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Rhode Island's School Funding Challenges in Historical Context

Daniel W. Morton-Bentley*

INTRODUCTION

A new federal lawsuit, *A.C. v. Raimondo*, alleges that Rhode Islanders have a constitutional right to a basic level of education.¹ While the specific claim in that lawsuit is novel, its approach is not. Beginning in the 1970s, education advocates filed numerous federal lawsuits alleging that state funding mechanisms for local school districts violated students' constitutional rights to education and equal protection.² When the United States Supreme Court rejected these arguments in the 1973 case of *San Antonio Independent School District v. Rodriguez*, advocates presented their arguments to state courts, alleging similar violations based on state constitutional provisions.³ Rhode Island's funding system was challenged in the 1995 case of *City of Pawtucket v. Sundlun*.⁴ The Rhode Island Supreme Court decisively rejected the challenge, as well as a successor case filed almost two decades later.⁵ State

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1. Complaint 2, ¶ 1, *A.C. v. Raimondo*, No. 1:18-cv-00645 (D. R.I. Nov. 28, 2018), <https://www.tc.columbia.edu/media/news/images/2018/november/CookvRaimondoFINAL.pdf> [<https://perma.cc/HD8T-DLF3>].

2. *Id.* at 15.

3. See 411 U.S. 1, 4 (1973).

4. 662 A.2d 40, 42 (R.I. 1995).

5. *Id.* at 62–63; *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778, 792 (R.I. 2014).

courts have reached different conclusions as to whether their state constitutions impose funding or adequacy obligations.

Does the Rhode Island Constitution require equality or some measure of adequacy in state funding to local school districts? This question actually presents two questions: *does* the Rhode Island Constitution impose such a requirement, and, regardless, *should* the Constitution impose such a requirement? In this Article, I contend that neither of these questions can be answered without examining Rhode Island's school funding challenges in historical context. This Article examines two historical periods that are crucial to understand whether Rhode Island's Constitution confers a right to educational funding. The first is the 1840s, a tumultuous decade that produced the Rhode Island Constitution.⁶ The second period is the 1960s and 1970s, the period when advocates, inspired by the educational jurisprudence that grew out of *Brown v. Board of Education*, invented and sold the constitutional argument for school funding.⁷

I further contend that the Rhode Island Supreme Court reached the correct—or at least the only historically defensible—conclusion in *City of Pawtucket v. Sundlun*. There is no evidence that Rhode Island sought to enshrine an equality or adequacy principle in its Constitution. This argument was the creation of imaginative, well-intentioned academics in the 1960s and 1970s. While greater funding for impoverished school districts is a noble goal, the Rhode Island Supreme Court wisely declined to reach such a policy into the Rhode Island Constitution based in part on a lack of historical evidence.

As evidenced by *A.C. v. Raimondo*, endless permutations of the constitutional argument for educational adequacy persist. I contend that these arguments should be subjected to the same historical scrutiny as the funding challenge in *City of Pawtucket v. Sundlun*. A close examination of the history of a constitutional provision ensures the existence of an independent judiciary. To ignore history invites judicial activism, which is a double-edged sword: it may favor liberal causes one day and conservative ones the next.⁸

6. See discussion *infra* section III.

7. See 347 U.S. 483 (1954).

8. MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 4 (2009) (“The new model of public law litigation has become such an established part of the legal landscape that conservatives

A brief word is necessary regarding the method of constitutional interpretation employed in this Article. There exists a vigorous debate as to how to best interpret statutory or constitutional provisions. Two “isms” dominate the literature from the 1980s to the present: textualism and originalism. These theories, appealing in their simplicity, have become saddled with qualifications. A recent book by the late Justice Antonin Scalia and Bryan A. Garner promoting textualism identified fifty-seven canons of statutory interpretation (and thirteen “false rules”),⁹ while originalism, according to one commentator, begat the theory of “original intentions originalism,” which begat “new” originalism.¹⁰ The academy is engaged in a perpetual quest for a theory that will unlock all constitutional conundrums, past and present.

I decline to fashion any such theory. While there is wisdom in textualism (words should be the focus of the inquiry), originalism (the intention and history of a provision matter), and the living constitution (constitutional meanings can evolve over time), I proceed on the assumption that the paramount consideration is the text of a constitutional provision and the historical circumstances that motivated its enactment. In addition, I explicitly reject the fundamentalist assumption that there is one “true” interpretation of such provisions. If lawyers wish to dabble in history, they must understand that the discipline is one of constant argument and critique, not preordained certainty.¹¹

as well as liberals now routinely look to the courts to remedy legislative or executive actions of which they disapprove.”).

9. ANTONIN SCALIA AND BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

10. M. Alexander Pearl, *Originalism and Indians*, 93 *TULANE L. REV.* 269, 275–76 (2018).

11. See JOSEPH J. ELLIS, *THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783-1789* 212, n.37 (2015). I also reject the two-fold approach suggested by Alexander Bickel in his article, “The Original Understanding and the Segregation Decision.” Bickel suggested that one should first examine “the congressional understanding of the immediate effect of the enactment on conditions then present,” and second, examine “what if any thought was given to the long-range effect, under future circumstances, of provisions necessarily intended for permanence.” Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1, 59 (1955). Bickel was one of Justice Felix Frankfurter’s law clerks when the Court issued the merits and remedy decisions in *Brown v. Board of Education*. His theory, then, is better understood as a defense of *Brown* rather than an interpretive method with broad applicability. See also Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor*

Part II of this Article offers a general history of public education in Rhode Island. Part III discusses Henry Barnard and Thomas Wilson Dorr, whose actions in the 1840s made an indelible mark on public education in Rhode Island. Part IV examines the United States Supreme Court's holding in *Brown v. Board of Education*, the case that spawned immeasurable litigation concerning public education.¹² Part V is devoted to a discussion of post-war legal activism, the Warren Court, and public education. Part VI addresses school funding litigation, first at the federal level and, after 1973, at the state level. Part VII analyzes the two Rhode Island school funding challenges, and Part VIII offers a brief conclusion.

II. A BRIEF HISTORY OF PUBLIC EDUCATION IN RHODE ISLAND

Massachusetts was the pioneer in colonial education. The Massachusetts Bay Colony was settled by Puritans, a Calvinist sect that fled religious persecution in England.¹³ Generally, colonial towns in New England during the seventeenth and eighteenth centuries, including the Massachusetts Bay Colony, funded local schools by a tax levied on residents.¹⁴ These schools were run by a teacher or schoolmaster selected by the town. As Protestants, the Puritans believed in the authority of the written Bible above all else.¹⁵ Education, then, was useful insofar as it would facilitate reading the Bible.¹⁶

Two colonial Massachusetts laws anticipated future trends in education. First, a 1642 law required compulsory school attendance, punishable by fine.¹⁷ This reflected a social

McConnell, 81 VA. L. REV. 1881 (1995).

12. 347 U.S. 483, 495 (1954).

13. GA. DEP'T OF EDUC., TEACHER NOTES: UNITED STATES HISTORY FOR THE GEORGIA STANDARDS OF EXCELLENCE IN SOCIAL STUDIES 44 (May 31, 2017), <https://www.georgiastandards.org/Georgia-Standards/Documents/Social-Studies-United-States-History-Teacher-Notes.pdf> [https://perma.cc/X5BC-GVA4].

14. *Id.* at 8.

15. See *April 14, 1642: Massachusetts Passes First Education Law*, MASSMOMENTS.ORG, <https://www.massmoments.org/moment-details/massachusetts-passes-first-education-law.html> [https://perma.cc/N3BY-9LH4] (last visited Jan. 27, 2019) [hereinafter *Massachusetts Passes First Education Law*].

16. *Id.*

17. *Id.*

commitment to school attendance.¹⁸ Second, a 1647 Massachusetts law required towns with fifty or more inhabitants to appoint schoolmasters, and towns with one hundred or more inhabitants to create grammar schools.¹⁹ The latter law became known as the “Old Deluder Satan Act” after its memorable preface, which indicated that it was a “chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures”²⁰ In New England, schools remained religiously grounded into the early nineteenth century.²¹

Rhode Island did not follow the Massachusetts model of education. After banishment from the Massachusetts Bay Colony for his anti-authoritarian views of religion (particularly his conception of “soul liberty”), theologian Roger Williams welcomed fellow religious outcasts to Rhode Island, including Baptists, Quakers, and Jews.²² For Williams and others, public education smacked of religion—specifically, Puritanical religion.²³ This contributed to antipathy toward a mass system of public education, which could, religious minorities feared, become a tool to silence religious dissent. It also reflected the “rampant individualism” of the colony. Scholar Edith Nye MacMullen posits that “[f]ear of centralization and a concentration of power were almost pathological” among Rhode Islanders.²⁴

18. *Id.* Whether this actually achieved compliance is beside the point. As scholar David B. Tyack put it, “generally these laws were unenforced and probably unenforceable.” David B. Tyack, *Ways of Seeing: An Essay on the History of Compulsory Schooling*, 46 HARV. EDUC. REV. 355, 359 (1976).

19. *Massachusetts Passes First Education Law*, *supra* note 15.

20. *Old Deluder Satan Law of 1647*, MASS.GOV, <https://www.mass.gov/files/documents/2016/08/ob/deludersatan.pdf> [<https://perma.cc/J5ML-Z3R9>] (last visited Feb. 22, 2019).

21. One aspect of this legacy was that Thomas Wilson Dorr’s People’s Constitution, discussed herein, explicitly referenced the “fear of God” as a rationale for a system of public education. CHARLES A. CARROLL, PUBLIC EDUCATION IN RHODE ISLAND 13 (1918).

22. *October 9, 1635: Roger Williams Banished*, MASSMOMENTS.ORG, <https://www.massmoments.org/moment-details/roger-williams-banished.html> [<https://perma.cc/3JMR-FLYK>] (last visited Jan. 27, 2019) [hereinafter *Roger Williams Banished*].

23. *See Massachusetts Passes First Education Law*, *supra* note 15.

24. EDITH NYE MACMULLEN, IN THE CAUSE OF TRUE EDUCATION: HENRY BARNARD AND THE 19TH CENTURY SCHOOL REFORM 106 (1991). Charles A. Carroll, whose 1918 book “Public Education in Rhode Island” was relied upon by the Rhode Island Supreme Court relied in *City of Pawtucket v. Sundlun*, contests this assertion and resents any implication of “alleged backwardness in education.” CARROLL, *supra* note 21, at 13.

