
[4] See generally id.
[5] Westminster Sch. Dist. of Orange Cnty. v. Mendez, 161 F.2d 774 (9th Cir. 1947).
[6] S. 952, 112th Cong. (2011); H.R. 1842, 112th Cong. (2011). Companion DREAM Act legislation was brought in Senate by Senator Richard Durbin (D-IL) and in the House of Representatives by Representative Howard Berman (D-CA). See generally IMMIGRATION POLICY CTR., infra note 234, at 1.

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

### A. The Majority Opinion

In 1968, when Mexican-American parents whose children attended the Edgewood Independent School District of San Antonio, Texas first brought the litigation that ultimately resulted in Rodriguez, Texas's schools operated under a complex system of funding.[7] Shortly after its entry into the Union in 1845, Texas had adopted a dual approach to funding schools that relied on the mutual participation of the local school districts and the state.[8] Local school districts were given the power to levy ad valorem taxes "for the 'erection … of school buildings' and for the 'further maintenance of public free schools,'" and these funds were supplemented by funds distributed to each district from the State's Permanent and Available School Funds.[9] However, as Texas became increasingly industrialized in the early twentieth century, significant differences in the value of assessable property became evident.[10] Recognizing that the state funds were increasingly unable to offset these local disparities, the state legislature created a committee in 1947 composed of educators and legislators whose task was to "propose a funding scheme that would guarantee a minimum or basic educational offering to each child that would help overcome interdistrict disparities in taxable resources."[11]

The committee's efforts led to the establishment of the Texas Minimum Foundation School Program, the funding system that was in place when the Rodriguez litigation was first brought.[12] This program called for state and local contributions to a fund that was allotted specifically for teacher salaries, operating expenses, and transportation costs.[13] Texas, using funds from its general revenues, funded approximately 80% of the Program and the school districts collectively provided the remaining 20%.[14] Each district's contribution to the districts' share, known as the Local Fund Assignment, was determined under a formula designed to reflect each district's relative taxpaying ability; each district financed its share of the

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[7] Rodriguez, 411 U.S. 1 at 9–11.
[8] Id. at 6.
[9] Id. at 7.
[10] Id. at 8.
[11] Id. at 9.
[12] Id. at 9.
[13] Rodriguez, 411 U.S. at 9.
[14] Id. at 9.

Assignment through revenues from local property taxation.[15] At the time of the litigation, every school district in Texas imposed a property tax through which it derived "locally expendable funds in excess of the amount necessary to satisfy its Local Fund Assignment under the Foundation Program."[16]

Despite these efforts at equalization, by 1968 significant disparities between school districts still existed. The Mexican-American parents who initiated the action that led to Rodriguez brought a class action on behalf themselves and their children, as well as on behalf of all other children throughout Texas who lived in school districts with low property valuations.[17] They argued that the current method of state financing for public elementary and secondary education deprived their class of equal protection of the laws under the Fourteenth Amendment to the Constitution.[18]

The United States District Court for the Western District of Texas found that Texas's education funding system violated the plaintiffs' equal protection rights under the Fourteenth Amendment.[19] The court made this determination by first looking at data from the 1967-68 school year, which showed that Texas's funding system resulted in significant disparities between school districts.[20] The court then found that Texas's constitutional and statutory framework for education funding drew distinctions between citizens depending on the wealth of the district where they lived and that -- despite the arguments of the San Antonio School District that there was a rational relationship between these distinctions and a legitimate state purpose -- "more than mere rationality [was] required . . . to maintain a state classification which affect[ed] a 'fundament interest,' or which [was] based upon wealth."[21] The court found both characteristics present in Texas's education funding system, as education was a fundamental interest and the classifications at issue were based upon wealth.[22] It subsequently determined that Texas's system of funding could only be upheld upon a showing that there was a compelling state interest in the system, and that Texas had failed to make such a showing.[23] It noted, however, that Texas's

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[15] Id. at 9–10.
[16] Id. at 10–11.
[17] Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 281 (W.D. Tex. 1971).
[18] Id.
[19] Id. at 285.
[20] Id. at 281–82.
[21] Id. at 282.
[22] Id.
[23] Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 282–84 (W.D. Tex. 1971).

showing had failed "even to establish a reasonable basis for these classifications.[24]" Due to its findings, the district court ordered that Texas adopt a new plan that did not "make the quality of public education a function of wealth other than the wealth of the state as a whole."[25] The state appealed, and the Supreme Court noted probable jurisdiction in order to consider the constitutional questions presented.[26]

The Supreme Court reversed.[27] Writing for the Court, Justice Powell began his analysis by first explaining Texas's educational funding system and considering the data that had been before the district court regarding educational funding disparities and the racial makeup of the various districts in San Antonio.[28] Justice Powell noted that Edgewood, with a racial makeup of students that was 90% Mexican-American and 6% African-American, spent a total of $356 per pupil.[29] Meanwhile Alamo Heights, the most affluent school district in San Antonio with a racial makeup consisting of a majority of white students and only 18% Mexican-American student and 1% African-American students, spent $594 per pupil.[30] The Court found that these funding disparities, and others like them throughout the state, were largely attributable to differences in the amount of money collected through local taxation.[31] It was these disparities that had compelled the district court to find that Texas's educational system violated the plaintiffs' equal protection rights under the Fourteenth Amendment.[32] Justice Powell noted that Texas had essentially conceded that its funding system could not pass the strict judicial scrutiny found appropriate by the district court and stated his belief that, if this was the correct system of review, few other state educational funding systems would be able to "pass muster."[33] The question thus became whether Texas's system of educational funding required strict judicial scrutiny and, if it did not, whether it rationally furthered a legitimate, articulated state purpose.[34] In order to determine whether Texas's system required strict judicial scrutiny, the Court

[24] Id. at 284.
[25] Id. at 285.
[26] San Antonio Indep. Sch. Dist. v. Rodriguez, 406 U.S. 966, 966 (1972).
[27] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 6 (1973).
[28] Id. at 6–14.
[29] Id. at 12.
[30] Id. at 12–13.
[31] Id. at 15.
[32] Id. at 15–16.
[33] Rodriguez, 411 U.S. at 16–17.
[34] Id.

proceeded to consider whether the system either: (1) was based on a suspect-classification or (2) implicated a fundamental interest.[35]

The Court first demonstrated that in this context wealth was not a suspect classification. It noted that the district court, and other courts to find wealth a suspect classification in school funding contexts, had simply assumed that, because in traditional school funding contexts some poor people received less expensive educations than some more affluent people, such systems discriminated on the basis of wealth.[36] This ignored important threshold questions, such as whether it made a difference for the constitutional analysis that the class could not be defined in customary equal protection terms, or whether the relative nature of the deprivation was of significant consequence.[37]

The Court analyzed these threshold determinations, suggesting first that -- based on the District Court opinion and the appellees' complaint, briefs, and contentions at oral argument -- there were at least three ways to characterize the group that the Rodriguez plaintiffs asserted was being discriminated against.[38] These were to suggest that the system was discriminating: "(1) against 'poor' persons whose incomes f[e]ll below some identifiable level of poverty or who might be characterized as functionally 'indigent,' or (2) against those who are relatively poorer than others, or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts."[39] Looking to precedent, Justice Powell demonstrated that the individuals who constituted the class discriminated against in previous cases before the Court involving wealth had been completely unable to pay for some desired benefit and, as a result, had "sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[40] He suggested that only the first method of describing the class at issue here would arguably fit into these criteria, but even this group failed to meet both requirements.[41] This was because it was both untrue to suggest that those individuals who were indigent were clustered into the poorest school districts, and because these individuals still received a public education and hence had not suffered "an absolute deprivation of the desired benefit."[42] The Court then also dismissed the

[35] Id. at 17.
[36] Id. at 18–19.
[37] Id. at 19.
[38] Id.
[39] Rodriguez, 411 U.S. at 19–20.
[40] Id. at 20–22.
[41] Id. at 22.
[42] Id. at 23.

second and third possible articulations of the class. It noted that in regards to the second description of the class the proof of a direct correlation between family wealth and expenditures for education was lacking,[43] and that the third classification -- which it said was the one embraced by Justice Marshall in his dissent -- was too "large, diverse, and amorphous" a class to merit strict scrutiny.[44]

