

## FEDERALISM AND FEDERAL RIGHTS MINIMALISM: OVERLOOKED EFFECTS ON STATE COURT EDUCATION LITIGATION IN WISCONSIN

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In 1973, the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez* held that education is not a fundamental right under the Fourteenth Amendment and that the Equal Protection Clause did not bar the state of Texas from using a system of school funding that produced radically unequal educational opportunities for students in low-wealth communities relative to those in more affluent districts. Federal defeat is said to have incentivized advocates seeking to improve and equalize public schooling to turn in their litigation efforts from federal court to state courts and from the Federal Constitution to state constitutions, which contain explicit provisions for education. Four decades later, an emergent scholarly movement now celebrates—or, at least, gives two cheers to—the Supreme Court’s rejection of education as an unenumerated federal constitutional right on the view that it opened up space for local solutions and increased self-governance, pointing to the dozens of state court decisions that have recognized or sought to enforce state constitutional rights to education not available under federal law. This Essay sounds a cautionary note about today’s “New ‘New Judicial Federalism,’” questioning its descriptive foundation and its normative conclusions. In particular, we look at state constitutional education litigation in Wisconsin as a case study that challenges the purported benefits for education rights of the earlier so-called New Judicial Federalism. We make three claims. First, rather than opening up political space in Wisconsin for equalizing and improving public schools, the Supreme Court narrowed democratic options by “Lochnerizing” local control and enabling the Wisconsin court to hard wire that concept into the Wisconsin Constitution despite its absence from the state education provision. Second, the Court’s rights-negating decision in *Rodriguez* (followed by others likewise rejecting education as fundamental) mobilized local opposition in Wisconsin against state education equalization efforts, giving these groups jurisprudential leverage to block democratic reforms that could have improved public schooling for Black, Brown, and poor children. Finally, *Rodriguez* and its progeny enabled the Wisconsin court to treat public schooling as a mere policy

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concern, rather than as a constitutional commitment, and thus as a matter that could be left to politics and ultimately to the market—which, in our view, served to erode the democratic foundation of public schooling in the state. We then examine the harmful educational trends that followed in the wake of *Rodriguez* and the Wisconsin court’s education decisions. We conclude with reflections on an alternative theory of federalism that would treat states as partners both with the federal government and with social movements in the construction of a robust right to education under both state and federal law.

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## INTRODUCTION

In 1973, the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez*<sup>1</sup> held that education is not a fundamental right under the Fourteenth Amendment and that the Equal Protection Clause did not bar the state of Texas from using a system of school funding that produced radically unequal educational opportunities for students in low-wealth communities relative to those in more affluent districts.<sup>2</sup> Federal defeat is said to have incentivized advocates to change their legal strategy: the central focus of litigation to improve and equalize public schools turned from federal court to state courts and from the Federal Constitution to state

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1. 411 U.S. 1 (1973).  
 2. *Id.* at 37, 55.

constitutions, which contain explicit provisions for education.<sup>3</sup> In the accepted origin story of what came to be known as the “New Judicial Federalism,”<sup>4</sup> these efforts received a substantial boost from Justice William J. Brennan, Jr.’s 1977 article published in the *Harvard Law Review*, drawing attention to state constitutions as “a font of individual liberties,”<sup>5</sup> and his later article exhorting state judges to “step into the breach” created by the Supreme Court’s retrenchment from recognizing and enforcing civil rights.<sup>6</sup> At the time, some scholars expressed skepticism about this “State Constitutional Renaissance,” calling it unprincipled and opportunistic<sup>7</sup>—a jurisdictional choice without intellectual or theoretical foundation—withstanding the Court’s insistence that in our federal system, public schooling primarily was a matter of state concern.<sup>8</sup>

Four decades later, the current Supreme Court is unlikely to recognize quality public schooling as an entailment of the Equal Protection Clause of the Fourteenth Amendment (or of any other constitutional provisions)<sup>9</sup>—part of a jurisprudential trend against recognition of

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3. Molly A. Hunter, *State Constitution Education Clause Language*, EDUC. L. CTR., <https://edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf> [https://perma.cc/3L38-78JS] (last visited Sept. 25, 2021) (compiling state constitution education clauses); Helen Hershkoff & Nathan Yaffe, *Unequal Liberty and a Right to Education*, 43 N.C. CENT. L. REV. 1, 10–11 (2020).