Despite these fears, in the wake of the industrial revolution, middle-class Rhode Islanders eventually warmed to the idea of public education. Ample access to waterpower made northern Rhode Island uniquely situated to become the center of the state's industrial revolution.²⁵ The technology for the water-powered textile mill had been pioneered in England by Jedediah Strutt.²⁶ Samuel Slater, one of eight children in an English farming family, apprenticed with Strutt in the late eighteenth century.²⁷ Slater realized the potential of the textile mill and memorized as much of the design as he could.²⁸ After Slater's apprenticeship expired in 1789, he immigrated to New York to replicate the experiments in America.²⁹ While in New York, he learned that Moses Brown, a Rhode Island businessman, sought to introduce cotton spinning and textile production to Rhode Island.³⁰ Brown and Slater agreed to a deal, and, after futile efforts to impose Arkwright-style spinning frames on existing machinery, Slater recreated Strutt's designs from England.³¹ Slater was immensely successful; the first mill was built on the banks of the Blackstone River in Pawtucket, Rhode Island, in 1793.³² But recreating Strutt's designs was illegal; for his misdeeds, Slater was dubbed, "Slater the traitor" across the Pond.³³ President Andrew Jackson, by contrast, called Slater "The Father of the American Industrial Revolution."³⁴ Mills proliferated in the Blackstone River Valley, in close proximity to Providence.³⁵ As industrial technology advanced, proximity to water was no longer necessary and Providence transformed into a manufacturing center.³⁶

25. NYE MACMULLEN, *supra* note 24, at 106.

26. Strutt had based his design, in turn, on architecture by the British inventor Richard Arkwright. JOHN WILLIAMS HALEY, *THE LOWER BLACKSTONE RIVER VALLEY* 50 (1936).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 50–51.

31. *Id.* at 51.

32. *Id.* at 52.

33. *Samuel Slater - The Father of the American Industrial Revolution*, DAILY KOS (Mar. 29, 2013, 10:29 PM), <https://www.dailykos.com/stories/2013/3/29/1197996/-Samuel-Slater> [<https://perma.cc/VCS9-95W4>].

34. *Id.*

35. ERIK J. CHAPUT, *THE PEOPLE'S MARTYR: THOMAS WILSON DORR AND HIS 1842 RHODE ISLAND REBELLION* 15 (2013).

36. *Id.*

The textile mills ushered in the rise of the modern industrial state, with all its benefits and burdens. The impact of industrialism on Rhode Island cannot be overstated. It shifted the state's historic center of power from the sea to the land, which shifted political and economic power from Newport to Providence.³⁷ It also led to an influx of immigrants, who arrived to meet factory owners' demand for cheap labor.³⁸ These immigrants recalibrated the social dynamic of Providence: "The influx of thousands of strangers into what had been a relatively homogeneous community disrupted traditional face-to-face relationships and eroded consensual values."³⁹

Industrialism also caused political inequality, which was particularly pronounced in Rhode Island.⁴⁰ The state, still operating under its colonial charter issued in 1620, afforded equal representation to each village or city in the general assembly, regardless of population. As Americans and immigrants became increasingly packed into urban and manufacturing centers, this produced absurd results. For example, in 1841, Providence housed forty percent of the white male population (which paid two-thirds of Rhode Island's taxes), but only provided five percent of the state's lawmakers.⁴¹

The industrial revolution coincided with the social movement known as the Second Great Awakening, a national movement of religious revival characterized by appeals to emotion and revelation.⁴² The Second Great Awakening also had a social component; many reformers sought to purify their souls by purifying society.⁴³ This led reformers to advocate for temperance and other forms of social and individual improvement.⁴⁴ The "goal was . . . to elevate the moderate, self-reliant, industrious, and moral

37. See *id.* at 15–16; see also JOHN S. GILKESON, JR., *MIDDLE-CLASS PROVIDENCE, 1820–1940* 7 (1986).

38. See generally GILKESON, *supra* note 37, at 7.

39. *Id.* at 19.

40. NYE MACMULLEN, *supra* note 24, at 106.

41. *Id.* at 106–07.

42. See *Religious Transformation and the Second Great Awakening*, UShISTORY.ORG, <http://www.ushistory.org/us/22c.asp> [https://perma.cc/UNJ3-WWNS] (last visited Jan. 26, 2019).

43. *Id.*

44. *Institutionalizing Religious Belief: The Benevolent Empire*, UShISTORY.ORG, <http://www.ushistory.org/us/22d.asp> [https://perma.cc/M7M4-JWG8] (last visited Jan. 26, 2019).

citizen.”⁴⁵ This reinforced the Victorian belief that society was engaged in a perpetual march toward progress.⁴⁶

This reforming impulse manifested in a mission to improve public schools.⁴⁷ Nye MacMullen explains that, in the early 1800s, a “new vision and a new urgency” to improve public education appeared. This vision had two elements.⁴⁸ First, education was to be approached methodologically.⁴⁹ Methods for instructing pupils and teachers alike would be ascertained, taught, and replicated.⁵⁰ Second, states were called upon to do more to assist local school districts.⁵¹ Not unlike later social reform movements like the New Deal and the Great Society, education reform was a top-down affair. Reformers sought to utilize the power of towns, villages, and cities—and to some extent, the state—to improve the quality of local education.⁵² The most prominent feature of the reform movement was the concept of the “common school”—so named because it was common to all inhabitants of a locality.⁵³ In the common school movement, the Victorian and Protestant values of “religious faith, economic industry, civic virtue, and education [were] all closely linked”⁵⁴

III. THE REFORMERS: HENRY BARNARD AND THOMAS WILSON DORR

The two towering figures in the common school movement were Horace Mann and Henry Barnard. While Barnard has slid into relative obscurity, in their day, both Mann and Barnard were giants who sought to bring structure and rigor to the teaching

45. NYE MACMULLEN, *supra* note 24, at 50.

46. *Id.*

47. *See id.* at 53; *see also* CARL L. BANKSTON III & STEPHEN J. CALDAS, PUBLIC EDUCATION—AMERICA’S CIVIL RELIGION: A SOCIAL HISTORY 29, 31 (2009).

48. NYE MACMULLEN, *supra* note 24, at 54.

49. *Id.*

50. *Id.*

51. *Id.* at 53.

52. *Id.* Historian John S. Gilkeson, Jr. argues that an incipient middle class formed around the time of the common school movement, and that the public education movement was one way in which the “stable, industrious, sober middle classes of society” set themselves apart from the excesses of the rich and the uncultured poor. GILKESON, *supra* note 37, at 10.

53. *Public School*, BLACK’S LAW DICTIONARY (10th ed. 2014).

54. BANKSTON & CALDAS, *supra* note 47, at 24. The quote describes the philosophy of lexicographer Noah Webster but could be equally said concerning the common school movement.

profession.⁵⁵ Barnard is important to the history of Rhode Island, as the State brought him in as an outside expert to make recommendations regarding Rhode Island's educational system.

Barnard was raised in a prosperous Hartford, Connecticut, household, and later attended Yale University.⁵⁶ He meandered for a few years after graduation, and eventually set his sights on politics. Barnard was elected to the Connecticut Legislature in 1837.⁵⁷ Although the school improvement movement preceded his election, Barnard "adopted the school cause" as his own.⁵⁸ Barnard threw himself into the issue, investigating Connecticut's public schools and designing a comprehensive system of school reform.⁵⁹ His investigation culminated in a report, which New York Chancellor James Kent described as a "bold and startling document."⁶⁰ It was a meticulously detailed description of the system that highlighted its weaknesses and identified areas of potential improvement.⁶¹ The Connecticut Legislature enacted many of Barnard's proposed reforms, and several years later, "[a]ttendance at school meetings was higher, there were new and repaired schools throughout the state, and in many of them uniform sets of books had been made available . . ."⁶² By 1841, Connecticut Democrats fought back against public school reform, an issue which they deemed "a party question, inaugurated by the Whigs, for the benefit of the Whigs."⁶³ In 1842, when Democrats achieved a majority in both houses, they repealed most of Barnard's reform legislation.⁶⁴

Nevertheless, Barnard's reputation as an educational reformer of the highest order was solidified. In 1843, Rhode Island Governor James Fenner engaged Barnard to repeat the Connecticut magic; his specific orders were "to survey the state, to visit schools and collect information in order to make recommendations for the 'improvement and better management of same.'"⁶⁵

55. NYE MACMULLEN, *supra* note 24, at ix.

56. *Id.*

57. *Id.* at 45.

58. *Id.* at 58–59.

59. *Id.* at 62–63.

60. *Id.* at 75.

61. *Id.* at 77.

62. *Id.* at 99.

63. *Id.* at 96.

64. *Id.* at 97.

65. *Id.* at 111.

Barnard stepped into a state recovering from a political crisis. The crisis was precipitated by a rebellion led by Thomas Wilson Dorr, an attorney and social activist.⁶⁶ Dorr descended from two generations of traders.⁶⁷ After making a fortune in Massachusetts, Dorr's father settled in Providence.⁶⁸ Dorr enjoyed a privileged upbringing, attending Phillips Exeter Academy and Harvard.⁶⁹ Upon graduation from Harvard, he studied law with New York Chancellor James Kent, the aforementioned admirer of Barnard's Connecticut report and "the most prominent state-level jurist in the country."⁷⁰ Dorr returned to Providence in the mid-1820s to practice law after a clerkship with famed Rhode Island attorney John Whipple.⁷¹ After a tour of the South and a sojourn in New York City, Dorr returned to Providence in 1831.⁷² He enjoyed a few years of success as a practicing lawyer and then threw himself into politics.⁷³ Dorr was elected to Rhode Island's General Assembly in 1834 as a Whig.⁷⁴ Dorr later switched party affiliation and became the Democratic Party chair in 1840.⁷⁵

Dorr was an ardent reformer and an abolitionist. He favored greater banking regulation and, as relevant to this Article, public education reform. Indeed, one of Dorr's earliest causes was for the creation of a high school in Providence.⁷⁶ However, the issue that became his rallying cry was universal white male suffrage. As mentioned above, Rhode Island continued to operate under its colonial charter in the nineteenth century.⁷⁷ The charter set restrictive voting conditions: only landowners with land worth more than \$134 (in contemporary dollars) could vote.⁷⁸ Professor Lawrence Friedman estimates that this "excluded perhaps nine out of ten even of white males over twenty-one."⁷⁹ Dorr railed against this requirement, which he felt to be a mockery of democratic

66. CHAPUT, *supra* note 35, at 29.

67. *Id.* at 14.

68. *Id.*

69. *Id.* at 16–17.

70. *Id.* at 21.

71. *Id.*

72. *Id.* at 23, 28.

73. *See id.* at 25.

74. *Id.* at 32.

75. *Id.* at 47.

76. *Id.* at 32.

77. *See id.* at 30.

78. *Id.*

79. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 75 (3d ed. 2005).

representation.

Dorr eventually joined the Rhode Island Suffrage Association, a “conglomeration of urban Whigs, reform-minded Democrats, and radical labor leaders.”⁸⁰ The Suffrage Association developed a statement of rights called the People’s Constitution, which contained many of the reforms close to Dorr’s heart, including a greater role for the State in education. The education clause read as follows:

The diffusion of knowledge, and the cultivation of a sound morality in the fear of God being of the first importance in a republican State, and indispensable to the maintenance of its liberty, it shall be an imperative duty of the Legislature to promote the establishment of free schools and to assist in the support of public education.⁸¹

The People’s Constitution also directed revenue from “lotteries and auction duties, as well as the entire income of the United States deposit fund” to be placed in a permanent education fund, thus providing a continual and ample source of state funding for education.⁸²

One reform cause notably absent from the People’s Constitution was abolition. While personally opposed to slavery, Dorr excluded abolition from the coverage of the People’s Constitution as part of a political bargain.⁸³ For this, he was pilloried by anti-slavery activists.⁸⁴

The General Assembly, responding to the People’s Constitution, called a constitutional convention in 1841 and developed its own constitution, the so-called Landholders’ Constitution.⁸⁵ The Landholders’ Constitution included, like the People’s Constitution, a provision concerning education. However, it was much more general than its counterpart. It read as follows:

The diffusion of knowledge, as well as of virtue, among the

80. CHAPUT, *supra* note 35, at 51. The Rhode Island Suffrage Association was founded on March 27, 1840. *Id.*

81. *City of Pawtucket v. Sundlun*, 662 A.2d 40, 46–47 (R.I. 1995) (emphasis omitted); *see also* CARROLL, *supra* note 21, at 121.