Having rejected wealth in this context as a suspect classification, the Court proceeded to consider whether education was a fundamental interest. While the Court took pains to note its belief that education was a vital service provided by the state, it also noted that this acknowledgement did not "determine whether [education] must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[45] Based on numerous precedents, the Court concluded that the proper means of determining whether or not education was "fundamental" required an assessment of whether "there is a right to education explicitly or implicitly guaranteed by the Constitution."[46] The Court noted that education was not among the rights given explicit protection by the Constitution, and that it could find no basis for suggesting that it was implicitly protected.[47]

The Court also rejected the plaintiffs' contention that education was distinguishable from other services provided by the state because it bore "a peculiarly close relationship to other rights and liberties afforded protection under the Constitution," such as freedom of speech rights under the First Amendment and the right to vote.[48] While the Court had repeatedly provided "zealous" protection to these rights, Justice Powell noted that the Court had never "presumed to possess either the ability or the authority to guarantee the citizenry the most effective speech or the most informed electoral choice."[49] Indeed, even though providing effective speech and informed choice were desirable, Justice Powell believed it was inappropriate for these goals to be implemented by judicial intrusion into legitimate state activities.[50] Furthermore, even if it could be demonstrated that some basic level of education was required to adequately utilize either the right to vote or First Amendment rights, the record contained no evidence that Texas's education system was providing any of its pupils an

[43] Id. at 25–27.
[44] Id. at 28.
[45] Rodriguez, 411 U.S. at 30.
[46] Id. at 33–34.
[47] Id. at 35.
[48] Id. at 35.
[49] Id. at 36.
[50] Id.

education that fell short of its base level.[51] Justice Powell also noted that the nexus theory urged by the plaintiffs had few logical limitations.[52] For these reasons, the Court determined that there was no fundamental right to education.[53]

Having determined that Texas's education system should not be subject to strict scrutiny, the Court still had to consider whether the system passed rational basis review -- requiring that it "bear some rational relationship to legitimate state purposes."[54] The Court first noted its hesitancy to intrude on decisions regarding state fiscal policies, as this was an area "traditionally deferred to state legislatures"[55] based on the significant "familiarity with local problems" required to make such determinations.[56] The Court also noted that this case would further require it to make judgments regarding educational policy, and that such judgments were similarly best made by those with "specialized knowledge and expertise" regarding local conditions.[57]

[51] Rodriguez, 411 U.S. at 36–37.
[52] Id. at 37.
[53] Id.
[54] Id. at 40.
[55] Id.
[56] Id. at 41.
[57] Rodriguez, 411 U.S. at 42.

Following its acknowledgement of these significant issues, the Court rehashed its earlier description of Texas's school finance system in order to show how its unique contours impacted the equal protection analysis.[58] Justice Powell demonstrated that Texas's reliance on both state and local resources was comparable to "systems employed in virtually every other state,"[59] and that this system adequately balanced that struggle between the "desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children."[60] The Court rejected the plaintiffs' argument that Texas's system was unconstitutionally arbitrary, noting, "if local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes."[61] Based on these considerations, the Court determined that "to the extent the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory."[62] Rational basis review required merely that a state's action "rationally further[] a legitimate state purpose or interest," and the Court found that Texas's "plan abundantly satisfie[d] [that] standard."[63]

## B. Justice Marshall's Dissent

Justice Thurgood Marshall penned an eloquent dissent to the Court's opinion in Rodriguez. [64] As Judge Jeffrey Sutton of the Sixth Circuit has argued, Justice Marshall's position as one of the winning lawyers in Brown meant that he had a unique appreciation of "the significance of [Rodriguez], including the possibility that the promises of Brown would never be fulfilled unless the courts not only eliminated de jure segregation by race but also curbed the effects of de facto segregation by wealth."[65] Indeed,

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[58] Id. at 44–47.
[59] Id. at 47–48.
[60] Id. at 49 (quoting James Coleman, Foreword to GEORGE D. STRAYER AND ROBERT M. HAIG, THE FINANCING OF EDUCATION IN THE STATE OF NEW YORK vii (1923)) (internal quotation mark omitted).
[61] Id. at 54.
[62] Id. at 54–55.
[63] Rodriguez, 411 U.S. at 55.
[64] Justice Douglas joined Justice Marshall in his dissent. Id. at 70 (Marshall, J., dissenting).
[65] Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez And Its Aftermath, 94 VA. L. REV. 1963, 1970 (2008).

Justice Marshall sought to invoke the spirit of Brown in the second paragraph of his dissent, citing to Brown for the idea that the Court should not allow for a political solution "sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that may affect their hearts and minds in a way unlikely ever to be undone."[66]

Justice Marshall first considered the Court's description of Texas's funding system.[67] He noted that the data presented in the district court amply demonstrated the disparate consequences of Texas's local property tax.[68] Indeed, Justice Marshall believed the data showed that, no matter how hard poor districts tried (such as by raising their tax rate), they could not achieve even near parity with their better off neighbors.[69] He also noted the failure of Texas's Minimum Foundation Program to close this gap as much as was intended when the law was initially put into place.[70] In particular, a comparison of the Edgewood and Alamo Heights neighborhoods demonstrated that state aid was doing very little, if anything at all, to narrow the gap.[71] Justice Marshall took stock of these various points in an attempt to refute the majority's repeated reference to how much state aid had gone to poor school districts; he noted, instead, that it was clear that Texas's state programs failed to adequately compensate for the large funding variations between different districts.[72]

Justice Marshall next considered the argument that, whatever the differences in funding, there were no discriminatory consequences for the children of the disadvantaged districts.[73] Justice Marshall believed that this was an absurd contention, as considerations of discrimination in education should be an "objective" inquiry that looked "to what the State provide[d] children, not to what the children [we]re able to do with what they receive[d]."[74] By this objective standard, differences in educational funding were indeed discriminatory. Justice Marshall again called on his previous experience with the NAACP to make this point, citing the cases of Sweatt v.

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[66] Rodriguez, 411 U.S. at 71–72 (Marshall, J., dissenting) (citing Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).
[67] Id. at 72–73.
[68] Id. at 74.
[69] Id. at 75.
[70] Id. at 79–80.
[71] Id. at 80–81 (Marshall, J., dissenting).
[72] Rodriguez, 411 U.S. at 81–82.
[73] Id. at 82.
[74] Id. at 84.

Painter[75] and McLaurin v. Oklahoma State Regents for Higher Education[76] -- cases Justice Marshall had argued in his time as an NAACP lawyer -- for the idea that the court had previously found violations of the Fourteenth Amendment based on disparities in funding.[77] He also noted that there was at least some evidence from the data before the district court that the disparities in funding had resulted in worse educational opportunities for poor children in Texas.[78] Beyond that, however, Justice Marshall rejected the Court's apparent contention that Texas's state funding programs had improved the position of children in the poorer districts enough to eliminate claims of intradistrict discrimination in available education resources.[79] The Court had "never [before] suggested that because some 'adequate' level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action.'"[80] By this standard, Texas's funding system ran afoul of the Equal Protection Clause.[81]

Justice Marshall proceeded to analyze the majority's claim that there was not a sufficiently defined disadvantaged class in this case.[82] He did not believe that there existed any source that stated that a necessity predicate for an equal protection claim was the "precise identification of the particular individuals who compose[d] the disadvantaged class," and that there was no reason for the imposition of such a requirement.[83] Justice Marshall rejected any arguments to the contrary, and suggested that there was more than sufficient evidence in the case that the form of discrimination here was "between the schoolchildren of Texas on the basis of the taxable property wealth of the districts in which they happen to live."[84]

Perhaps especially relevant for this article's analysis was Justice Marshall's description of why the district court's determination that Texas's law must overcome strict scrutiny was correct. Justice Marshall rejected the Court's suggestion that a "fundamental interest" was only one found in the

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[75] Sweatt v. Painter, 339 U.S. 629 (1950).
[76] McLaurin v. Oklahoma, 339 U.S. 637 (1950).
[77] Rodriguez, 411 U.S. at 84–85 (Marshall, J., dissenting).
[78] Id. at 85–86.
[79] Id. at 87.
[80] Id. at 88.
[81] Id. at 89–90.
[82] Id. at 91.
[83] Rodriguez, 411 U.S. at 94.
[84] Id. at 96–97

text of the Constitution itself, suggesting this was far too rigid a metric.[85] Indeed, he suggested that the Court had repeatedly found rights nowhere guaranteed in the text of the Constitution, such as the right to procreate, to vote in state elections, or to appeal in a criminal conviction, to be fundamental.[86] While he acknowledged that the majority might be correct that choosing which rights were fundamental was difficult, Justice Marshall refused to accept that it could not be done or that it would merely devolve into an "unprincipled, subjective 'picking-and-choosing.'"[87] Those rights found fundamental but not explicitly guaranteed by the Constitution were afforded special judicial consideration because they were so "interrelated with constitutional guarantees" as to be worthy of additional protection.[88] Indeed, he noted, ""only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself."[89] As to they types of classifications worthy of more careful judicial consideration, Justice Marshall demonstrated that the Court had consistently adjusted the care given based on the invidiousness of the particular classification.[90] He then proceeded to consider these two issues -- fundamental interests and suspect classifications -- individually.