4. See Hon. Diane S. Sykes, *The “New Federalism”*: Confessions of a Former State Supreme Court Justice, 38 OKLA. CITY U. L. REV. 367, 370 (2013) (distinguishing Justice Brennan’s encouragement of the “new judicial federalism” from the “new federalism” of the Rehnquist Court).

5. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

6. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

7. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 805 (1992) (calling state constitutional discourse “impoverished”); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 432–34 (1988) (questioning the sincerity of Justice Brennan’s invocation of federalism to support greater state constitutional judicial activity). These criticisms have not subsided. See, e.g., Joseph A. Ranney, *Wisconsin Law in the Age of Individualism*, 100 MARQ. L. REV. 923, 964 (2017) (discussing criticisms of independent state constitutional interpretation by some Wisconsin Supreme Court justices).

8. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973) (“The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters.”).

9. See Hershkoff & Yaffe, *supra* note 3, at 9–10 (discussing current prospects for the recognition of a federal constitutional right to education). Congress likewise has retreated in its support of public schooling. See LEARNING POL’Y INST., *THE FEDERAL ROLE IN ADVANCING EDUCATION AND EXCELLENCE* 2 (2020), [https://learningpolicyinstitute.org/sites/default/files/product-files/LPI\\_Ed2020\\_BRIEF.pdf](https://learningpolicyinstitute.org/sites/default/files/product-files/LPI_Ed2020_BRIEF.pdf) [https://perma.cc/VFD3-4NQA] (“Unfortunately,

unenumerated federal constitutional rights,<sup>10</sup> which we call federal rights minimalism.<sup>11</sup> An emergent scholarly movement now celebrates—or, at least, gives two federalism cheers to—the Supreme Court’s rejection of education as an unenumerated federal constitutional right on the view that it opened up space for local solutions and increased self-governance, pointing to the dozens of state court decisions that have recognized or sought to enforce state constitutional rights to education not available under federal law.<sup>12</sup> While recognizing these state solutions as “imperfect,”<sup>13</sup> commentators nevertheless suggest that they are proof that the Supreme Court was wise to have taken—and presumably would be wise to retain—a minimalist federal approach to education rights.<sup>14</sup>

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beginning in the 1980s, the federal government retreated from its role in securing equity and excellence through investment and action. Had the rate of progress achieved in the 1970s continued, the achievement gap between Black and White students would have been fully closed by the beginning of the 21st century.”). Moreover, the federal government’s pattern of support exacerbates funding differentials among states. *See* Robert A. Schapiro, *States of Inequality: Fiscal Federalism, Unequal States, and Unequal People*, 108 CALIF. L. REV. 1531, 1561 (2020) (“The federal government currently does little to equalize the educational resources in the different states, and its spending actually exacerbates the inequalities.”).

10. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6–7 (1996). The term minimalism generally is associated with “the [judicial] phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided.” *Id.*

11. Recently, a hollow echo of Justice Brennan’s call to step into the breach has resurfaced, but this time as apologia for federal rights minimalism. *Jones v. Mississippi*, 141 S. Ct. 1307, 1323 (2021) (Justice Kavanaugh noting, in coda to opinion holding that the Eighth Amendment does not bar mandatory juvenile life without parole, that states can “impos[e] additional sentencing limits” beyond those required by the Federal Constitution).

12. *See, e.g.*, Lauren Cyphers, *Maximalist Decision Making: When Maximalism Is Appropriate for Appellate Courts*, 123 W. VA. L. REV. 611, 611–20 (2020) (“*Rodriguez* . . . was democracy-promoting and left room for other actors outside of the judiciary to do the work. . . . *Rodriguez* . . . forced the states to take action.”) (footnote omitted); *see also* Victoria J. Dodd, *The Education Justice: The Honorable Lewis Franklin Powell, Jr.*, 29 FORDHAM URB. L.J. 683, 690 (2001) (“Justice Powell . . . might be pleased with another post-*Rodriguez* development: state supreme courts . . . [finding] a fundamental right to an education. . . . These . . . rulings would meet the federalism and ‘local control’ concerns expressed by Justice Powell in *Rodriguez*, while ensuring all children the right to a quality education.”). *Cf.* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 22–41 (2018).

13. *See* SUTTON, *supra* note 12, at 40; *Rodriguez*, 411 U.S. at 17 (upholding the federal constitutionality of a system of school funding that the state concedes “has ‘defects’ and ‘imperfections’” but nevertheless defended as rational).

14. Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1986 (2008) (raising the question of whether when federal courts “do nothing” for education reform the states may “do more” to develop local approaches).