82. CARROLL, *supra* note 21, at 123. The People’s Constitution further forbade borrowing from the aforementioned fund. Ironically, funds were borrowed to suppress Dorr’s Rebellion. *Id.*

83. CHAPUT, *supra* note 35, at 59, 69.

84. *Id.* at 69–70, 75.

85. *Id.* at 64–65.

people being essential to the preservation of their rights and liberties, it shall be the duty of the General Assembly to promote public schools and to adopt all other means to secure to the people the advantages and opportunities of education which they may deem necessary and proper.⁸⁶

Dorr participated in the Landholders' Convention, but soon soured on it when the convention decided to retain, among other provisions, the property requirements for voters.⁸⁷

The Suffrage Association, through the newly-formed People's Party, submitted the People's Constitution to the people for a vote. The vote passed overwhelmingly: 13,944 in favor and fifty-two opposed.⁸⁸ Unsurprisingly, newly "enfranchised" voters (i.e., those who were not, in fact, eligible to vote but would receive the franchise if the vote passed), cast ballots in favor of the measure. However, even excluding these voters, the ballot measure still would have passed: the majority of legal freeholders voted in favor of the People's Constitution.⁸⁹ On April 18, 1842, elections were held under the People's Constitution and Dorr was elected Governor.⁹⁰ Rhode Island now boasted two governments, and a constitutional crisis was born.

The Landholders' Constitution was also put to a vote, but it failed to pass by a narrow margin of 8,689 to 8,013.⁹¹ While Dorr celebrated, the general assembly set in motion a plan to crack down on the Suffrage Association. In early April 1842, it passed a series of resolutions, one of which deemed it treason to assume office under the People's Constitution.⁹² On May 9, 1842, a warrant was issued for Dorr's arrest.⁹³

The stage was thus set for a dramatic confrontation between the existing government and the People's government. Instead, two events in May 1842 caused the precipitous downfall of Dorr and the People's Party. First, despite a personal appeal from Dorr,

86. *City of Pawtucket v. Sundlun*, 662 A.2d 40, 47 (R.I. 1995).

87. CHAPUT, *supra* note 35, at 66.

88. *Id.* at 76–77.

89. *Id.* at 77.

90. Patrick T. Conley, *Popular Sovereignty or Public Anarchy? America Debates the Dorr Rebellion*, in *RHODE ISLAND IN RHETORIC AND REFLECTION: PUBLIC ADDRESSES AND ESSAYS* 129, 130 (2002).

91. CHAPUT, *supra* note 35, at 84–85.

92. *Id.* at 85.

93. *Id.* at 119.

President John Tyler refused to provide assistance to the People's Party.⁹⁴ Tyler feared that federal intervention would have explosive implications in the American South: if the federal government were willing to intervene on behalf of disenfranchised white voters, what would stop a later Yankee administration from intervening on behalf of African-Americans?⁹⁵ Although Tyler stood to lose support from Northern Democrats who supported Dorr, the risk of igniting the slavery question was too grave. Tyler wrote to Rhode Island Governor Samuel Ward King and informed him that he would not intervene in Rhode Island's internecine squabble if and until it reached the point of armed rebellion.⁹⁶

Second, on May 17, 1842, Dorr launched a disastrous attempt to seize an arsenal in Providence.⁹⁷ After President Tyler denied Dorr's request for federal assistance, Dorr visited New York City.⁹⁸ There, Dorr received a friendly reception and the promise of support.⁹⁹ When Dorr returned to Rhode Island, he learned that Governor King had upped the political stakes: King had declared martial law and imprisoned a number of Dorr's supporters.¹⁰⁰ Additionally, a one thousand dollar bounty had been placed on Dorr's head.¹⁰¹

Dorr faced this adversity with revolutionary fervor. Upon his return to Providence in May 1842, he delivered a speech in which he professed, "his readiness to die in the cause in which he had sacrificed everything but his life." Raising a sword skyward, Dorr declared that his "ensanguined blade should be again imbued with blood, should the people's cause require it."¹⁰²

Dorr decided that it was time to take action and seize the arsenal located in Providence. Dorr secured two cannons in a building controlled by local militias and arranged for them to be wheeled to his headquarters on Federal Hill.¹⁰³ In the evening,

94. *See id.* at 132.

95. *See id.* at 88–91.

96. *Id.* at 90–91.

97. *Id.* at 136.

98. *Id.* at 144.

99. *See id.*

100. *Id.* at 155–56.

101. *Id.* at 144.

102. Howard R. Ernst, *A Call to Arms: Thomas Wilson Dorr's Forceful Effort to Implement the People's Constitution*, in 66 RHODE ISLAND HISTORY 59, 62 (2008).

103. *Id.* at 62, 63.

Dorr and hundreds of his supporters (though less than anticipated), proceeded to the arsenal to launch an attack.¹⁰⁴ The cannons, which were the centerpiece of the planned assault, did not fire.¹⁰⁵ Dorr effected a hasty retreat. This, in turn, caused his outside support, including in New York, to evaporate. The “Dorr Rebellion” thereafter collapsed and the general assembly regained control of the State.¹⁰⁶ Dorr was eventually captured, tried for treason, found guilty, and received a life sentence of hard labor.¹⁰⁷ His sentence was later commuted, but Dorr lived out the rest of his days in relative obscurity.¹⁰⁸

After the failure of the Landholders’ Convention, the general assembly drew up a new constitution, which voters approved in November of 1842.¹⁰⁹ The Constitution boasted some significant reforms; for example, it offered suffrage to African-Americans and outlawed slavery.¹¹⁰ But despite these concessions to egalitarianism, the document generally affirmed the interests of Rhode Island’s elites.¹¹¹ For example, while it lessened voting restrictions, it retained the \$134 property qualification for “foreign-born naturalized citizens,” which, according to Dorr’s biographer, Erik J. Chaput, was intended to disenfranchise Irish Catholics who were immigrating in large numbers.¹¹² And its education provision was remarkably similar to the version set forth in the Landholders’ Convention.¹¹³ Thus, the conservative forces had won. Governor

104. *Id.* at 63.

105. *Id.* at 73.

106. *Id.* at 74, 75.

107. *Id.* at 76.

108. *Id.* The Dorr Rebellion gave rise to the well-known Supreme Court case of *Luther v. Borden*, 48 U.S. 1 (1849). Luther was a Dorr ally who challenged a raid on his house and asked the Court to decide which government—the People’s or the Charter—was in place during the tumultuous events of 1842. *Id.* at 3. The Court dodged the question, deeming it a political issue, and not a legal dispute. *Id.* at 35. For an explanation of the case, which is beyond the scope of this Article, see CHAPUT, *supra* note 35, at 192–203.

109. *See* CHAPUT, *supra* note 35, at 166.

110. *See id.* at 165, 167–168.

111. *See id.* at 167.

112. *Id.* Specifically, the Constitution created three classes of voters: (1) “native-born citizens with a year’s residency [who] owned real estate valued at \$134, or had two years’ residency and paid taxes on real or personal property valued at \$134 or more”; (2) voters who “lived in the state for two years and paid a \$1 registry tax”; and (3) “foreign-born naturalized citizens who qualified to vote or hold office only by owning \$134 worth of real estate.” *Id.*

113. *See id.* at 166.

King's successor in 1843 was James Fenner, who previously served as Governor from 1807 to 1811, and again from 1824 to 1831.¹¹⁴ Governor Fenner's party, which had been assembled by Governor King in response to the Dorr Rebellion, called itself the Law and Order or "legal" party of Rhode Island.¹¹⁵ Thus, in a not-too-subtle metaphor, law and order had been restored to Rhode Island.

In the wake of the tumultuous and divisive events of the Dorr Rebellion, Rhode Island politicians agreed on a noncontroversial cause: incremental improvement of the public schools. Barnard was an attractive candidate for the task, as his Great Awakening-influenced vision of public school improvement was agreeable to both moderate Whigs and moderate Democrats.¹¹⁶ Barnard brought the same tireless, methodical approach that he employed in Connecticut to Rhode Island.¹¹⁷

Barnard produced an educational proposal containing various provisions concerning support of the public schools.¹¹⁸ The plan established a firm administrative structure for the public schools and "mandated a shared responsibility for the support of schools" between local districts and the State.¹¹⁹ With respect to funding, while the plan confirmed that twenty-five thousand dollars of state money would be devoted to the "encouragement and maintenance of public schools," it did not require local districts to establish schools or set a financial floor.¹²⁰ The general assembly adopted Barnard's plan and appointed him the first Commissioner of Education for the State of Rhode Island.¹²¹

Barnard's education plan promoted organization and quality in the public education system, but did not require the State to allocate significant funds to education.¹²² Thus, there is no evidence that the drafters of the Rhode Island Constitution, particularly in light the tumultuous events of the 1840s, sought to

114. *Fenner, James*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=f000074> [<https://perma.cc/AK5H-MYMH>] (last visited Jan. 27, 2019).

115. CHAPUT, *supra* note 35, at 79.

116. NYE MACMULLEN, *supra* note 24, at 116.

117. *Id.* at 113. The first, held in Bristol on December 16, 1843, was "widely reported in the press." *Id.*

118. *Id.*

119. *Id.* at 119.

120. *Id.* at 117.

121. Barnard's plan called for the creation of the Commissioner position. *Id.* at 120–21.

122. *Id.* at 146.

equalize educational resources throughout the state vis-à-vis the Rhode Island Constitution.

IV. *BROWN V. BOARD OF EDUCATION*

The argument that state and federal constitutions require equal or adequate funding originated in the post-World War II era, an era conveniently bookended by two landmark United States Supreme Court cases concerning public education: *Brown v. Board of Education (Brown I)*, in 1954,¹²³ and *San Antonio Independent School District v. Rodriguez*, in 1973.¹²⁴ Law had previously been utilized as a political and social tool, but its use in these respects grew exponentially in the post-war era. In the hands of activists, law became a blunt instrument to compel the government to effectuate social change. The intellectual roots of this development can be traced to *Brown*.¹²⁵

While in retrospect, *Brown* seems a *fait accompli*, it was a groundbreaking and radical decision that departed from traditional notions of judicial review.¹²⁶ Noah Feldman put the stakes thusly: “A Supreme Court ruling that segregation was unconstitutional would be the most aggressive piece of judicial activism in American history.”¹²⁷ After oral arguments in *Brown I*, the Justices were immediately divided, and those who sought to strike down segregation disagreed on how to do so.¹²⁸ Justice Robert H. Jackson, reluctant to strike down segregation, insisted that if the Court prohibited segregation, it should admit that it was making new law and not adhering to the original meaning of the equal protection clause. After heroic efforts of persuasion led by Justice Felix Frankfurter, the Court reached a consensus: it would hold that segregation was unconstitutional without Justice Jackson’s

123. 347 U.S. 483 (1954) (*Brown I*).