Justice Marshall first turned to the question of whether education was a fundamental interest. He found the Court's opinion to fly in face of the importance of education indicated in previous Court decisions, the "unique status accorded public education by our society," and "the close relationship between education and some of our most basic constitutional values."[91] The Court's suggestion that education was not a fundamental interest disregarded one of the central tenets of Brown and failed to acknowledge the substantial relationship between education and numerous Constitutional guarantees, including First Amendment rights and rights to participation in the political process.[92] The majority mischaracterized this issue, as the question was not whether the state must guarantee "the most effective speech or the most informed choice," but instead whether the interrelation of education and substantive constitutional rights meant that laws impinging on educational opportunity should receive a more searching equal

[85] Id. at 99.
[86] Id. at 100.
[87] Id. at 84–85, 102.
[88] Id. at 103.
[89] Rodriguez, 411 U.S. at 103.
[90] Id. at 109.
[91] Id. at 111.
[92] Id. at 84–85, 110–113 (Marshall, J., dissenting).

protection analysis.[93] Given *Brown's* holding that "the opportunity of education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms,'" anything less than a searching inquiry into laws that impinged on individual educational opportunity was insufficient.[94]

Next, Justice Marshall considered whether the classification at issue in Rodriguez was suspect enough to warrant strict scrutiny. He first noted that the Court had previously repeatedly found that wealth could create suspect classifications and merit strict scrutiny.[95] He found that the two characteristics that the Court suggested must be apparent for wealth to be such a classification -- a complete inability to pay for a desired benefit and an accompanying absolute deprivation of the benefit -- were not actually present in all of the previous precedents finding wealth classifications to merit strict scrutiny.[96] Instead, the Court should have made a determination regarding the appropriateness of strict scrutiny by looking at "the importance of the interests being affected and the relevance of personal wealth to those interests."[97] With those considerations in mind, Justice Marshall found the case before the Court an ideal candidate for strict scrutiny.[98]

Having shown strict scrutiny to be the appropriate standard, Justice Marshall concluded by subjecting Texas's educational financing laws to strict scrutiny. He first noted, however, that like the district court he did not believe that Texas's laws could even pass rational basis review.[99] This was because he found the state's only justification -- the importance of local educational control -- to be an excuse rather than a justification for the educational inequity that was presented to the district court.[100] The need for local educational control did not suggest that there also must be local fiscal control and -- even if local fiscal control was judged important -- Texas had, "rather than reposing in each school district the economic power to fix its own level of per pupil expenditure," arranged the system "to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes)."[101] Based on the record before the Court, Justice Marshall

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[93] Id. at 115–116.
[94] Id. at 116.
[95] Rodriguez, 411 U.S. at 117.
[96] Id. at 117–18.
[97] Id. at 122.
[98] Id.
[99] Id. at 126.
[100] Id.
[101] Rodriguez, 411 U.S. at 127–29 (quoting Van Dusartz v. Hatfield, 334 F. Supp. 870, 876 (D.C. Minn.

found insufficient justification for the clear discrimination present in Texas's school financing system and believed Texas's financing system violated the Equal Protection Clause.[102]

## C. Racial Identity of Latinos at the time of Rodriguez

While its outcome was obviously a step backwards from the broad educational equity promised by Brown, Rodriguez in some ways demonstrated both advancements in society's understanding regarding Latinos in the early and mid-twentieth century as well as a developing Latino self-identity. A comparison of the Court's approach to Latino racial identity here with the earlier understanding of Latino racial identity exhibited by the Ninth Circuit in Mendez bears this contention out. The great paradox in this comparison is that the increasing acknowledgement of Latino identity by the Rodriguez court led to a judicial defeat, while the Ninth Circuit's grouping of Latino students with white students in Mendez led to a judicial victory.

Latino identity in the United States has always contained many elements that defy easy characterization despite attempts at broad racial grouping. While, unlike African-Americans, Latinos did not have to content with the many injustices that resulted from enslavement and its aftermath, Latino Americans in the early twentieth century were nonetheless treated as second-class citizens.[103] The 1910s and 1920s saw a great increase in the number of Latino Americans in the United States as many Mexicans "were recruited to come [to the United States] as cheap labor for various industries."[104] While these immigrants became integral to many American agricultural and industrial undertakings, a sense that these individuals were somehow not "real Americans" continued to pervade the American consciousness.[105] With the Great Depression came a wave of anti-immigrant hysteria and Latino Americans, particularly those who were of Mexican dissent or were perceived to be of Mexican dissent, were not immune.[106] Indeed, both federal and local governments engaged in systematic mass deportations between 1929 and 1944 that scholars have estimated either

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1971) (internal quotation mark omitted).

[102] Id. at 132–33.

[103] Eric L. Ray, Comment, Mexican Repatriation and the Possibility for a Federal Cause of Action: A Comparative Analysis on Reparations, 37 U. MIAMI INTER-AM. L. REV. 171, 174 (2005).

[104] Id.

[105] Id. at 172.

[106] See id. at 174–75.

"forcefully deported" or "forcefully persuaded to leave the United States for Mexico" between 500,000 and two million individuals perceived to be Mexican.[107] Many of these people were U.S. citizens or legal residents.[108]

For those Latino Americans who remained in the United States, developing an identity that centered on the claim that they were quintessential members of the United States became essential to social advancement.[109] Many members of the Mexican American community began to assert that Mexicans were racially white.[110] This push resulted in a change in census categorization, as where the 1930 Census had "listed Mexicans as a separate race, under an imprecise definition of persons born in Mexico, or with parents born in Mexico, and who were 'not definitely white, Negro, Indian, Chinese, or Japanese,'" pressure from Mexican Americans and the Mexican government caused "the 1940 Census [to] classif[y] persons of Mexican-descent as 'white,' if they were 'not definitely Indian or of other nonwhite race . . .'"[111] This also resulted in a change in legal strategies to combat discrimination against Mexican-Americans, as most prominent Mexican American civil rights organization, including the League of United Latin American Citizens and the GI Forum, attacked segregation not on the ground that this racial practice was morally wrong, but because Mexican Americans were ostensibly white. Employing what they termed the "other white" strategy, these groups insisted that Mexican Americans were members of the white race and that, consequently, no basis existed for subjecting Mexicans to racial segregation of the sort imposed on blacks.[112]

Mendez, a case involving discrimination against Mexican-Americans in California in the late 1940, perfectly illustrates this legal strategy. Under a common plan practiced by California school officials in the 1940s, all children of "Mexican and Latin descent" were barred from schools attended by other children and segregated into schools solely attended by other children of "Mexican and Latin descent."[113] The parents of Mexican children subject to this discrimination brought a class action lawsuit against

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[107] Id. at 171.
[108] Id. at 171.
[109] Ian Haney López, White Latinos, 6 HARV. LATINO L. REV. 1, 2 (2003).
[110] Id.
[111] Steven Harmon Wilson, Some Are Born White, Some Achieve Whiteness, and Some Have Whiteness Thrust Upon Them: Mexican Americans and the Politics of Racial Classification in the Federal Judicial Bureaucracy, Twenty-five Years After Hernandez v. Texas, 25 CHICANO-LATINO L. REV. 201, 207–08 (2005).
[112] López, supra note 109, at 2.
[113] Westminster Sch. Dist. of Orange Cnty. v. Mendez, 161 F.2d 774, 776 (9th Cir. 1947).