This Essay sounds a cautionary note about today's "New 'New Judicial Federalism,'"<sup>15</sup> questioning its descriptive foundation and its normative conclusions. In particular, we look at state constitutional education litigation in Wisconsin as a case study,<sup>16</sup> offering it as a counter-narrative to the emergent consensus that federalism and federal rights minimalism have worked to improve and equalize the public schooling of children who are poor or of color.<sup>17</sup> Prior to the Supreme Court's decision in *Rodriguez*, school reform lawsuits had been filed in a number of states; these efforts were in the vanguard and not in reaction to the Supreme Court's decision.<sup>18</sup> Wisconsin was among a small number of unusual states in which the legislature actually had taken the lead in seeking to reform school funding<sup>19</sup>—efforts, we argue, that *Rodriguez* short-circuited. By refusing to recognize education as a fundamental federal right, *Rodriguez* played an expressive role in mobilizing resistance in Wisconsin to state judicial enforcement of the state's constitutional right to education, providing reform's opponents with a jurisprudential resource that they

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15. The "New 'New Federalism'" is to be distinguished from the "New Federalism," which viewed "the appropriate remedies for the excesses of centralized efforts to control social and economic life . . . [as] deregulation and devolution of decisional authority to the market and to state and local authorities," including the Supreme Court's "restricting the availability of judicial remedies to enforce rights asserted under federal programs by program beneficiaries." Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 921–22 (1985); see also Sykes, *supra* note 4.

16. For an overview of the Wisconsin Constitution, see Robert F. Williams, *Is the Wisconsin State Constitution Obsolete? Toward a Twenty-First Century, Functionalist Assessment*, 90 MARQ. L. REV. 425, 426–35 (2006).

17. See *infra* Section II.A. For criticisms of the concept, see David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 559–63 (2008), and James A. Gardner, *The "States-As-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 475 (1996) ("[T]he metaphor[']s . . . use to justify constructions of state constitutions by state courts is misleading and improper.").

18. See *Rodriguez*, 411 U.S. at 18–19 ("The wealth discrimination discovered by the District Court in this case, and by several other courts that have recently struck down school-financing laws in other States, is quite unlike any of the forms of wealth discrimination heretofore reviewed by this Court.") (footnote omitted). See also Paul L. Tractenberg, *Robinson v. Cahill: The "Thorough and Efficient" Clause*, 38 L. & CONTEMP. PROBS. 312 (1974) ("After *Serrano*, [and before *Rodriguez*] school finance laws in Texas, Minnesota, Kansas, New Jersey, Arizona, and Michigan were struck down in rapid succession; and challenges to similar laws were brought in more than thirty other states." (footnotes omitted)); Robert E. Lindquist, *Buse v. School Finance Reform: A Case Study of the Doctrinal, Social, and Ideological Determinants of Judicial Decisionmaking*, 1978 WIS. L. REV. 1071, 1074–77 (discussing state and federal education challenges prior to *Rodriguez*); John Silard & Sharon White, *Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause*, 1970 WIS. L. REV. 7, 11–15 (describing early state and federal court equality challenges to intra-state disparities in educational quality).

19. W. Norton Grubb, *The First Round of Legislative Reforms in the Post-Serrano World*, 38 L. & CONTEMP. PROBS. 463 (1974).

leveraged politically to narrow democratic reform and then used to justify invalidation of those reforms by the state court. Influenced by federal doctrine, the Wisconsin court struck down the legislature's equalization efforts and instead entrenched the state's use of local property taxes to fund public schooling—a system that predictably limits the ability of low-wealth districts both to meet their students' educational needs and to provide educational opportunities on a par with those in higher-wealth districts.<sup>20</sup> In the wake of *Rodriguez* and its progeny—including Fourteenth Amendment decisions that have all but eliminated integration as a remedy for racial segregation in a state's public schools<sup>21</sup>—white suburban spending patterns for public schooling generally are able to reflect household preferences, but educational options in low-wealth districts—where mostly Black, Brown, or poor people reside—are constrained and limited.<sup>22</sup> Wisconsin parents who want their children to attend schools in better-resourced districts face significant legal barriers: state law requires out-of-district children to pay tuition for public schooling;<sup>23</sup> localities have been incentivized by federal constitutional doctrine to dismantle voluntary interdistrict transfer programs aimed at increasing integration;<sup>24</sup> and a state-funded private-school voucher program that has become the centerpiece of Wisconsin's education reform policy disproportionately benefits wealthy over poor households.<sup>25</sup>