124. 411 U.S. 1 (1973).

125. See *Brown I*, 347 U.S. 483.

126. See NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES 373 (2010). As Feldman explains, “The [federal] judiciary had no legacy of protecting racial or other minorities. At no time in the history of the United States had a judicial body stood in the vanguard of promoting progressive social change. For that matter, no judges in the world had ever done such a thing.” *Id.*

127. *Id.* at 383.

128. See *id.* at 374–78; see also MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 149–50 (2008).

candid admission.¹²⁹ When Justice Warren read the opinion aloud and reached the key holding, he improvised the word “unanimously,” so as to read: “we *unanimously* hold.”¹³⁰ At the word “unanimously,” audible gasps went through the courtroom.¹³¹

It was a bold, courageous stand against segregation. But rendering the decision was the easy part. *Brown I* addressed liability (i.e., whether segregated schools violated the equal protection clause), while a successor decision, known as *Brown II*, addressed the remedy (i.e., how segregation would be eliminated).¹³² The Court understood that a demand for immediate compliance might lead Southern states to simply abolish public education.¹³³

Brown II was issued on May 31, 1955, one year after *Brown I* sent shockwaves through the political and judicial system.¹³⁴ It returned the underlying cases to the lower courts and informed them that principles of equity should guide the remedy:

In fashioning and effectuating the decrees, the courts will be guided by equitable principles . . . characterized by a practical flexibility . . . Courts of equity may properly take into account the public interest in the elimination of such obstacles¹³⁵

In other words, courts were commanded to do what they had to do to implement *Brown I*.¹³⁶ With respect to timing, however, the Court gave school districts and states substantial leeway.¹³⁷ The Court recognized the myriad difficulties in restructuring local school systems and acknowledged that change could not occur overnight.¹³⁸ Thus, the Court ordered compliance to proceed with “all deliberate speed.”¹³⁹

Despite the Justices’ “heroic” compromise and ruling, *Brown I*

129. *Id.* at 402.

130. *Id.* at 403 (emphasis added).

131. *Id.*

132. 349 U.S. 294 (1955) (*Brown II*).

133. Lino A. Graglia, *When Honesty Is “Simply . . . Impractical” for the Supreme Court: How the Constitution Came to Require Busing for School Racial Balance*, 85 MICH. L. REV. 1153, 1156 (1987).

134. *See Brown II*, 349 U.S. at 294.

135. *Id.* at 300.

136. *Id.*

137. *Id.*

138. *Id.* at 300–01.

139. *Id.* at 301.

proved “incoherent as a statement of constitutional law.”¹⁴⁰ Noah Feldman explained:

The mess that the Court and the country made of *Brown [I]* in the years that followed reflected this incoherence. Was *Brown* a strong statement that the Constitution demanded desegregation? Then why did its sequel, *Brown II*, contemplate a gradual and stepwise remedy, one that was not even specified in detail? Was *Brown [I]* based on the original meaning of the Constitution or on changed circumstances that required the Constitution itself to change?¹⁴¹

The Court’s “intentional” decision to gloss over these issues, Feldman argues, “cast the whole problem of constitutional interpretation into decades of turmoil.”¹⁴²

Conceptual problems aside, implementation of *Brown II* was a herculean labor. In response to the *Brown* decisions, “[g]ood faith did not follow” in the deep South.¹⁴³ Some localities actively resisted, while others dragged their heels. Racial violence surged in 1955; this violence included the infamous and “particularly gruesome” murder of Emmett Till.¹⁴⁴ In March of the following year, nineteen United States Senators and eighty-two United States Representatives signed the so-called “Southern Manifesto,” a document that denounced *Brown II* as an “abus[e] [of] judicial power” and “urged southerners” to resist forced integration by “all lawful means.”¹⁴⁵ In 1959, Prince Edward County, Virginia closed all of its public schools. African-Americans challenged the closure in court, but students lost years of schooling while this litigation played out.¹⁴⁶ Some whites, desperate to find a fig leaf for

140. FELDMAN, *supra* note 126, at 407.

141. *Id.* (emphasis in original).

142. *Id.* at 407–08.

143. Thomas E. Chandler, *The End of School Busing? School Desegregation and the Finding of Unitary Status*, 40 OKLA. L. REV. 519, 524 (1987).

144. *The Civil Rights Movement and the Second Reconstruction, 1945–1968*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Keeping-the-Faith/Civil-Rights-Movement/> [https://perma.cc/EK5H-MNMR] (last visited Jan. 27, 2019).

145. *Id.*; see also JAMES T. PATTERSON, GREAT EXPECTATIONS: THE UNITED STATES 1945–1974 398 (1996).

146. Patterson, *supra* note 145, at 398; BOB SMITH, THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA, 1951–1964 241 (1965).

segregation, even dredged up the antiquated doctrine of interposition.¹⁴⁷ School districts were repeatedly dragged into court, and several of the disputes reached the United States Supreme Court.¹⁴⁸

The Court affirmed its holdings in *Brown I* and *Brown II* and grew increasingly tired of efforts to evade its desegregation orders. In the 1968 case of *Green v. County School Board of New Kent County*, the Court struck down a school board's "freedom of choice" plan enacted 10 years after *Brown II*.¹⁴⁹ The Court chided the school board for the delay, calling it out its "deliberate perpetuation of [an] unconstitutional dual system" and declaring that "[s]uch delays are no longer tolerable."¹⁵⁰ Additionally, in the 1971 case of *Swann v. Charlotte-Mecklenburg Board of Education*, the Court opined that the States were moving too slow, integration was inevitable, and, though it would be painful and awkward, the transitional period of integration would be brief.¹⁵¹ The Court also explicitly endorsed a polarizing remedy: busing. Thus, the Court gave its blessing to judicial rerouting of local busing assignments to promote racial diversity.¹⁵²

The majority of white Americans disapproved of busing,¹⁵³ and the public response to such efforts was "swift and largely hostile."¹⁵⁴ As commentators Thomas and Mary Edsall memorably put it, busing "fell like an ax through the Democratic Party, severing long-standing connections and creating a new set of troubled alliances: white, blue-collar northerners with southerners against blacks and upper-middle-class liberals."¹⁵⁵ Richard Nixon,

147. CARL T. BOGUS, *BUCKLEY: WILLIAM F. BUCKLEY JR. AND THE RISE OF AMERICAN CONSERVATISM* 168 (2010).

148. Graglia, *supra* note 133, at 1156. Professor Lino A. Graglia, stalwart enemy of the Court's desegregation cases, argues that it was the Civil Rights Act of 1964, not *Brown I*, that spurred the Court's broad endorsement of remedies. *Id.*

149. 391 U.S. 430, 438–39 (1968).

150. *Id.*

151. 402 U.S. 1, 28 (1971). "The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." *Id.*

152. *See generally* Chandler, *supra* note 143.

153. ANDREW HARTMAN, *A WAR FOR THE SOUL OF AMERICA: A HISTORY OF THE CULTURE WARS* 63 (2015); PATTERSON, *supra* note 145, at 732 (1996).

154. *See* Chandler, *supra* note 143, at 527.

155. *See* HARTMAN, *supra* note 153.

in particular, made much political hay out of public opposition to busing in the late 1960s and early 1970s. This was a deliberate strategy to cultivate the white southern vote and secure his reelection in 1972.¹⁵⁶

While the Court had suggested in *Green* and *Swann* that its commitment to integration was unbending, its enthusiasm waned in the 1970s. Just three years after the Court's enthusiastic commitment to desegregation in *Swann*, it held, in *Milliken v. Bradley*,¹⁵⁷ that Detroit could not combat white flight by merging suburban, largely white school districts with overwhelmingly African-American Detroit.¹⁵⁸ The Court reasoned that the suburban districts had not engaged in segregation and, thus, could not be forced to take any remedial action. *Milliken*, Professor James T. Patterson argues, "badly hurt whatever hopes reformers still maintained of overturning *de facto* segregation of the schools . . ." ¹⁵⁹

V. THE LEGAL HOOK, THE WARREN COURT, AND PUBLIC EDUCATION

For all the trouble surrounding its implementation, *Brown I* was a massive victory for social activists. *Brown I* proved that lawyers could dream up a theory and enact it into law. Better yet, lawyers could share in the moral credit for their achievements.¹⁶⁰ This proved irresistible for lawyers in the post-war era, who, emulating the American Civil Liberties Union and the National Association for the Advancement of Colored People's Legal Defense Fund, created legal organizations devoted to social causes.¹⁶¹ These self-professed public interest lawyers, in the name of the weak and disenfranchised, attacked governmental programs for failing to live up to federal law or constitutional standards.¹⁶² And they did so, as Professors Ross Sandler and David Schoenbrod

156. PATTERSON, *supra* note 145, at 730.

157. 418 U.S. 717 (1974).

158. PATTERSON, *supra* note 145, at 734.

159. *Id.*

160. ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 17–18 (2003). "Heroes in Congress proclaimed new rights, hero-judges enforced the new rights against the law-breaking state and local officials, and hero-attorneys guarded the new rights." *Id.* at 28.

161. *Id.* at 25.

162. *Id.*

explain, by way of the legal hook.¹⁶³ The legal hook operated as follows:

Reform-minded attorneys identify a program that needs change, construct a legal theory that some constitutional or statutory requirement has been violated, and file a lawsuit. The alleged violation becomes, in the parlance of lawyers, a 'legal hook' for seeking broader reform.¹⁶⁴

The legal hook was successful in achieving victories in court. Public interest attorneys scored a host of victories during the 1960s and 1970s by using law to achieve social reforms.¹⁶⁵

The legal hook gibed with the liberal, reform-minded spirit that animated the Supreme Court in the 1960s. While departing from the text and history of the Constitution proved wrenching to the *Brown I* Court, the Court under Chief Justice Earl Warren found it far easier. Depending on one's political or jurisprudential views, the Warren Court's decisions are the most beloved or maligned holdings of all time. Some notable examples include *Gideon v. Wainwright*, which established a right to counsel in state criminal proceedings, *Miranda v. Arizona*, where the Court articulated a list of rights police officers must recite prior to custodial interrogation, and *Griswold v. Connecticut*, where the Court discerned a constitutional right to "marital privacy," which encompassed contraceptive communications.¹⁶⁶ *Griswold* was the most infamous. In flowery language, Justice William Douglas opined "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."¹⁶⁷ *Griswold's* reasoning, in turn, was

163. *Id.* at 1.

164. *Id.* at 3-4.

165. *See generally id.* at 3-6.

166. *See generally* *Miranda v. Arizona*, 384 U.S. 436 (1966); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Justice Stewart phrased it best:

"What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy 'created by several fundamental constitutional guarantees.' With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."

Griswold, 381 U.S. at 530 (Stewart, J., dissenting).