the Westminster School District of Orange County, and the District Court for the Southern District of California found that the segregation practiced by the school district was "arbitrary and discriminating and in violation of rights guaranteed to plaintiffs by the Constitution of the United States."[114] While the Ninth Circuit considered numerous issues regarding the district court's conclusion, of particular relevance here was the court's consideration of Supreme Court precedent upholding "state laws providing for limited segregation of the great races of mankind."[115] While the defendants urged the court to find their practice of segregation acceptable based on these precedents, numerous amicus briefs suggested the court should find segregation against children of any race unconstitutional.[116] The court rejected both these suggestions.[117] Instead, inspired by the arguments of the Mexican-American plaintiffs in this case, the court ruled that the Supreme Court precedent cited was not relevant here as: (1) California's segregation was based on an administrative decree rather than a legislative act; and (2) the cited cases only involved segregation between "one or another of the great races of mankind."[118] For the court, then, segregating between Latino children and white children would be segregating "within one of the great races," suggesting that the court grouped Latino children with white children rather than with African-American children.[119] The Ninth Circuit thus affirmed the district court and found the discrimination practiced against the Latino American children to be unconstitutional.[120]

By the time of Rodriguez, however, Latino racial identity, both in terms of self-identification as well as government classification, had undergone significant changes. The first factor in these changes was the African-American civil rights movement of the 1960s, which led to many laws that

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[114] Id. Indeed, many would read the district court's decision as having ruled that separate but equal was inherently unconstitutional. See, e.g., Neil Foley, Over the Rainbow: Hernandez v. Texas, Brown v. Board of Education, and Black v. Brown, 25 CHICANO-LATINO L. REV. 139, 145 (2005). The district court's ruling and reasoning likely inspired arguments made by Thurgood Marshall and the NAACP in Brown and subsequent segregation cases, as Marshall supported the Mendez litigation and wrote an amicus brief for the NAACP in support of the Mendez plaintiffs in the Ninth Circuit. See id. at 145. Marshall's amicus brief seized on arguments made in the district court to argue that "separation itself [is] violative of the equal protection of the laws . . . on the grounds that equality cannot be effected under a dual system of education." Id. (quoting Motion and Brief of Amicus Curiae NAACP at 9, Mendez, 161 F.2d 774 (No. 11310)) (internal quotation marks omitted). The Ninth Circuit rejected these arguments. Mendez, 161 F.2d at 780.

[115] Mendez, 161 F.2d at 779.

[116] Id. at 780. These briefs included the brief filed by Thurgood Marshall on behalf of the NAACP. See supra note 114.

[117] Mendez, 161 F.2d at 780.

[118] Id.

[119] Id.

[120] Id. at 781.

Latino activists began to see as crucial for combating lingering discrimination against their community. Among these laws was the Civil Rights Act of 1964, which authorized federal officials to withhold funds from states that continued to permit racial discrimination and specifically authorized "the Department of Health, Education, and Welfare (HEW) to issue goals and guidelines for school desegregation."[121] HEW's Office of Civil Rights, however, initially only gathered discrimination statistics using the categories of white and black, but after pressure from Hector Garcia, the first Mexican American member of the U.S. Civil Rights Commission, the Office of Civil Rights expanded its consideration to consider "black, white, and 'other' in 1967 in order to address Mexican American complaints of discrimination."[122] Other was defined to encompass "Indian American, Oriental, Eskimo, Mexican-American, Puerto Rican, Latin, Cuban, etc."[123]

The second factor in these changes was the growth of the Chicano movement of the late 1960s. Many of the older generation of Mexican Americans in the mid-to-late 1960s still subscribed to the idea of their racial identity as being primarily white and resisted any association with African-Americans.[124] For the younger generation, however, exposure to the racial self-identification of the Black Power movement, as well as the first Mexican labor strikes organized by Cesar Chavez in 1965, led to an increasing tendency to proclaim a non-white identity and to see their struggle through the lens of the Black Power movement.[125] This also resulted in a growing awareness of the continuing discrimination against Mexican Americans. In one week in March 1968, the same year that the Rodriguez plaintiffs first brought their lawsuit, continuing disgust over discrimination and poor school conditions led over 10,000 high school students in the overwhelmingly Mexican East Los Angeles to walk out of school.[126] Many have viewed this event as the birth of the Chicano movement that led to an increasing Mexican American and Latino identity.[127] Indeed, when Rodriguez was finally decided in 1973, the federal government adopted the term Hispanic for the first time.[128]

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[121] Wilson, supra note 111, at 209.
[122] Id. at 209–10.
[123] Id. at 210.
[124] Ian F. Haney López, Protest, Repression, and Race: Legal Violence and the Chicano Movement, 150 U. PA. L. REV. 205, 218–19 (2001).
[125] Id. at 219–20.
[126] Id. at 207.
[127] Id.
[128] ARMANDO NAVARRO, MEXICANO POLITICAL EXPERIENCE IN OCCUPIED AZTLÁN: STRUGGLES AND CHANGE 408 (2005). The term was first used by the Department of Health, Education and Welfare based on the recommendation of the Task Force on Racial/Ethnic Categories. Id.

The Rodriguez litigation demonstrates the result of these movements. Both the plaintiffs in the case and the Court's decision posited that the discrimination practiced upon the plaintiffs in the case was discrimination based on wealth.[129] This framing allowed the plaintiffs to accomplish three different, important goals. First, it allowed the plaintiffs to include both discrimination against Latino Americans and discrimination against African-Americans by the Texas law under the same umbrella. Second, it acknowledged separate racial identities for African-Americans, Latino Americans, and whites, as demonstrated by the court's use of statistics counting these individual groups separately.[130] Third, it allowed the plaintiffs to argue for an equalization of funding, rather than desegregation, as a remedy to their concerns. Such a remedy was more in keeping with the self-help solutions urged by both the Black Power and Chicano movements.[131]

Paradoxically, however, this litigation strategy failed where the Mendez litigation strategy, arguing that discrimination against Latinos was wrong because they were also white, had succeeded. Perhaps the litigation strategy was in part to blame, but numerous other factors, specifically, the difficulties in attacking a system that was still unfair but no longer explicitly segregated and the shift from the Warren to the Burger court, were more likely responsible for the Court's decision.[132] Nonetheless, Rodriguez is interesting for the light it sheds on an increasingly developing Latino identity.

### D. What Were the Implications of a Shift From the Warren Court to the Burger Court?

As noted above, the shift from the Warren Court to the Burger Court likely played a principal role in the Supreme Court's decision in Rodriguez.

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[129] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1,18–20. (1963).

[130] See, e.g., id. at 12–13 ("The school population is predominantly 'Anglo,' having only 18% Mexican-Americans and less than 1% Negroes.").

[131] See James Forman, Jr., The Secret History of School Choice: How Progressives Got There First, 93 GEO. L.J. 1287, 1306–07 at nn. 115–16 (2005). In terms of school desegregation, this tendency towards self-help is generally demonstrated by the community control movement, which argued that local residents should be able to take control of their schools away from the centralized bureaucracy. See id. at 1305. This movement grew, in some measure, out of frustration with the struggle for integration, as some activists began to believe that "if white families were so hostile to integrating, black and brown people might as well get on with the business of taking control of and improving their own schools." Id. at 1306.

[132] The importance of the shift from the Warren Court to the Burger Court is discussed in further detail below. See infra Section II.D.

From his appointment by President Eisenhower in 1953 till his retirement in 1968, Chief Justice Earl Warren led one of the most far-reaching, liberal courts in Supreme Court history.[133] Included among the Court's decisions were: (1) an end to school desegregation in Brown;[134] (2) the unanimous declaration that states could not choose to ignore the Court's opinions in Cooper v. Aaron;[135] (3) the assertion that states must provide attorneys for defendants unable to afford them in Gideon v. Wainwright.[136] For many conservatives and strict constructionists, the Warren Court's rulings were troublesome and guaranteed rights far beyond those included in the Constitution.