We argue that in Wisconsin, local control over public schooling—a prime rationale for federal rights minimalism—is (to borrow language from a dissenting Wisconsin justice) “at best illusory and at worst a cruel hoax.”<sup>26</sup> Moreover, the children's disadvantages from inadequate and unequal public schooling do not end at the schoolhouse door; rather, they multiply over a lifetime in terms of low wages, health insecurity, and criminal stigmatization.<sup>27</sup> In our view, the Court's refusal to treat education as fundamental, its elevation of local control to quasi-constitutional status, and its formal approach to racial equality inhibited, rather than encouraged, state educational reforms and run counter to an

20. See Hershkoff & Yaffe, *supra* note 3, at 10–11. See *infra* Part III.

21. See Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L.J. 795, 807–12 (2004) (analyzing the Court's integration decisions fifty years after *Brown v. Board of Education*).

22. See Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1674–75 (1979) (“[F]amilies in higher income suburbs demand and receive more services than their counterparts in lower income suburbs.”).

23. WIS. STAT. § 121.77 (2019–20); see, e.g., *State ex rel. Smith v. Bd. of Educ. of Eau Claire*, 71 N.W. 123, 124 (Wis. 1897).

24. See *infra* notes 103–05, 209–18 and accompanying text.

25. See *infra* notes 180–84 and accompanying text.

26. *Kukor v. Grover*, 436 N.W.2d 568, 593 (Wis. 1989) (Bablitch, J., dissenting).

27. See *infra* Part III.

attractive theory of federalism. The Court's education decisions, purporting to take a hands-off approach to public schooling, were not beneficial to disadvantaged students but rather played an important, expressive role in influencing a policy shift to the market-education model that dominates today and has served to erode the democratic foundation of public schooling in Wisconsin.<sup>28</sup>

In Part I, we recall the overlooked history of state constitutional litigation in Wisconsin concerning public schooling. Specifically, we revisit a trio of decisions of the Wisconsin Supreme Court interpreting the state constitutional requirement that district schools “be as nearly uniform as practicable.”<sup>29</sup> In each of the lawsuits, the Wisconsin court either invalidated legislative efforts to equalize school resources or refused to enforce the state constitutional mandate of school “uniformity” as requiring more than a formal legislative duty “to provide the opportunity for all children in Wisconsin to receive a free uniform basic education.”<sup>30</sup> As such, the Wisconsin court left intact and helped to exacerbate racial and class disparities in the provision of public schooling—disparities that the legislature had sought to remedy prior to the U.S. Supreme Court's decision in *Rodriguez*.

In Part II, we unpack the Wisconsin court's interpretive approach to the state constitution's education provisions and examine the impact of federal doctrine upon it. We make three claims. First, rather than opening up political space for equalized and improved public-school reforms, the U.S. Supreme Court narrowed democratic options by “Lochnerizing” local control and enabling the Wisconsin court to hard wire that concept into the Wisconsin Constitution—even though the education provisions of the state constitution nowhere refer to local control or give it constitutional status. Second, the Court's rights-negating decision in *Rodriguez* (followed by others likewise rejecting education as fundamental) mobilized local opposition in Wisconsin to state education equalization efforts, giving these groups jurisprudential leverage to block democratic reforms that could have improved public schooling for Black, Brown, and poor children. Finally, *Rodriguez* and its progeny enabled the Wisconsin court to transform public schooling from a constitutional commitment into a mere policy concern that could be left to politics and the market—which, in our view, served to erode the democratic foundation of public schooling in the state.

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28. See Kirby Thomas West, *Learning to Change: New Takes on Education Reform*, 22 FED. SOC'Y L. REV. 202, 207 (evaluating recent literature on market-based educational “choice” programs).

29. WIS. CONST. art. X, § 3.

30. E.g., *Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992).

In Part III, we examine educational trends that have followed in the wake of *Rodriguez* and the Wisconsin court's education decisions. We see within the Wisconsin school system an increase in racial and wealth achievement gaps, a racialized increase in school suspensions and juvenile detention, and lifetime economic consequences for affected children in terms of low-wage unemployment or no employment. In all, we argue *Rodriguez* contributed to a vicious circle that reenforces the low wealth of racially segregated communities, as well as that of the Black, Brown, and poor children who reside and are compelled to attend school in those districts. Recognizing the complex relation of law and on-the-ground conditions, we do not purport to make a causal argument. But Supreme Court decisions can have consequential effects through their symbolic and expressive value, serving to shape political and economic options and to channel them to particular policies and goals.