167. *Griswold*, 381 U.S. at 484 (majority opinion). Warren's biographer Jim Newton relates a humorous anecdote: when the Court broke for summer vacation after *Griswold* was decided, Warren penned a note to Justice Douglas

instrumental to *Roe v. Wade*, the most controversial product of the Warren Court's jurisprudential philosophy.¹⁶⁸

The activist spirit was not limited to high-profile disputes. For example, in a 1973 case, the Court held that a group of five law students could challenge orders of a federal agency based on the group's allegation that claimed that they "suffered economic, recreational and aesthetic harm directly as a result of the adverse environmental impact" of a regulatory action.¹⁶⁹ Holdings like these reflected the belief of many of the Justices that the law should adapt with the times, unrestrained by precedent or historical understanding of constitutional provisions. Chief Justice Warren captured this sentiment in his 1972 book, "A Republic, If You Can Keep It":

Where there is injustice, we should correct it; where there is poverty, we should eliminate it; where there is corruption, we should stamp it out; where there is violence, we should punish it; where there is neglect, we should provide care; where there is war, we should restore peace; and wherever corrections are achieved we should add them permanently to our storehouse of treasures.¹⁷⁰

Brown was but one attack upon racial disparity in public education—an arguably more significant development was the Civil Rights Act of 1964, which, like *Brown*, prohibited segregation in public schools.¹⁷¹ The Civil Rights Act also contained a procedural provision that had a significant impact on public education.¹⁷² This provision required the United States Commissioner of Education—

which implored him to "[k]eep our Penumbra flying all summer!" JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 455 (2006).

168. *Roe v. Wade*, 410 U.S. 113 (1973), *modified*, *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

169. *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 678 (1973).

170. NEWTON, *supra* note 167, at 516–17. The quote is inscribed on the tombstone where Warren and his wife Nina are buried in Arlington National Cemetery. *Id.*

171. Graglia, *supra* note 133, at 1156.

172. Elizabeth Evitts Dickinson, *Coleman Report Set the Standard for the Study of Public Education*, *JOHNS HOPKINS MAG.*, <https://hub.jhu.edu/magazine/2016/winter/coleman-report-public-education/> [<https://perma.cc/3QHA-ETTB>] (last accessed Jan. 1, 2019); *see also* James S. Coleman et al., *Equality of Educational Opportunity*, U.S. DEP'T OF HEALTH, EDUC., AND WELFARE: OFF. OF EDUC. (1966), <https://files.eric.ed.gov/fulltext/ED012275.pdf> (last accessed Mar. 21, 2019).

renamed the Secretary of Education after the Department of Health, Education, and Welfare became a cabinet level post in 1979—to study public education and determine how much “race, color, religion, or national origin” affected equality of education in public schools.¹⁷³ President Lyndon Johnson eventually reached out to Sociologist James Coleman, who agreed to conduct the study.¹⁷⁴ His findings were published in a 1966 report titled “Equality of Educational Opportunity.”¹⁷⁵

Coleman’s findings were nuanced and not susceptible to political categorization. First, Coleman discerned what is now known as the achievement gap.¹⁷⁶ Poor and African-American students scored several grades below affluent white students in math and reading.¹⁷⁷ However, the cause was not, as liberal reformers had surmised, a simple lack of money. Coleman found that the most important factor dictating a child’s success was his or her familial and social circumstances.¹⁷⁸ As Coleman later explained, “[a]ll factors considered, the most important variable—in or out of school—in a child’s performance remains his family’s education background.”¹⁷⁹

Coleman’s other findings further explained the achievement gap. Coleman found that diversity, in the fullest sense of the word, was crucial to student success.¹⁸⁰ This meant a holistic sense of diversity beyond mere racial diversity.¹⁸¹ Coleman also observed that affluent students succeeded because they felt they had agency and were masters of their own fate.¹⁸² The poor, by contrast, felt that they were victims of life circumstances.¹⁸³ Coleman also discounted the role of teachers, finding that learning was a “function more of the characteristics of his classmates than of those

173. Evitts Dickinson, *supra* note 172.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *See* Coleman, *supra* note 172, at 29 (“Thus, there is more to “school integration” than merely putting Negroes and whites in the same building, and there may be more important consequences of integration than its effect on achievement.”).

182. Evitts Dickinson, *supra* note 172.

183. *Id.*

of the teacher.”¹⁸⁴

With specific respect to school funding, Coleman found that while there were “some definite and systematic directions of difference between the schools attended by minorities and those attended by the majority,” there was relatively little disparity between the facilities and programs afforded to African-American and white communities.¹⁸⁵ Regional factors were “usually considerably greater than minority-majority differences.”¹⁸⁶ Coleman specifically found that “when student body characteristics [we]re taken into account, the variance accounted for by a facilities measure (which includes per pupil expenditure) is very small indeed.”¹⁸⁷ Coleman further submitted that “if adjustments had been made to remove student body factors in the present analysis, together with facilities and curriculum measures, the unique contribution of per pupil expenditure for Southern Negroes would have nearly vanished.”¹⁸⁸ Thus, according to the report, there was not a drastic need to redistribute cash to African-American and poor communities.¹⁸⁹ However, even if policymakers were inclined to do so, Coleman felt that those efforts would be in vain.¹⁹⁰ As he put it, schools “bring little influence to bear on a child’s achievement that is independent of his background and social context.”¹⁹¹ Poor school achievement, in other words, was a mere symptom of an unhealthy social and familial environment.¹⁹²

The report was not what the public or the federal government expected.¹⁹³ It did not suggest simple or identifiably partisan recommendations, and liberals and conservatives derived different lessons from it.¹⁹⁴ Liberals focused on the economic inequality findings, arguing that economic redistribution would help fight poverty and inequality.¹⁹⁵ Conservatives argued that more money would not solve schools’ woes since, according to the report, money

184. *Id.*

185. Coleman, *supra* note 172, at 121.

186. *Id.* at 122.

187. *Id.* at 312.

188. *Id.*

189. See Evitts Dickinson, *supra* note 172.

190. HARTMAN, *supra* note 153, at 215.

191. *Id.*

192. See Evitts Dickinson, *supra* note 172.

193. *Id.*

194. *Id.*

195. *Id.*

was a relatively irrelevant factor in student achievement.¹⁹⁶

The liberal interpretation inspired many in the academy to launch an offensive against school financing systems.¹⁹⁷ Almost every state, including Rhode Island, divided public education costs at the state and local levels, relying on a formula to determine the extent of the state contribution. While the state contribution was equal or equitable (i.e., it provided a greater percentage of money to poorer districts), this was usually offset by large disparities in local contributions, which were culled from local school taxes (which, in turn, were derived from the property tax base).

This discrepancy was untenable to many reformers, including scholars.¹⁹⁸ Historian James Gordon Ward has traced the origin of the argument that discrepancies in school funding violated the U.S. Constitution's Equal Protection clause to two books.¹⁹⁹ Educator Arthur Wise published the first, *Rich Schools Poor Schools*, in 1968.²⁰⁰ In the book, Wise applied *Brown I*'s equal protection principle to school funding.²⁰¹ If "separate but equal" school systems were unconstitutional, Wise asked, how could unequally funded school systems be constitutional?²⁰² Wise offered a detailed journey through a wide array of Supreme Court cases concerning the equal protection clause.²⁰³ After concluding that the Supreme Court had, in many instances, intervened to protect groups which had been subject to irrational treatment, Wise posed the following inquiry: "Can children receive substantially different educational opportunities solely because of their parents' economy

196. *Id.*

197. James Gordon Ward, *Conflict and Consensus in the Historical Process: The Intellectual Foundations of the School Finance Reform Litigation Movement*, 24 J. OF EDUC. FIN., no. 1, Summer 1998, at 14.

198. *Id.*

199. *Id.* at 14–15. Professor Judith C. Areen notes that Arthur Wise posed a short version of the argument in a 1965 article in the publication *Administrator's Notebook*. See Judith C. Areen, *The Judicial and Education Reform: A Reassessment*, 61 GEO. L. REV. 1009, 1012, n.19 (1973). Wise explained, in a published interview, that the 1965 article was based upon a term paper which he wrote while a student at Harvard in the spring of 1964. Deborah A. Verstegen, *Arthur E. Wise and the Promise of Equal Educational Opportunity*, 25 J. OF EDUC. FIN., no. 4, Spring 2000, at 583, 585.

200. Gordon Ward, *supra* note 197, at 14.

201. *Id.*

202. See generally ARTHUR E. WISE, *RICH SCHOOLS POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY* (1968).

203. *Id.*

circumstances or where they happen to be born?”²⁰⁴ Wise laid out two approaches the Supreme Court could take to address this issue of educational equality.²⁰⁵ The Court could, as did the Warren Court in cases concerning criminal and indigent rights, proceed on a case-by-case basis.²⁰⁶ Alternatively, the Court could dive in to a state’s finances and “deal with disparities in pupil expenditures” by declaring certain disparities to be unconstitutional.²⁰⁷ Wise opined that the Court would not have to seek complete equality because there were circumstances, such as gifted students, students with disabilities, and “regional price differences,” that justified disparate expenditures.²⁰⁸

Toward the end of the book, Wise candidly admitted that the “political impasse” of educational financing was “the basic reason for considering the problem a constitutional one.”²⁰⁹ Put bluntly, state legislators had no incentive to spend money that did not provide “direct benefits” to their constituents.²¹⁰ In other words, as in *Brown*, the political route was a dead-end, and the only hope for reform would be through the judiciary. This reflected the prevalent view in the 1960s that the Supreme Court could and should be used as a tool to effectuate social policy.²¹¹

The second seminal book in shaping school funding litigation was John E. Coons, William H. Clune III, and Stephen D. Sugarman’s *Private Wealth and Public Education*, published in

204. *Id.* at 158–59.

205. *Id.* at 192–93.

206. *Id.* at 193.

207. *Id.*

208. *Id.* at 194.

209. *Id.* at 198.

210. *Id.*

211. See William B. Gould, *Rich Schools Poor Schools the Promise of Equal Educational Opportunity; Quality of Inequality Urban and Suburban Public Schools*, 55 CORNELL L. REV. 145, 145–51 (1969) (book review). Professor William B. Gould offered a trenchant analysis of Wise’s theory and its implications in a 1969 book review. See *id.* Gould identified weaknesses in the argument, including the question of whether more money would produce better educational outcomes, and the thorny issue of remedy. *Id.* On the latter point, Gould speculated that the difficulty of the issue led Wise to advocate for “rough dollar equity.” *Id.* at 150. But this, argued Gould, was silly because rich whites would not stand for it. *Id.* The only effective remedy would be a “complete reversal” of spending policies, which Gould did not see as feasible. *Id.* Gould concluded that the time was not right for a constitutional assault of school finance systems. *Id.* at 150–51.

1970.²¹² The three authors, attorneys, compiled a dense tome, which examined issues affecting school finance and also outlined their case against public school funding.²¹³ While the authors agreed that unequal funding of schools was wrong, they recognized that the problem eschewed a simplistic solution.²¹⁴ Indeed, the authors recognized that local control was an essential component of school district governance, including the ability to make local decisions on how to allocate limited governmental resources.²¹⁵ Thus, radical yet simplistic proposals—such as abolition of the public schools, or state control with an attendant per-pupil rate or needs-based system—would not do.²¹⁶ The authors offered a moderate proposal to combat the problem: a formula that rewarded districts for the percentage of wealth they taxed instead of the amount of tax revenue which they collected.²¹⁷ The problem, the authors posited, was that the same percentage of taxation yielded less money in school districts with a smaller tax base.²¹⁸ Thus, if district A has ten times the tax base of district B, a ten percent tax might yield ten million dollars in district A but only one million dollars in district B.²¹⁹ The authors proposed that the richest district would set the tax ceiling, and the state would kick in the amount to help poorer districts meet this ceiling.²²⁰ So using the hypothetical above, a state would pay nine million dollars to district B so that each district taxed ten percent of its tax base and received ten million dollars in revenue. The authors deemed this procedure “power equalization.”²²¹

The authors, unlike more utopian reformers, were not after a fixed measure of equality or a uniform per-pupil rate.²²² They conceded that their proposal would permit voters to let their schools descend into financial oblivion if that was what they chose.²²³ The authors’ grievance was that school districts were not allowed a free

212. JOHN E. COONS, ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION (1970).

213. *See id.*

214. *See id.*

215. *Id.* at 14–16.