Richard Nixon was among those troubled by the Warren Court's perceived activism. His election to the presidency in 1968 was largely brought about by an appeal to law-and-order voters who had grown tired of the cultural upheaval of the 1960s and had grown increasingly conservative.[137] Nixon promised a return to simpler times, and included among his many criticisms of the country's cultural upheaval was frequent criticism of the activist decisions of the Supreme Court under Chief Justice Warren.[138] Given the opportunity to appoint a new Chief Justice upon Chief Justice Warren's retirement in 1968, Nixon chose Warren Burger, a judge on the United States Court of Appeals for the District of Columbia Circuit. Nixon had promised to appoint a strict-constructionist to the court throughout his campaign, and Burger was a perfect candidate who was a known critic of the Warren Court's jurisprudence.[139]

By 1973, the Court included three additional appointments by President Nixon: Justice Blackmun, Justice Powell, and Justice Rehnquist.[140] As Judge Sutton notes, this made the Court "a different forum in which to advance the argument that education was a fundamental right or that wealth was a suspect class."[141] Indeed, the five-member Rodriguez majority consisted of the four Nixon appointees and Justice Stewart.[142]

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[133] See e.g., James B. O'Hara, Introduction to THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION 3, 3 (Bernard Schwartz ed., 1998).
[134] Brown v. Board of Education, 347 U.S. 483, 493 (1954).
[135] Cooper v. Aaron, 358 U.S. 1, 19–20 (1958).
[136] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
[137] Allen Rostron, The Law and Order Theme in Political and Popular Culture, 37 OKLA. CITY U. L. REV. 323, 334 (2012).
[138] Id. at 335–36.
[139] See O'Hara, supra note 133, at 3.
[140] Sutton, supra note 65, at 1968.
[141] Id.
[142] Id.

The differences between the Warren Court and the Burger Court can be seen by illustrating, as Justice Marshall did in his dissent,[143] the stark difference between the language of Brown and Rodriguez. In Brown, the Court remarked that:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[144]

Conversely, less than 20 years after Brown, the Rodriguez Court found that, "to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory."[145] Thus, the promise of broad educational equality made by the Warren Court had instead, in the hands of a Burger Court loathe to intrude in what it perceived as properly legislative determinations, become merely a promise to correct those systems so rife with inequality as to be invidiously discriminatory. The Burger Court would further cabin Brown's reach the next year in Milliken v. Bradley,[146] which clarified the distinction between de jure and de facto segregation in holding that segregation alone, absent a showing of an explicit policy meant to further it, did not merit a judicial remedy under Brown or the Court's discrimination cases that followed it.[147]

## III. LEGACY

### A. Possibilities For Future Litigation

One of the interesting things to look at when considering Rodriguez's implications is what the Supreme Court's ruling told future litigants who

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[143] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 71–72 (1973) (Marshall, J., dissenting).
[144] Brown v. Board of Education, 347 U.S. 483, 493 (1954).
[145] Rodriguez, 411 U.S. at 54–55.
[146] See Milliken v. Bradley, 418 U.S. 717, 719 (1974).
[147] Id. at 745–47.

would seek to allege that educational inequality violated their rights under the Equal Protection Clause of the Fourteenth Amendment. The Court rejected the argument that the disparities between the rich and poor neighborhoods were unconstitutional, instead noting that whether "the quality of education may be determined by the amount of money expended for it" was an unsettled question and that, "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."[148] Justice Marshall in dissent disputed whether such a holding was truly in keeping with the language and spirit of Brown, noting that considerations of discrimination in education should be an "objective" inquiry that looked "to what the State provide[d] its children, not to what the children [were] able to do with what they receive[d]."[149]

Whether or not it was in keeping with Brown, the Court's reasoning would appear to suggest that a case where plaintiffs could demonstrate that poor children were receiving an "inadequate education" would prove more successful. What would be required to prove such a discrepancy, however, was left an open question. Subsequent educational discrimination cases before the Supreme Court to consider Rodriguez do not appear to have precisely resolved this question.[150]

The requirement of such a showing, however, demonstrates the great irony of the success of the litigants in Brown. Pre-Brown, African-Americans were repeatedly successful in bringing equal protection cases by basing their claims on disparities in the resources provided to segregated black schools in comparison to white schools.[151] However, Rodriguez suggests that, in order for post-Brown litigants to make out a successful Equal Protection claim, they must demonstrate not only a disparity in funding between schools but also that such disparity in funding has resulted in unequal educational opportunities. Whether or not this was the intention of the Court in Brown, it appears to be a part of Brown's legacy.

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[148] Rodriguez, 411 U.S. at 23–24.

[149] Id. at 84 (Marshall, J., dissenting).

[150] See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788–790 (2007) (Kennedy, J., concurring); Missouri v. Jenkins, 515 U.S. 70, 99–102 (1995); Papasan v. Allain, 478 U.S. 265, 266–67, 283–89 (1986); Plyler v. Doe, 457 U.S. 202, 221, 223–24, 229–30 (1982).

[151] See, e.g., Sweatt v. Painter, 339 U.S. 629, 633–35 (1950); McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637, 640–42 (1950). Justice Marshall, in fact, noted this point in his dissent in Rodriguez. Rodriguez, 411 U.S. at 84–85.

## B. Effects of the Case on Racial/Ethnic Groups Other than African-Americans

Although Rodriguez did not directly benefit work to mitigate funding disparities between wealth and poor school districts, the case indirectly led to a partial decrease in funding disparities.[152] The decision left states and state courts empowered to curb funding inequality within their borders.[153] Both the majority and the dissent advanced manners in which states could mitigate funding disparities.[154] Indeed, although Justice Powell's majority opinion allowed for the continuance of a funding system that allowed wealthier districts to provide better educations to their students than poorer district, it did not prevent states from finding funding equations that could better distribute money to school districts.[155] In dicta, Justice Powell stated that the Court's decision should not be seen as "placing [the Court's] judicial imprimatur on the status quo. . . . And certainly innovating thinking as to public education . . . and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. . . But the ultimate solutions must come from lawmakers . . ."[156] Additionally, Justice Powell noted that there were two way, apart from the funding equation in question, in which school district funding could be equalized if states chose to do so: (1) state-wide financing of school districts; and (2) a financing scheme that would provide districts a specified amount of money regardless of the districts' taxes bases by redistributing money from wealthier districts to poor districts.[157] Further, in a footnote to his dissent, Justice Marshall explicitly noted, and arguably encouraged, states to continuing reviewing this issue under their state constitutions. Justice Marshall wrote "nothing in the Court's decision . . . should inhibit further review of state educational funding schemes under state constitutional provisions."[158]

The alternatives and remedies that both Justices Powell and Marshall offered have been utilized throughout the states to mitigate the inequities that disparities in school funding have caused. During the time of Rodriguez and in the years since, most state legislatures have passed wealth-equalization formulas for funding their public schools,[159] and every state has

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[152] Sutton, supra note 65 at 1971–72.
[153] See Rodriguez, 411 U.S. at 58–59 (majority opinion), 68–69 (White, J., dissenting).
[154] Id. at 58 (majority opinion), 68–69 (White, J., dissenting).
[155] Id. at 58 (majority opinion), 68–69 (White, J., dissenting).
[156] Id. at 58–59.
[157] Id. at 41 n. 85.
[158] Rodriguez, 411 U.S. at 133 n. 100 (Marshall, J., dissenting).
[159] Sutton, supra note 65, at 1971.

enacted some type of school-financing equalization scheme.[160] While Justice Powell's legislative remedy took hold throughout the country, Justice Marshall's call for further review of state education funding did not go unheeded. Indeed, there were two waves of school-funding litigation in state courts proliferated from 1973 to the present.[161]

In the first wave of litigation, from 1973 – 1989, claimants focused on the gap between rich and poor school districts, and the difficulty that poor school districts had in closing the gap.[162] During this phase of litigation, claimants based their arguments on equal protection and other rights clauses that were in state constitutions.[163] In the second, and more successful, litigation wave from 1989 to the present, claimants attacked states' methodologies for determining guaranteed funding and the level of the funding.[164] To do so, claimants implicated the education clauses found in states' constitutions,[165] which often guaranteed access to "thorough and efficient" public schools.[166] Under this legal strategy, plaintiffs have won nearly two-thirds of the education-funding lawsuits they have brought.[167] State court challenges on the issue of school funding made a great deal of sense since schools are local creatures. Despite the loss to the Rodriguez plaintiffs, "[r]ight or wrong, Rodriguez unleashed school-funding innovation throughout the country that continues to this day."[168]

A prominent example of the tangible effect that the post-Rodriguez second wave school-financing litigation has had on the learning outcomes of children is the long-running Abbott v. Burke education litigation in New Jersey. Over the course of more than thirty-five years, the New Jersey Supreme Court has handed down decisions that have supported continued decreases in funding disparities between rich districts and poor districts.[169] In the second iteration of the Abbott case, Abbott II,[170] the plaintiff argued that the state's statutory financing provisions for public elementary and