We briefly conclude. In our view, the U.S. Supreme Court's refusal to recognize education as a fundamental federal constitutional right has produced overlooked but substantial negative effects on state and local efforts to improve and equalize public schooling for Black, Brown, and poor children. The Wisconsin experience at the least raises concerns about a theory of federalism that leaves public schooling to local choice and to the fiscal limits of states and localities. To be sure, states play an important role in the construction of education rights, not least of all as sites of social movements that candidly address the historically subordinate status of Black, Brown, and poor children in the United States. States also offer sources of law that protect a more robust sense of human flourishing than currently associated with the Federal Constitution. But federalism is hollow if its promise of self-governance depends on market power and builds on—rather than challenges—a social foundation that is stratified by race and class. Far from applauding *Rodriguez* as encouraging “imperfect” solutions by the states, we urge acknowledgment of the harms that those imperfect solutions have served to perpetuate.

#### I. THE WISCONSIN CONSTITUTION EDUCATION CLAUSE AND STATE COURT LITIGATION

Theorists of federalism often justify giving power and authority to subnational units in order to encourage self-governance, foster autonomy, and support accountability.<sup>31</sup> On this view, the central government's taking a hands-off approach to a problem can leave space for the people of a state to step in and participate in the decisions by which they are

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31. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 915–25 (1994) (acknowledging but questioning the association of federalism with public participation, citizen choice, and state experimentation).

bound.<sup>32</sup> In *Rodriguez*, the Supreme Court made clear that public schooling is a state concern that is best left to a state's people to design and administer as they think appropriate.<sup>33</sup> From this perspective, the Supreme Court's federal rights minimalism—its decision not to recognize a federal constitutional right to education that would require a modicum of uniformity from state to state—can be seen as opening up space for innovative and local solutions.

We regard the spatial metaphor as tantalizing but nevertheless incomplete and misleading. In particular, the spatial metaphor, mechanistic in design, ignores the expressive effect that Supreme Court decisions can have on the political space that it is said to foster when it declines to recognize a national right. We do not doubt that the Court's minimalist approach may indeed open up local political space, but the space is not empty or devoid of federal influence. To the contrary, the Court's decisions serve a signaling function about how these spaces should be deployed and occupied. As Cass R. Sunstein has put it, "Supreme Court decisions have short-term effects in communicating certain messages containing national judgments about what is and is not legitimate"<sup>34</sup>—and, in *Rodriguez*, the Court's decision signaled that it was permissible to confine Black, Brown, and poor children in school districts unable to provide educational opportunities on a par with those in districts where the children were white and more affluent. At least in Wisconsin, the Court's message in *Rodriguez* was clear. Opponents of educational reform raised the decision as a shield against legislative efforts to equalize state funding for public education. And the Wisconsin Supreme Court relied on the decision in reading the state constitution to bar egalitarian democratic reforms that the state legislature had enacted. Under the influence of the Supreme Court, even if not under its direction or compulsion, the Wisconsin Supreme Court embedded the *Rodriguez* notion of local control into the Wisconsin Constitution, even though the state constitution education text nowhere refers to such a principle, and the state court then relied on the state constitution to bar the legislature from reforming its school funding formula in ways that could have improved educational opportunities to children in low-wealth districts.

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32. See, e.g., Martha F. Davis, *Design Challenges for Human Rights Cities*, 49 COLUM. HUM. RTS. L. REV. 27, 48 (2017) ("[Local governance] situates problem solvers differently in relation to the problems, creating a place to imagine more dramatic changes to the existing structures and to devise experimentation to test approaches.").

33. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973) ("The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters.").

34. Sunstein, *supra* note 10, at 69.

*A. Wisconsin School Funding Reform Prior to Rodriguez*

Almost a half century after *Rodriguez* rejected education as a fundamental federal right, the decision may seem an inevitable result that flowed from established precedent. After all, under the current approach to the Fourteenth Amendment, the Federal Constitution affords no right to social and economic support—there is no federal right to cash public assistance to meet survival needs, no right to housing to prevent homelessness, and no right to essential health care to prevent death, all on the view that “the government does not owe its citizens any affirmative duty of care.”<sup>35</sup> To the contrary, *Rodriguez* was a constitutional game changer, halting the Court’s increasing recognition of the relation between social and economic conditions and the legal commitment to equal participation in democratic life.<sup>36</sup> Just half a decade before the decision in *Rodriguez*, an article in the *Supreme Court Review* stated with some confidence that “a judicial concept of constitutional duty, of obligation to take action, is being evolved out of a series” of cases involving the Equal Protection Clause, Due Process, and other federal constitutional provisions.<sup>37</sup> That same year, Philip Kurland, admittedly with reluctance, predicted that “sooner or later the Supreme Court will affirm the proposition that a State is obligated by the Equal Protection Clause to afford equal educational opportunity to all of its public school students.”<sup>38</sup> Indeed, one should not forget that *Rodriguez* overturned the lower courts’ decisions to invalidate the Texas school funding system and that the decision was a close five-to-four.<sup>39</sup> Court-watchers expected the U.S. Supreme Court to uphold the lower court’s decision, and prior to the

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35. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1132–35 (1999).