216. *Id.* at 33.

217. *Id.* at 34.

218. *Id.* at 34–35.

219. *Id.*

220. *Id.*

221. *Id.* at 35.

222. *Id.* at 17–35.

223. *Id.* at 35.

or fair choice with respect to funding, as the deck was stacked in favor of districts with more taxable wealth.²²⁴ Thus, the authors' argument can be described as "free market plus": it heartily endorsed a libertarian approach to school district funding so long as the playing field was leveled.

Interestingly, *Private Wealth and Public Education* opened with a foreword by none other than James Coleman, author of *Equality of Educational Opportunity*.²²⁵ Coleman's foreword was laudatory but guarded.²²⁶ Coleman credited the scope of the authors' inquiry and their novel theory of power equalization; he deemed it "an impressive intellectual feat."²²⁷ Coleman also voiced his agreement with those portions of the book advocating for family choice, reiterating his findings that a child's familial and social circumstances were of paramount importance.²²⁸ Thus, "any state which dictates the school or school district to which each child goes is unequally distributing . . . educational resources, however equally it is distributing finances."²²⁹

Coleman concluded his foreword by asking the big question that loomed behind *Private Wealth and Public Education*: "How far should states go in seeking equality?"²³⁰ The answer, Coleman stated, was elusive.²³¹ Tinkering with funding mechanisms was relatively uncontroversial.²³² But there had also been, as Coleman delicately observed, state efforts toward "racial and class integration," which proved "even more ineffective than . . . attempt[s] to redistribute financial resources."²³³ Thus, the role of the states was "not a question that is easily answered, and it is not a question raised in this book."²³⁴ Those difficult questions would soon be raised in a series of court cases alleging that local funding mechanisms violated the United States Constitution.

VI. SCHOOL FUNDING LITIGATION: FROM THE ACADEMY TO THE

224. *Id.* at xix.

225. *Id.* at vii–xvi.

226. *Id.*

227. *Id.* at x.

228. *Id.* at xiv.

229. *Id.*

230. *Id.* at xvi.

231. *Id.*

232. *Id.* at xv.

233. *Id.*

234. *Id.* at xvi.

COURTROOM

Wise and the trio of Coons, Clune, and Sugarman, represented a “wave of consciously activist scholarship written with an avowed bias, and aimed at producing specific legal results.”²³⁵ Unsurprisingly, activists transported these arguments into court.²³⁶ While the precise legal theory varied, the basic premise, was that states were not evenly or fairly distributing resources among districts.²³⁷ The first landmark victory for advocates was *Serrano v. Priest*, a 1971 decision by the California Supreme Court, which held that California’s school funding system violated the equal protection clause.²³⁸ California, like most states, funded schools through a combination of local property taxes and state funds.²³⁹ The California Supreme Court reasoned, using language reminiscent of Coons et al., that the system was unconstitutional because it “makes the quality of a child’s education depend upon the resources of his school district and ultimately upon the pocketbook of his parents.”²⁴⁰ While the court agreed with the plaintiffs on the equal protection argument, it expressly disclaimed reliance on the education guarantee in the California Constitution, ruling that the state constitutional guarantee of a “system” of public education merely referred to “uniform[ity] in terms of the prescribed course of study and educational progression from grade to grade,” not equal funding.²⁴¹ Due to the procedural posture of the case, the court did not have to address the thorny issue of remedy; the case was instead remanded for trial.²⁴²

235. Stephen R. Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 U. PA. L. REV. 504, 512 (1972).

236. *Id.*

237. The first significant challenge in the postwar era was *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff’d per curiam sub nom. McInnis v. Ogilvie*, 394 U.S. 1197 (1969). The district court dismissed the plaintiffs’ Fourteenth Amendment claim and, additionally, dismissed the matter as presenting a non-justiciable political question. *Id.* at 337. The Supreme Court denied review in a *per curiam* decision. *McInnis*, 394 U.S. 1197.

238. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

239. *Id.* at 1246.

240. *Id.* at 1263.

241. *Id.* at 1249.

242. On remand, the trial court found, unsurprisingly, that the system was unconstitutional. However, before the trial court issued its decision, the United States Supreme Court decided *San Antonio Independent School District v. Rodriguez*, discussed below, which seriously undercut the California

Serrano's radical holding delighted advocates and stunned more circumspect commentators.²⁴³ Professor Judith C. Areen found it "remarkable" that a court would "simply assume [] that quantity of funding relates directly to quality of schooling," relying upon "a simple factory model" where "money was the input and educated students the output."²⁴⁴ *Serrano* also inspired similar lawsuits throughout the country, including a federal lawsuit filed in the United States District Court for the Western District of Texas captioned *Rodriguez v. San Antonio Independent School District*.²⁴⁵ The court's decision could have been written by Coons and his co-authors; for example, in a knowingly or unknowingly plagiarized passage, the court wrote that "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole."²⁴⁶ The defendants, state entities, appealed the decision and

Supreme Court's equal protection analysis. 411 U.S. 1 (1973). Additionally, the California Legislature attempted to address the disparities, which efforts the California Supreme Court criticized in its 1971 opinion. *Serrano*, 487 P.2d 1241. In 1976, the California Supreme Court again held, that California's school funding system was unconstitutional, basing its holding on the equal protection clause of the State constitution. *Serrano v. Priest*, 557 P.2d 929, 938–39 (Cal. 1976). The court upheld the trial court's findings, including a finding that "differences in dollars do produce differences in pupil achievement." *Id.* at 930. The court also noted multiple remedies which the Legislature could adopt:

- (1) full state funding, with the imposition of a statewide property tax;
- (2) consolidation of the present 1,067 school districts into about five hundred districts, with boundary realignments to equalize assessed valuations of real property among all school districts;
- (3) retention of the present school district boundaries but the removal of commercial and industrial property from local taxation for school purposes and taxation of such property at the state level;
- (4) school district power equalizing[,] which has as its essential ingredient the concept that school districts could choose to spend at different levels but for each level of expenditure chosen the tax effort would be the same for each school district choosing such level whether it be a high-wealth or a low-wealth district;
- (5) vouchers; and
- (6) some combination of two or more of the above.

Id. at 938–39.

243. Areen, *supra* note 199, at 1013.

244. *Id.*

245. 337 F. Supp. 280, 284 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973); Paul D. Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227, 1231–32, n.31 (1973).

246. *Compare Rodriguez*, 337 F. Supp. 280, *rev'd*, 411 U.S. 1, with COONS ET AL., *supra* note 212, at 2 ("The quality of public education may not be a function of wealth other than the wealth of the state as a whole.").

the United States Supreme Court granted certiorari.²⁴⁷

As explained in *Rodriguez*, Texas, like California, Rhode Island, and virtually all states, operated a dual system of school financing comprised of local property taxes and state funding.²⁴⁸ In the mid-twentieth-century, Texas—again, like Rhode Island—established a foundation aid program designed to distribute state aid to those districts that needed it most.²⁴⁹ However, inequalities among districts persisted, largely due to differing property tax bases.²⁵⁰ The *Rodriguez* lawsuit was brought as a class action lawsuit by Mexican-American students and other minority students “who [were] poor and reside[d] in school districts having a low property tax base”²⁵¹

Finding that wealth was a ‘suspect’ classification and that education was a ‘fundamental’ interest, the district court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling state interest.²⁵² On that issue, the court concluded, “[n]ot only are defendants unable to demonstrate a compelling state interest . . . they fail even to establish a reasonable basis for these classifications.”²⁵³

The United States Supreme Court reversed, in a rebuke to the district court and *Serrano*.²⁵⁴ The Court first addressed the plaintiffs’ imprecise definition of its “suspect class.”²⁵⁵ The Court found the district court’s analysis on this point to be lackadaisical, surmising that the class could be defined one of three ways: (1) “poor” people as defined by a certain level of income; (2) relatively poor individuals; or (3) those who live in “poor” school districts.²⁵⁶ The Court found that the plaintiffs failed to produce sufficient evidence on the first two categories.²⁵⁷ It further noted that, proof aside, the assumption underlying these class definitions (i.e., that the poorest people lived in locations with the worst public schools)

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

248. *Id.* at 6.

249. *Id.* at 6–10.

250. *Id.* at 8.

251. *Id.* at 5.

252. *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 282–84 (W.D. Tex. 1971), *rev’d*, 411 U.S. 1 (1973).

253. *Id.* at 284.

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

255. *Id.* at 19.

256. *Id.* at 19–20.

257. *Id.* at 22.

was not self-evident.²⁵⁸ With respect to the third definition, the Court noted that this could be defined to include children in every district other than the richest district (the definition adopted by the California Supreme Court in *Serrano*), or children in districts with assessable property that falls below some fixed measure.²⁵⁹ The Court did not accept either of these definitions, deeming the plaintiffs “a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts.”²⁶⁰

Next, the Court held that education was not a fundamental right under the United States Constitution.²⁶¹ Education was not found in the text of the Constitution, the Court reasoned, and the mere importance of a right did not make it fundamental.²⁶² In a bit of circular reasoning, the Court stated that a right could only be considered fundamental if it were an “established constitutional right.”²⁶³ Linguistic formulations aside, the “established constitutional right” standard presented a high bar. For example, as the *Rodriguez* Court noted, a 1970 decision held that the right to public welfare benefits was not fundamental.²⁶⁴ Moreover, the plaintiffs in *Rodriguez* were not alleging a total deprivation of education, they merely complained about relative funding levels and the relative quality of education.²⁶⁵ Thus, the Court found that the plaintiffs failed meet their burden of proving a fundamental

258. *Id.* at 23.

259. *Id.* at 27–28.

260. *Id.* at 28. Criticisms of *Rodriguez* tend to ignore the plaintiffs’ weaknesses in defining the alleged suspect class. For example, Professor Justin Driver, in a highly readable survey of United States Supreme Court decisions concerning public education, states in this respect that the *Rodriguez* majority merely “entertained the possibility that some indigent citizens might in fact live in property-rich school districts and vice-versa.” JUSTIN DRIVER, *THE SCHOOL-HOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 320 (2018). Professor Driver also describes the class definition as one of several “doctrinal niceties.” *Id.* at 321. Nevertheless, while sympathetic to the plaintiffs’ claims, Professor Driver acknowledges that the challenge was a product of its times, and that, were it filed today, “it seems plausible that challengers . . . would find not a single justice who agreed that the Constitution prohibits arrangements resembling those contested in *Rodriguez*.” *Id.* at 326.