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[160] Id. at 1972. Only Hawaii has adopted the other funding scheme Justice Powell mentioned—the statewide funding option. Id.
[161] See id. at 1973.
[162] Id.
[163] Id.
[164] Id.
[165] Id.
[166] Id. at 1974.
[167] Id. As of June 2008, plaintiffs have won twenty-eight of the forty-five state-constitutional challenges to states' systems of funding public schools. Id.
[168] Sutton, supra note 65, at 1977.
[169] History of Abbott v. Burke, EDUC. LAW CTR., http://www.edlawcenter.org/cases/abbott-v-burke/abbott-history.html (last visited Oct. 25, 2013).
[170] Abbott ex rel. Abbott v. Burke, 575 A.2d 359 (N.J. 1990).

secondary schools was unconstitutional because it produced financial and education disparities that were in conflict with the Thorough and Efficient Clause[171] of the state's constitution.[172] The court found that, in violation of the state's constitution, certain poorer urban school districts did not provide a thorough and efficient education to their students.[173] The court also found that the constitutional deficiency was a product of the statutory funding scheme and ordered that the statute be amended or that new legislation be passed so that poorer urban districts received "substantially equal" funding to that of the wealthier property-rich districts.[174] The court listed twenty-eight school districts that it believed met the criteria for "poorer urban districts."[175] Years later in Abbott V,[176] the New Jersey Supreme Court mandated further reforms to the education in the so-called Abbott districts that called for the implementation of a variety of learning reforms including the creation of "full-day kindergarten and a half-day pre-school program."[177] In accordance with this line of cases, the New Jersey Department of Education promulgated regulations that required Abbott districts to enroll ninety-percent of preschool-aged children in an early learning program by the 2005 – 2006 school year.

The effects of the increased funding have led to substantial gains for some Abbott districts. In one Abbott-designated district, Union City, the influx of funding to implement the court's orders helped to strengthen a the academic foundations of a city that was in educational disrepair. A predominantly immigrant city where most individuals speak another language than English in the home[178] and where more than ninety percent of its student are eligible for a free or reduced-price school lunch,[179] Union City was one of the lowest-performing school districts in New Jersey.[180] However, in the years following the Abbott decisions and the increase in funding that allowed the district to implement its policy goals,[181] Union City

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[171] N.J. CONST. art. VIII, § 4, para. 1.
[172] Abbott, 575 A.2d at 362–63, 366.
[173] Id. at 408.
[174] Id.
[175] Id. at 408, 412–14.
[176] Abbott ex rel. Abbott v. Burke, 710 A.2d 450 (N.J. 1998).
[177] Id. at 473–74.
[178] State & County QuickFacts: Union City (city), New Jersey, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/34/3474630.html (last modified June 27, 2013).
[179] Data & Research, EDUC. L. CTR., http://www.edlawcenter.org/research/data-research.html (scroll down to "Students in Special Programs 2012–13" section; then find and click on "Union City" in the scroll list of "Free/Reduced Lunch by District") (last visited Oct. 27, 2013).
[180] Gordon MacInnes, Lessons from New Jersey, AM. PROSPECT (June 13, 2010), http://prospect.org/article/lessons-new-jersey.
[181] Cf. Sara Mead, *Education Reform Starts Early: Lessons from New Jersey's PreK*-3rd Reform Ef-

saw dramatic gains in the academic achievement of its students. When the state first tested fourth graders in 1999, only one-third of Union City fourth graders were thirty-one points lower than higher-performing Abbott districts.[182] By 2008, nearly seventy-eight percent of fourth graders in the city were proficient, closing the gap to eight points.[183] Moreover, by 2008, the gap in math between the city's eighth graders and those in non-Abbott districts closed to only three percentage point, narrowing from twenty-six percentage points in 1999.[184] State court-mandated changing in funding has benefitted the city's school district and the children that it serves.

### C. Where are the Rodriguez Litigants and What is the State of Education Funding in Edgewood, Texas Today?

Though information on the Rodriguez litigants is hard to come by, one book dedicated to the case placed Demetrio Rodriguez, named plaintiff and one of the Edgewood parents that filed the original lawsuit, in the same Edgewood neighborhood where he lived when the case was first litigated.[185] After the case, Mr. Rodriguez continued to fight for well-financed schools, and was recognized for his contributions to the fight for access to quality education.[186] On April 22, 2013, Mr. Rodriguez passed away from complications of Parkinson's Disease.[187] Mr. Rodriguez's daughter Patricia, one of the catalysts for Mr. Rodriguez's decision to take part in the suit,[188] is a third-grade bilingual teacher in the Edgewood School District.[189] Years after the litigation that brought school-funding disparities to the Supreme Court, the Edgewood schools have been funded at the same levels as public

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forts, NEW AM. FOUND. 18 (Dec. 2009), http://www.newamerica.net /sites/newamerica.net/files/ policydocs /Education%20Reform%20Starts%20Early_0.pdf; Tracking Progress, Engaging Communities: Union City Abbott Indicators Technical Report, EDUC. L. CTR. 73–75 (Spring 2005), http://www.edlawcenter.org/assets/files/pdfs/publications /AbbottIndicators Technical_UnionCity.pdf.

[182] MacInnes, supra note 180. The students were tested for proficiency in literacy. Id.

[183] Id.

[184] Id.

[185] PAUL A. SRACIC, SAN ANTONIO V. RODRIGUEZ AND THE PURSUIT OF EQUAL EDUCATION 153 (2006).

[186] William Celis III, *One Man's Legal Odyssey*, N. Y. TIMES (Apr. 10, 1994), http://www.nytimes.com/1994/04/10/education/one-man-s-legal-odyssey.html; see also Elaine Ayala, Rodriguez, Who Fought for Equality Dies at 87, MYSANANTONIO.COM (Apr. 23, 2013), http://www.mysanantonio.com/news/local_news/.article/Rodriguez-who-fought-for-equality-dies-at-87-4456618.php.

[187] Elaine Ayala, Rodriguez, Who Fought for Equality Dies at 87, MYSANANTONIO.COM (Apr. 23, 2013), http://www.mysanantonio.com/news/local_news/.

[188] Id.

[189] Id.

schools in wealthier school districts.[190] In fact, in the 2003 – 2004 academic year, the Edgewood School District spent slightly more money on a per pupil basis than Alamo Heights, the wealthy district that Edgewood first used to highlight the stark disparity in school funding.[191]

### D. Where Is the Latino Community Today?

Post-Rodriguez, the Latino community has grown in number and is as diverse as ever before. As of 2011, nearly fifty-two million Latinos lived in the United States, amounting to nearly seventeen percent of the population and up from nearly thirteen percent in 2000.[192] The states with the highest concentration of Latinos (in order of Latino population size) are California, Texas, Florida, New York, and Illinois;[193] nearly two-thirds of Latinos live in these five states alone.[194] Despite how this population is grouped when counted, Latinos are not an ethnic monolith; indeed, there is no strong sense of commonality among Latinos from different ethnicities. By a nearly two-one-margin across nearly all major Latino demographic subgroups, Latinos believe that they have many different cultures rather than a common culture.[195] This is a belief that is also found at the governmental level. In fact, according to both current federal policy and accepted social science, "Hispanics do not constitute a separate race and can in fact be of any race."[196] The 2000 Census illustrated this point by first asking respondents to mark whether they were "Spanish/Hispanic/Latino" and then in a separate question to identify their race.[197] Indeed, while Mexican Americans, Cubans, and Puerto Ricans share a common language and cultural roots, "national loyalties are too deeply internalized and the social and cultural experiences and history of each nationality are too divergent

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[190] See SRACIC, supra note 185, at 149; see also Sutton, supra note 65, at 1976.

[191] Sutton, supra note 65, at 1976–77.

[192] SETH MOTEL & EILEEN PATTEN, PEW RESEARCH CTR., STATISTICAL PORTRAIT OF HISPANICS IN THE UNITED STATES, 2011, tbl.1 (2013), available at http://www.pewhispanic.org/files/2013/02/Statistical-Portrait-of-Hispanics-in-the-United-States-2011_FINAL.pdf.

[193] Id. tbl. 15.

[194] See id.

[195] PAUL TAYLOR ET AL., PEW RESEARCH CTR., WHEN LABELS DON'T FIT: HISPANICS AND THEIR VIEWS OF IDENTITY 19 (2012), available at http://www.pewhispanic.org/files/ 2012/04/PHC-Hispanic-Identity.pdf.