261. *Rodriguez*, 411 U.S. at 35.

262. *Id.*

263. *Id.* at 31.

264. *Id.* at 33.

265. *Id.* at 37.

right.²⁶⁶

Because the case did not involve infringement of a fundamental right, it received the same scrutiny as ordinary legislation: rational basis review. Under this standard, Texas passed with flying colors.²⁶⁷ As a preliminary matter, the Court recognized that the case “involve[d] . . . persistent and difficult questions of educational policy” outside of the Court’s bailiwick.²⁶⁸ Borrowing a memorable phrase from *Dandridge v. Williams*, the welfare benefits case, the Court stated: “Education, perhaps even more than welfare assistance, presents a myriad of ‘intractable economic, social, and even philosophical problems.’”²⁶⁹ The Court further observed that Texas had taken numerous steps to decrease inequality and promote education throughout the state.²⁷⁰

The court dismissed the plaintiffs’ argument that disparate funding harmed poor individuals. Taxation always has some discriminatory impact, the Court noted, and states needed some leeway to design and carry out such systems.²⁷¹ Additionally, the Court explained, even if it declared Texas’ system unconstitutional, the plaintiffs did not propose an alternative system to replace it.²⁷² Presumably, the Court noted in a footnote, the replacement would be one hundred percent state funding.²⁷³ The Court also identified the “power equalization” theory of Coons et al. as another alternative, but dismissed it as unworkable, noting that commentators disagreed as to “whether it is feasible, how it would work, and indeed whether [the theory itself] would violate the equal protection [clause]”²⁷⁴

Thus, the door to a federal right to education had been decisively closed, but advocates were not deterred. They promptly shifted their focus to the states, grounding their arguments in state equal protection clauses.²⁷⁵ Indeed, in a major victory for

266. *Id.* at 40.

267. *Id.* at 53–54.

268. *Id.* at 42.

269. *Id.* (quoting *Dandridge v. Williams*, 397 U.S. 471, 487 (1970)).

270. *Id.* at 45–48.

271. *Id.* at 41.

272. *Id.* at 41 n.85.

273. *Id.*

274. *Id.*

275. Emily Parker, *Constitutional Obligations for Public Education*, EDUC. COMMISSION OF THE STATES (Mar. 2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [<https://perma.cc/NYQ5-RK94>].

advocates, the New Jersey Supreme Court unanimously held in 1973 (the same year *Rodriguez* was decided) that its school funding system violated the State's education clause.²⁷⁶ Over the next several decades, dozens of lawsuits were filed alleging that educational funding violated state constitutions.²⁷⁷ Eventually, as Michael A. Rebell explained, “[a]t the end of the 1980s, civil rights lawyers changed their focus from equal protection claims based on disparities in . . . funding . . . to claims based on opportunities for a basic level of education guaranteed by the specific provisions in the state constitutions.”²⁷⁸ Thus, arguments about “equality” gave way to arguments about “adequacy.”²⁷⁹ The underlying issue, however, remained the same: litigants sought to use the courts to effectuate social change concerning public education.²⁸⁰

Within the context of school funding litigation, New Jersey is also famous for the monumental struggle of the New Jersey Supreme Court to bend the legislature to its will. As noted above, in a landmark 1973 decision, the New Jersey Supreme Court found the state's funding mechanism unconstitutional.²⁸¹ And in a later decision, *Abbott v. Burke*, the court found that the educational system was inadequate as applied to poor urban districts.²⁸² After *Abbott*, the matters returned to the political branches, where foot-dragging and noncompliance followed. Commentator Alexandra Greif has described an example of the legislature's failings: the fallout after the passage of the State Quality Education Act of 1990 (QEA).²⁸³ The QEA would have redistributed money into the poor urban districts at issue in pending school funding litigation.²⁸⁴ However, it faced fierce resistance from suburban voters and the

276. *Robinson v. Cahill*, 303 A.2d 273, 298 (N.J. 1973).

277. *An Introduction to Equality of Opportunity*, STAN. U., <https://edeq.stanford.edu/sections/equality-opportunity-introduction> [<https://perma.cc/T6VR-JXYX>] (last accessed Jan. 27, 2019).

278. REBELL, *supra* note 8, at 17.

279. David Hinojosa & Karolina Walters, *How Adequacy Litigation Fails to Fulfill the Promise of Brown [But How It Can Get Us Closer]*, 2014 MICH. ST. L. REV. 575, 602 (2014).

280. *See generally id.*

281. *Robinson*, 303 A.2d at 298.

282. 575 A.2d 359, 412 (N.J. 1990).

283. Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott V Mandate*, 22 YALE L. & POL'Y REV. 615, 621–22 (2004).

284. *Id.* at 621.

state's largest teachers' union.²⁸⁵ Greif explains that the law shifted pension contributions from the state to local districts, and that teachers would get lower benefits or wages if the local districts could not meet their pension responsibilities.²⁸⁶ Against this political backlash, "legislators buckled."²⁸⁷ They replaced the QEA with a watered-down successor, and Democrats, who held majorities in the legislature and had championed the QEA, paid with their seats. Even though the QEA had never taken effect and Democrats acceded to public outcry, many voters still smoldered over Democrats support for the QEA in the first instance. As a result, in 1991, Republicans gained majorities in both houses.²⁸⁸ The case presented a cautionary tale in school funding litigation; not only was legislative compliance with court orders a heavy political lift, but doing so could also cost legislators their jobs.

Given the ubiquity of state education and equal protection clauses, it was only a matter of time until a school funding lawsuit reached Rhode Island. Economic circumstances provided a convenient moment: "severe economic distress" caused by the Governor's closing of forty-five insolvent credit unions in 1991 resulted in caps to state education reimbursement. The overall reimbursement rate dropped from 52.3 percent in 1991 to 38.1 percent in 1992.²⁸⁹

VII. CHALLENGES TO RHODE ISLAND'S PUBLIC EDUCATION FUNDING SYSTEM

The first challenge to Rhode Island's funding system was *City of Pawtucket v. Sundlun*, a consolidated challenge brought by students, parents, government officials, and multiple schools.²⁹⁰ On February 24, 1994, the superior court ruled that Rhode Island's funding system violated the state equal protection and education clauses of the Rhode Island Constitution.²⁹¹ Following this blockbuster holding, a host of school districts and politicians

285. Greif, *supra* note 285, at 622.

286. *Id.*

287. *Id.*

288. *Id.*

289. *City of Pawtucket v. Sundlun*, 662 A.2d 40, 53 (R.I. 1995).

290. *Id.* The plaintiffs sued multiple state officials in their individual capacities. *Id.* at 42. The superior court bifurcated the claim into liability and damages portions. *Id.* at 43.

291. *Id.* at 42.

scrambled to intervene on appeal.²⁹²

In its decision, the Rhode Island Supreme Court first explained that the General Assembly was entitled to enormous deference.²⁹³ Rhode Island vested unlimited power in the legislature, subject only to constitutional carve-outs for the executive and judiciary branches.²⁹⁴ Thus, to prevail, the litigants were required to prove “beyond a reasonable doubt” that the legislature violated the constitution.²⁹⁵

The court next examined the history of the education clause.²⁹⁶ The court noted that, although there were consistent calls to establish a system of free schools in Rhode Island in after the revolution, localism generally prevailed.²⁹⁷ An 1828 Act permitted towns to raise revenue to support schools and established a state fund to support education.²⁹⁸ But efforts such as this contemplated minimal state involvement in public education.²⁹⁹

This approach persisted after the Dorr Rebellion. The court noted, as explained above, that the legislature deliberately snubbed Dorr’s People’s Constitution with respect to education by adopting, almost verbatim, the language utilized in the Landholders’ Constitution.³⁰⁰ Additionally, Barnard’s suggestions, enacted by the legislature, squeezed local districts for funds, not the State.³⁰¹ Indeed, the Barnard Act’s requirement that localities impose a certain level of local taxation as a prerequisite to obtaining state funds demonstrated that localities bore the primary responsibility for education.³⁰²

The plaintiffs’ expert conceded that neither the 1842 Constitution nor the Barnard Act required towns to even establish schools, let alone ensure an equal or minimum level of funding.³⁰³ Indeed, the court observed that the legislature did not explicitly

292. *Id.* at 43.

293. *Id.* at 44–45.

294. *Id.*

295. *Id.* at 45.

296. *See id.* at 45–46. Throughout its decision, the Court principally relied upon Charles A. Carroll’s “Public Education in Rhode Island.” *See* CARROLL, *supra* note 21.

297. *Sundlun*, 662 A.2d at 45.

298. *See id.* at 46.

299. *See id.*

300. *See id.* at 47–48.

301. *Id.* at 48.

302. *Id.*

303. *Id.*

require that towns operate schools until 1882.³⁰⁴ The expert further conceded that equal funding was a “relatively new concept” unknown to nineteenth-century legislators.³⁰⁵

The court also determined that the Rhode Island Constitutional Convention of 1986 did not add anything to its analysis.³⁰⁶ By 1986, *Rodriguez* was thirteen years old and school funding lawsuits had been litigated in at least seventeen state courts.³⁰⁷ Thus, if the 1986 convention sought to provide a minimum funding level or impose some sort of equality principle, it would have explicitly done so, and it did not. Indeed, among the resolutions that it explicitly rejected were guarantees of “an equal opportunity for an education on a per capita basis,” and “an equal education regardless of [a child’s] community of residence.”³⁰⁸

The court then considered the parties’ equal protection claim. In an analysis echoing *Rodriguez*, the court explained that the General Assembly had, since the mid-twentieth century, increased state funding for public education and attempted to make it more equitable.³⁰⁹ At the turn of the century, the State offered funding to school districts that enacted desired reforms,³¹⁰ such as creating high schools or hiring qualified superintendents.³¹¹ In 1955, Rhode Island enacted its foundation aid program, which provided a per pupil rate of seventeen dollars and a \$200,000 equalization fund to be distributed based on need.³¹² In 1960, that program was supplanted by an operation aid program, which ensured that the State shouldered a greater percentage of the cost of education in poorer districts.³¹³ Rhode Island further enacted a host of reforms in the early 1990s that further increased the amount of aid to poorer districts.³¹⁴ The court stated that the wealthy districts currently receive little, if any, State reimbursement.³¹⁵ And in 1993, the legislature created a “distressed district fund,” which provided

304. *Id.*

305. *Id.* at 49.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* at 59–60.

310. *See id.* at 51.

311. *Id.* at 50.

312. *Id.*

313. *Id.*

314. *Id.* at 51.