[196] SONYA TAFOYA, PEW HISPANIC CTR., SHADES OF BELONGING 1 (2004), available at http://pewhispanic.org/files/reports/35.pdf.

[197] Id.

for [terms such as "Hispanic"] to be the basis of identity and group self-image."[198]

Along with their growth in population, the education needs of the Latino community have grown as well. Currently, Latinos are the youngest major racial or ethnic group with a median age of twenty-seven,[199] and are the largest minority group within the nation's public school system.[200] Additionally, Latinos saw a twenty-four percent increase in their college enrollment from 2009 to 2010, and the number of Latinos enrolled in two or four-year colleges grew to an all-time high in 2010.[201] However, this success does not account for the overall trend in educational attainment among Latinos. Overall, despite the growth in their acquisition of postsecondary opportunities, Latinos have the lowest educational attainment level of any other group in the country.[202] As of 2011, less than half of Latino children were enrolled in any early childhood education program and only half of Latinos in high school earned their diploma on time.[203] At the postsecondary level, only thirteen percent of Latinos have a bachelor's degree and only four percent have a graduate or postgraduate degree.[204]

The educational attainment issues of Latinos are compounded by the economic status that they face. Latinos face a poverty rate of nearly twenty-six percent that is higher than the overall U.S. poverty rate (15.9 percent), and more than thirty-four percent of Latino children live in poverty as compared to 22.5 percent of the child population overall. [205] In spite of the hardships that Latinos in face in comparison with other demographic groups, more than two-thirds of Latinos either believe that they have been as successful in the United States as other minority groups or have been more successful.[206] This finding suggests that despite the current state of the

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[198] J.R. Porter & R. E. Washington, Minority Identity and Self-Esteem, 19 ANN. REV. SOCIOLOGY 139, 141 (1993).

[199] TAFOYA, supra note 196, at 14.

[200] WHITE HOUSE, WINNING THE FUTURE: IMPROVING EDUCATION FOR THE LATINO COMMUNITY 1, available at http://www2.ed.gov /about/inits/list/hispanic-initiative/ winning-the-future-improving- education- latino-community.pdf.

[201] RICHARD FRY, PEW HISPANIC CTR., HISPANIC COLLEGE ENROLLMENT SPIKES, NARROWING GAPS WITH OTHER GROUPS 3 (2011), available at http://www.pewhispanic.org/files/ 2011/08/146.pdf.

[202] WHITE HOUSE, supra note 200, at 1–2.

[203] Id. at 1–2. Those Latino students who do complete their secondary education are "only half as likely as their peers to be prepared for college." Id. at 2.

[204] Id. at 2.

[205] SETH MOTEL, PEW RESEARCH CTR., STATISTICAL PORTRAIT OF HISPANICS IN THE UNITED STATES, 2010, tbl.37 (2012), available at http://www.pewhispanic.org/2012/02/21/statistical-portrait-of-hispanics-in-the-united-states-2010/.

[206] TAYLOR ET AL., supra note 195, at 18.

community and problems that it must face, Latinos are positive about the how they are faring in the United States and how their plight compares with that of other minorities in the country.

## E. Public Safety Spending v. Education Spending

Despite the steps that have been taken to reduce the funding inequalities between poor and wealth school districts, there has yet to be a diminution in one other important funding disparity: that between prison spending and education spending. State criminal corrections spending has outpaced growth in spending on education, transportation, and public assistance,[207] and, after adjusting for inflation, state spending on criminal correction has tripled over the past three decades and has become the fasting-growing budgetary expense after Medicaid.[208] Indeed, according to a review of data from the Department of Justice and the National Education Association, many states spend three to four times more per capita on incarceration than on education.[209] California, the most populous state in the union, spends about $47,000 per inmate while spending approximately $9,000 per student.[210] New York spends roughly $56,000 per prisoner and about $16,000 for its students, while Georgia and Michigan each spend about a third of the amount on their public school students as they do on their prison populations.[211]

The same dichotomy between criminal corrections spending and public school spending can be found between criminal corrections spending and higher education spending. Research has shown that, adjusting for inflation, over the twenty-year period from 1987 to 2007 states' corrections spending grew more than the six times more than spending on higher education.[212] Regionally, the differences between higher education and prison spending were more pronounced. During the same time period, inflation-adjusted

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[207] Solomon Moore, Prison Spending Outpaces All but Medicaid, N.Y. TIMES Mar. 3, 2009, at A13, available at http://www.nytimes.com/2009/03/03/us/03prison.html?_r=0.

[208] John Tierney, For Lesser Crimes, Rethinking Life Behind Bars, N.Y. TIMES Dec. 12, 2012, at A1, available at http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=all&_r=0.

[209] Elizabeth Prann, States Spend Almost Four Times More Per Capita on Incarcerating Prisoners Than Educating Students, Studies Say, FOX NEWS (Mar. 14, 2011), http://www.foxnews.com/ politics/2011/03/14/states-spend-times-incarcerating-educating-studies-say-464156987/.

[210] Id.

[211] Id.

[212] PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 4 (2008), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf (2008).

prison spending in the Northeast rose sixty-one percent while higher education spending in the region dropped 5.5 percent.[213] In the West, the amount of money allotted to prisons grew 205 percent while money spent on postsecondary education only grew twenty-eight percent.[214] Analysis on the spending disparity between prison and higher education at the state reveals an even more staggering divide. In 2011, California's postsecondary education received thirteen percent less inflation-adjusted dollars than in 1980 while criminal corrections received a 436 percent expansion in funding during the same period.[215]

In all, the growth in state spending on prisons and criminal corrections has outpaced the growth in education spending. However, unlike the push for funding parity between rich school districts and poor school districts that occurred during the aftermath of Rodriguez, there does not seem to be a concerted, serious push to reverse the trend of the growth in prison spending outpacing the growth in education spending.[216] The policy discussion surrounding the growth in funding of incarceration and education presents a zero-sum proposition, because, unlike the federal government, most states have to balance their budgets.[217] As a result, a dollar spent in one area is a dollar that can no longer be spent in another.[218] The effects of this decision could have significant consequences for the future of the children from poor areas whom Rodriguez litigation aimed to benefit and who have benefitted from the education funding cases post-Rodriguez litigation. Children from low-income areas are at a distinct disadvantage when increases in prison spending result in slower growth or a reduction in education spending. Research has shown that significant concentrations of people going to prison came from poor neighborhoods of color, and in these neighborhoods millions of dollars are being spent to

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[213] Id. at 15.

[214] Id.

[215] PRERNA ANAND, CAL. COMMON SENSE, WINNERS AND LOSERS: CORRECTIONS AND HIGHER EDUCATION IN CALIFORNIA (2012), http://www.cacs.org/ca/article/44.

[216] In his 2010 State of the State address, Governor Arnold Schwarzenegger of California called for a state constitutional amendment that would ensure that funding of higher education would exceed spending on prison. NAACP, MISPLACED PRIORITIES: OVER INCARCERATE, UNDER EDUCATE 15 (2011), available at http://naacp.3cdn.net/ecea56adeef3d84a28_azsm639wz.pdf. However, the governor's proposal failed to get a serious transaction. Pat Wingert, Classrooms or Prison Cells?, NEWSWEEK (June 28, 2010, 6:00 AM), http://mag.newsweek.com/2010/06/28/classrooms-or-prison-cells.html.

[217] PEW CTR. ON THE STATES, supra note 212, at 15. See generally NAT'L CONFERENCE OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISION 3 (2010), available at http://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf (reporting the number of states in which a governor must submit a balanced budget, the number of states in which the legislature must pass a balanced budget, and the number of states that are barred from carrying over a deficit from year to year).

[218] PEW CTR. ON THE STATES, supra note 212, at 15.

incarcerate its residents.[219] As a result, money spent on incarceration is often the predominant public investment in those communities while education opportunities are dwindling with repeated budget cuts.[220] According to researchers, completing school is a critical protective factor for adolescents who come from troubled neighborhoods.[221] Yet, money is diverted from this resource to incarceration, preventing low-income youth in many areas of the country from having quality access to an effective tool for betterment.

## F. Implications of the Dream Act

One topic that is important to any discussion surrounding issues affecting the Latino community is the plight of undocumented immigrants in the United States. Currently, there are 11.7 million immigrants living without proper documentation in the United States,[222] and an estimated 1.8 million undocumented immigrants are children.[223] Despite their immigration status, undocumented children are guaranteed a primary and secondary education.[224] In invalidating a Texas law that denied funding to school districts to educate children not "legally admitted" into the United States and authorized school districts to deny public school enrollment to such children,[225] the Supreme Court established in Plyler v. Doe that undocumented children are "persons" under the Fourteenth Amendment[226] and are entitled to the equal protection of the laws that a state may choose to establish.[227] Although the Court noted that public education is not right and cited Rodriguez to support this proposition,[228] it also stated that the denial of education to some groups of children conflicted with one of the goals of the Equal Protection Clause: "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of

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[219] NAACP, supra note 216, at 19.
[220] Id.
[221] Id. at 17.
[222] JEFFREY S. PASSEL ET AL., PEW RESEARCH CTR., POPULATION DECLINE OF UNAUTHORIZED IMMIGRANTS STALLS, MAY HAVE REVERSED 6 (2013), http://www.pewhispanic.org /files/2013/09/ Unauthorized-Sept-2013-FINAL.pdf.
[223] ROBERTO G. GONZALES, COLLEGE BD., YOUNG LIVES ON HOLD: THE COLLEGE DREAMS OF UNDOCUMENTED STUDENTS 6 (2009), http://professionals.collegeboard.com/profdownload/young-lives-on-hold-college-board.pdf.
[224] See Plyler v. Doe, 457 U.S. 202 (1982).
[225] Id. at 205.
[226] Id. at 210.
[227] Id. at 215.
[228] Id. at 221 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)).

individual merit."[229] The Court then argued that denying undocumented children an education would prevent them from being able to "live within the structure of [American] civic institutions" and prevent them from contributing to the country.[230] Taking these factors into account, the Court held that a state could not deny undocumented children a primary or secondary education unless it furthered a substantial goal of the state.[231] As a result of the ruling, almost all undocumented children attend elementary school.[232]

However, the same cannot be said of access to higher education for undocumented students. While Plyler guaranteed access to elementary and high school education for undocumented youths, the decision did not address postsecondary education.[233] Each year 65,000 undocumented youth who have been in the country for five years or longer graduate from high school.[234] However, while no federal law prohibits the admission of undocumented immigrants to U.S. colleges and universities or requires proof of immigration status or citizenship to enter institutions of higher learning, this group of young adults faces an uncertain future without proper documentation. While many colleges have a "don't ask, don't tell" policy regarding the admission of undocumented students, the most significant factor that these youth face is financing their continued education.[235] Without legal status, undocumented students are not eligible for federal financial aid nor are they legally allowed to work in order to help defray the costs of their education.[236] Although, sixteen states permit undocumented students to pay in-state tuition,[237] the price to attend college is still high. As such, it is estimated that only five to ten percent of undocumented high school graduates move go to college because most cannot afford tuition or because some schools will not allow them to matriculate.[238]

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[229] Id. at 221–22.
[230] Plyler, 457 U.S. at 223.
[231] Id. at 224.
[232] GONZALES, supra note 223, at 11.
[233] Id.
[234] Id. at 4.
[235] Desiree Adib, Undocumented Students Struggle Toward College, ABC NEWS (Apr. 12, 2009), http://abcnews.go.com/GMA/Weekend/story?id=7197094&singlePage=true.
[236] See id.
[237] The following states currently provide in-state tuition for undocumented students: California, Colorado, Connecticut, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Texas, Utah, and Washington. NAT'L CONFERENCE OF STATE LEGISLATURES, UNDOCUMENTED STUDENT TUITION: STATE ACTION (July 2013), http://www.ncsl.org/issues-research/ educ/undocumented-student-tuition-state-action.aspx.
[238] IMMIGRATION POLICY CTR., THE DREAM ACT: CREATING OPPORTUNITIES FOR IMMIGRANT

A popular solution[239] for solving the problem of immigration status for undocumented young adults and the related complications that their status brings is the DREAM Act. The DREAM Act was first introduced in 2001 by bipartisan coalitions in the House of Representatives and in the Senate.[240] The legislation has come up for a vote several times in the past decade since it was introduced; however, it has failed to become law.[241] The DREAM Act would provide a pathway for legal status for an estimated 2.1 million undocumented young people who came to the United States as children,[242] commonly known as DREAMers. The legislation places a number of conditions on undocumented young adults in order for them to gain citizenship. In order to obtain legal status, an undocumented young person must have lived in the United States continuously for five years prior to the enactment of the Act and must have been fifteen years old or younger when they initially entered the country.[243] Those who seek to gain citizenship must have also graduated from high school, earned their GED, or have been admitted to an institution of higher learning.[244] An eligible person would receive lawful permanent resident status if he or she has been of good moral character during the six year period of conditional permanent resident status and if he or she has acquired a degree from a postsecondary institution; completed at least two years—in good standing—bachelor's degree program or higher; or has served in the military for at least two years and, if discharged, received honorable discharge.[245] Eligibility and eventual citizenship under the DREAM Act would make higher education more accessible to undocumented young adults. Under the proposed legislation, students who would be granted conditional permanent resident status under the Act would be eligible for tuition assistance in the form of federal work-study and federal student loans, and states would no longer be restricted in providing financial aid to those students.[246]

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STUDENTS AND SUPPORTING THE U.S. ECONOMY 1 (2011), available at http://www.immigrationpolicy .org /sites/default/files/docs/Dream_Act_updated_051811.pdf.

[239] Ninety-one percent of Latinos support the DREAM Act. PEW RESEARCH CTR., LATINOS OVERWHELMINGLY SUPPORT DREAM ACT (July 9, 2012), http://www.pewresearch.org/daily-number/latinos-overwhelmingly-support-dream-act/.

[240] IMMIGRATION POL'Y CTR., supra note 238, at 5.

[241] See id. at 5.

[242] JUAN CARLOS GUZMÁN & RAÚL C. JARA., CTR. FOR AM. PROGRESS, THE ECONOMIC BENEFITS OF PASSING THE DREAM ACT 1 (2012), available at http://www.americanprogress.org /wp-content /uploads/2012/09/DREAMEcon-7.pdf.

[243] S. 952, 112th Cong. § 3 (b)(1)(A) - (B) (2011).

[244] S. 952, 112th Cong. § 3 (b)(1)(E) (2011).

[245] S. 952, 112th Cong. § 3 (a)(1) (2011).

[246] See S. 952, 112th Cong. § 3 (a)(1) (2011).

The impact of the DREAM Act on both eligible persons and the nation is significant. In an economic context, researchers have estimated that the implementation of the DREAM Act would add $329 billion to the U.S. economy by 2030.[247] Since one of the legislation's requirements is for undocumented young adults to attain at least an associate-level degree in order to be eligible for legalization, this legislation creates a strong incentive for DREAMers to complete high school and to obtain or to continue their postsecondary education. Further, enactment of the DREAM Act would produce thousand of college graduates that would become part of the pool of higher-income earners.[248] Currently, most undocumented immigrants are not able to work legally; as a result, many undocumented young adults are forced to work under-the-table jobs that do not require skilled labor.[249] Passage of the DREAM Act would boost the earnings of eligible undocumented young adults by allowing them to work legally, which would allow DREAMers to employ their skills and education in above-board jobs.[250] Additionally, as these individuals attain further education, they will be able to obtain higher paying jobs that will spur the economy.[251] By 2030, the additional earnings of DREAMers are projected to result in the addition of $4.6 billion in new federal business tax revenue and $5.6 billion in household income tax.[252] Moreover, during the same time period, the increased spending power of DREAMers is estimated to support the creation of 1.4 million new jobs.[253] Passage of the DREAM Act has the potential to be impactful not just for those young, undocumented Latinos it would benefit, but also for the nation.

## IV. CONCLUSION

Rodriguez emerges from this analysis with a mixed legacy. While it was a certainly a blow to the initial promise of Brown, the suggestions by Justice Powell and Justice Brown for ways for state legislatures and state courts to curb educational funding disparities have met with some success. Despite these efforts, however, much work remains to be done. Closing, or at least narrowing, the gap between public safety spending and education spending would be a good start, as would the passage of the DREAM Act.

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[247] GUZMÁN & JARA., supra note 242, at 1.
[248] Id. at 2.
[249] IMMIGRATION POL'Y CTR., supra note 238, at 4.
[250] GUZMÁN & JARA, supra note 242, at 8.
[251] Id.
[252] Id. at 10.
[253] Id.

Fifty-nine year later, Brown's promise of education "available to all on equal terms" remains unfulfilled.