315. *Id.* at 51–52.

money—for public school purposes only—to three poor districts.³¹⁶ In sum, as local and State school spending consistently increased, the State had taken measures to redistribute funding where it was needed.³¹⁷

In reaching a contrary holding, the superior court had reasoned that Rhode Island's education clause was textually similar to clauses in Massachusetts and Kentucky, whose courts found their state funding schemes unconstitutional.³¹⁸ The superior court also reasoned that the word “promote” in the education clause imposed an obligation on the State to ensure that school districts were roughly equal because “in many instances” in the nineteenth century, the word was used interchangeably with “found” or “establish.”³¹⁹

The Rhode Island Supreme Court rejected these arguments.³²⁰ First, any suggestion that the history of the education clause supported an official measure of adequacy or equality was “clearly wrong.”³²¹ Rhode Island towns were not required to have schools in 1842.³²² If there was no mandate for a school, there was certainly no mandate for equity.³²³ Second, “promote” did not obligate the State to offer some base level of service.³²⁴ Quoting the definition of “promote” in Noah Webster's 1828 dictionary, the court found that the word, then and now, meant “[t]o forward” or “to advance.”³²⁵ And, as evidenced by the education clause, “promote” could not mean found or establish for two reasons: first, towns were not required to establish schools; and, second, towns established the schools, not the general assembly.³²⁶ Finally, the court observed that the general assembly's mission—to “promote education by all means which it may deem necessary and proper”—reflected a desire to vest educational issues in the general assembly and to afford it discretion in choosing how to accomplish such goals.³²⁷

316. *Id.* at 53.

317. *See id.* at 50–54.

318. *Id.* at 54.

319. *Id.* at 54–55.

320. *Id.* at 55.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 56.

325. *Id.*

326. *Id.*

327. *Id.* at 56–57.

The court next addressed the separation of powers doctrine, which applied to both the education clause and equal protection claims.³²⁸ The judiciary, the court reasoned, was an inappropriate forum for school funding challenges.³²⁹ Even if the court deemed the funding scheme unconstitutional, there were no “judicially manageable standards” to manage the legislature’s efforts.³³⁰ The court cited the bitter back-and-forth that occurred between the state legislature and the judiciary in New Jersey in the wake of *Abbott*. The court also cited the United States Supreme Court’s 1995 decision in *Missouri v. Jenkins*, which released Missouri from an eighteen-year-old desegregation order.³³¹ The thrust of that decision was that the district in question had made progress toward integration and that control over the school system should be returned to the local district as soon as possible.³³² Heeding *Jenkins*, the *Sundlun* court held that the General Assembly had virtually unlimited discretion, and that the plaintiffs “should seek their remedy in that forum rather than in the courts.”³³³

Nevertheless, the court briefly touched upon the merits of the equal protection claim.³³⁴ The court reasoned that the level of scrutiny was low because no fundamental right was involved. Thus, the court easily found that preservation of local control was a legitimate state interest and that reliance on a partial degree of local financing for school district rationally furthered this interest.³³⁵ The court further chided the superior court for excluding evidence of Rhode Island’s relative equality in education funding.³³⁶ This revealed that, in 1989–1990, Rhode Island was the third most equalized per-pupil ratio state in the country.³³⁷ The court acknowledged that Rhode Island, and most of New England, offered a low amount of total state reimbursement.³³⁸ But more significantly for an equal protection analysis, the amount offered was equitably distributed.

328. *Id.* at 57.

329. *Id.* at 58.

330. *Id.*

331. *Id.* at 59 (citing *Missouri v. Jenkins*, 515 U.S. 70 (1995)).

332. *Id.*

333. *Id.* at 57, 63.

334. *Id.* at 59.

335. *Id.* at 61–62.

336. *Id.* at 60.

337. *Id.* at 61.

338. *Id.*

Finally, the court noted that it was loath to endorse a definition of equality that was outcome-based. Citing again to the Supreme Court's decision in *Missouri v. Jenkins*, it noted that the school district in that case received significant financial upgrades after the desegregation decree, yet continued to struggle with achievement.³³⁹ This "illustrate[d] that money alone may never be sufficient to bring about 'learner outcomes' in all students."³⁴⁰

Decisive as *Sundlun* was, two school committees, Woonsocket and Pawtucket, posed a second challenge in 2010.³⁴¹ According to the complaint, two things had changed since *Sundlun*, which compelled an opposite result. First, Rhode Island voters adopted constitutional amendments in 2004, which affirmed the principle of separation of powers and eliminated the "Continuing Powers" clause discussed in *Sundlun*.³⁴² This clause stated that the general assembly continued to possess the powers it wielded prior to the 1842 Constitution.³⁴³ Second, the general assembly had tweaked the school funding formula and, according to the plaintiffs, produced new disparities.³⁴⁴ The school committees again asserted violations of the state equal protection clause and added an allegation that the funding scheme violated students' substantive due process rights.³⁴⁵

The superior court rejected the claims out of hand, reasoning that *Sundlun* and an advisory opinion issued by the Rhode Island Supreme Court in 2008 precluded such challenges under the

339. *Id.*

340. *Id.*

341. *See* Woonsocket Sch. Comm. v. Chafee, 89 A.3d 778 (R.I. 2014).

342. *Id.* at 789–90.

343. The clause read: "The general assembly shall continue to exercise the powers it has heretofore exercised, unless prohibited in this Constitution." *Id.*

344. One of the School Committee's lawyers laid out the litigation strategy in an article published less than a year before the filing of the complaint. Samuel D. Zurier, Esq., *Separation of Powers and Rhode Island's Constitutional Right to A Public Education*, 57 R.I. B.J. 7, 7 (May/June 2009). The second attorney representing the School Committees apparently changed his mind as to the validity of another state court challenge; he co-authored an article five years after *Sundlun* in which he theorized that the Rhode Island State Courts were closed to school adequacy claims and that the most viable theory, though an uphill battle, would be alleged violations of the Federal Equal Protection Clause and Article VI of the Civil Rights Act of 1964 in federal court. David V. Abbott & Stephen M. Robinson, *School Finance Litigation: The Viability of Bringing Suit in the Rhode Island Federal District Court*, 5 ROGER WILLIAMS U. L. REV. 441, 444 (2000).

345. *Chafee*, 89 A.3d at 782.

doctrine of *stare decisis*.³⁴⁶ On appeal, the Rhode Island Supreme Court agreed, finding that the issues had been squarely raised and addressed in *Sundlun*.³⁴⁷ The court acknowledged that *Sundlun* had cited and relied upon the “Continuing Powers” clause, but the court found that its reasoning was not dependent upon the clause.³⁴⁸ The *Sundlun* court’s broader point was that, in Rhode Island’s constitutional system of government, the general assembly wielded plenary power over education.³⁴⁹ The court made short work of the substantive due process argument, upholding the trial court’s finding that the plaintiffs did not meet their burden of proving that the funding scheme bore “no substantial relation to the public health, safety, morals, or general welfare.”³⁵⁰ In sum, while concerned by the allegations of inadequacy, and leaving the door open for a constitutional violation on more egregious facts, the plaintiffs had shown no reason to depart from the court’s ruling in *Sundlun*.³⁵¹

As noted above, litigants have commenced a new federal lawsuit in the U.S. District Court for the District of Rhode Island which, though not a typical school funding lawsuit, is a direct descendant of the school funding litigation.³⁵² Indeed, like many of the school funding lawsuits, although the lawsuit is directed at the State of Rhode Island, it has little to do with the Ocean State.³⁵³ As noted in a recent profile of the case published in *The Atlantic*, “[one] thing that made Rhode Island appealing was not that it stood out for any reason, but that it didn’t”³⁵⁴ Thus, Rhode Island

346. *Woonsocket Sch. Comm. v. Chafee*, No. 2010-946, 2012 WL 2946774, at *1 (R.I. Super. Ct. July 12, 2012), *aff’d*, 89 A.3d 778 (R.I. 2014). In the advisory opinion, the court indicated in the advisory opinion that “the separation of powers amendments did not . . . limit or abolish the power of the General Assembly in any other area where we have previously found its jurisdiction to be plenary.” *Chafee*, 89 A.3d at 791 (alterations in original) (quoting *In re Request for Advisory Op. from H.R. (Coastal Res. Mgmt. Council)*, 961 A.2d 930, 934 (R.I. 2008)).

347. *Chafee*, 89 A.3d at 789.

348. *Id.* at 791.

349. *Id.*

350. *Id.* at 794 (citation omitted).

351. *Id.* at 794–95.

352. *See* Complaint, *supra* note 1.

353. *See id.*

354. Alia Wong, *The Students Suing for a Constitutional Right to Education*, ATLANTIC (Nov. 28, 2018), <https://www.theatlantic.com/education/archive/2018/11/lawsuit-constitutional-right-education/576901/> [<https://perma.cc/9QG5-X2LM>].

simply proved a convenient forum for a new spin on a well-worn legal theory.³⁵⁵

While *A.C. v. Raimondo* may yet be resolved through a close analysis of the history of the federal or Rhode Island constitutions, early signs are not encouraging. For example, in paragraph thirty-four of the complaint, the plaintiffs assert that “[i]n the nineteenth century, a ‘common school’ system—i.e., the American public school system—was established precisely to ensure that all students, rich or poor, native or immigrant, may be educated together in a common environment in which civic knowledge and civic values could be inculcated.”³⁵⁶ Even allowing for some advocacy, the claim is patently untrue. The plaintiffs’ claim is reminiscent of an 1870 Thomas Nast cartoon depicting a “happy circle of racially diverse children” as emblematic of the common schools.³⁵⁷ As Benjamin Justice indicates, “Revisionist scholars and their successors have ungently dissected the naiveté of this vision, pointing to segregated schools for African and Native Americans, no school for Chinese children in California, and so on.”³⁵⁸

CONCLUSION

The school funding cases raise fundamental questions about government and democracy. What role should states have in determining school funding? Should state legislatures or courts make these decisions? Can the democratic process be trusted to resolve social inequality, or should the judiciary nudge the political branches toward social progress? The answers to these questions inevitably involve questions of constitutional interpretation, as each state constitution mandates a system of public education.³⁵⁹

355. Professor Justin Driver characterized the claim as “a creative, shrewd effort to cobble together a coalition of liberals and conservatives.” *Id.*

356. See Complaint, *supra* note 1.

357. Benjamin Justice, *Thomas Nast and the Public Schools of the 1870s*, 45 *HIST. OF EDUC. Q.* 171, 190 (2005). Michael Rebell, the lead attorney on the case, made a similar claim in a 2009 book. REBELL, *supra* note 8, at 18. Specifically, Rebell stated that most State constitutional provisions regarding education “were incorporated into the state constitutions as part of the common school movement of the mid-nineteenth century, which created statewide systems for public education and attempt to inculcate democratic values by bringing together under one roof students from all classes and backgrounds.” *Id.*

358. *Id.*

359. See Parker, *supra* note 277.

Constitutional meaning, of course, may simply be whatever a court wants it to be. But this approach lacks principle; it turns constitutional debates into mere political battles.

The better approach, I argue, is constitutional interpretation based on the historical circumstances that motivated a constitutional provision. The Rhode Island Supreme Court used this approach in *City of Pawtucket v. Sundlun*, basing its decision on the historical circumstances that motivated the education clause of the Rhode Island Constitution, not a theory developed by academics in the wake of *Brown v. Board of Education*. The historical approach is “conservative” in the sense that it seeks to constrain the potential universe of constitutional interpretation. But this should not be conflated with political conservatism. As the authors of a 1972 article published in the *Yale Law Journal* posited, courts’ poor institutional capacity for making policy could, in the realm of education finance, “leave the legislatures latitude to revise educational finance in ways which would not help—and in fact could hurt—the poor.”³⁶⁰ The call of the times can be deafening. But it is fidelity to democratic principles, such as sound constitutional interpretation, that will ultimately prove enduring.

360. Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 *YALE L.J.* 1303, 1304 (1972).