36. Cf. Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401, 1401 & n.2 (1995). These efforts were allied with advocacy and community organizing aimed at establishing a constitutional “right to live.” *Id.* (“[Advocates] plan[ed] to beat poverty in the courtroom through a series of test cases designed to create a judicially recognized ‘right to live’—a right of access to the essentials of subsistence.”).

37. Arthur Selwyn Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199, 200–11.

38. Philip B. Kurland, *Equal Educational Opportunity, or the Limits of Constitutional Jurisprudence Undefined*, in THE QUALITY OF INEQUALITY: URBAN AND SUBURBAN PUBLIC SCHOOLS 47, 47 (Charles U. Daly ed., 1968); see also Philip B. Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 583 (1968) (repeating this same prediction, offering criticisms of a ruling in favor of equal educational opportunity, and insisting the emphasis ought to be on a quality education) [hereinafter Kurland, *Equal Educational Opportunity*].

39. Nicholas Kristof, Opinion, *If Only There Were a Viral Video of Our Jim Crow Education System*, N.Y. TIMES (May 21, 2021), <https://www.nytimes.com/2021/05/21/opinion/sunday/education-racism-segregation.html> [<https://perma.cc/GT6M-BMP8>] (“If a single justice had switched [their vote in *Rodriguez*], America would today be a fairer and more equitable nation.”).

decision eleven state legislatures had taken the initiative and amended their public school funding systems in order to redress educational disparities.<sup>40</sup> Wisconsin was among them and was one of nine states to adopt what is known as a district power-equalizing formula for distributing state educational aid.<sup>41</sup> Wisconsin's law sought to reduce interdistrict disparities in educational spending per pupil, and, because district property taxes drove school funding disparities, it used a mechanism called "negative aid" under which a portion of property taxes raised in high-property wealth districts went to the state to distribute to low-property wealth districts as "positive aid."<sup>42</sup> On the view that the Wisconsin Constitution made public schooling a state responsibility, with local contribution to its support, the law thus sought to lessen disparities in school spending between rich and poor districts, in part by requiring wealthy districts to pay into a state fund that supported schools in districts with a smaller tax base from which to fund schools.<sup>43</sup>

### *B. Wisconsin School Funding Litigation, Round One*

*Rodriguez* almost immediately changed the dynamics of Wisconsin's legislative reform effort, sending a signal that interdistrict funding disparities were an acceptable feature of public schooling. Academic commentary published soon after *Rodriguez* was decided predicted the decision's likely impact on Wisconsin school reform, reporting that wealthy districts were "contemplating litigation" to challenge "the fruits of reform."<sup>44</sup> In fact, high-wealth districts quickly took steps to block the legislature's equalization measure, filing an original action in the

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40. See W. Norton Grubb, *The First Round of Legislative Reforms in the Post-Serrano World*, 38 L. & CONTEMP. PROBS. 459, 459–60 (1974) ("[T]he general consensus was that the United States Supreme Court would uphold the *Rodriguez* decision.").

41. *Id.* at 463–64 ("Two characteristics were shared by the nine states which adopted [district power-equalizing] legislation following the first round of litigation. First, school finance reform had been under discussion in each state legislature for some time prior to the legal challenges which began in 1970. Second, most of the nine were relatively homogeneous, either in terms of previous school expenditure patterns, or by virtue of being largely rural." (footnotes omitted)).

42. Comment, *State Constitutional Restrictions on School Finance Reform: Buse v. Smith*, 90 HARV. L. REV. 1528, 1530–31 (1977).

43. WIS. STAT. §§ 121.07–08 (1975–76), *invalidated by Buse v. Smith*, 247 N.W.2d 141 (Wis. 1976). Four separate commissions examined Wisconsin's system of school financing before the legislature adopted the reform invalidated by the *Buse* court, which was modeled on the power equalization formula ordered by the *Serrano* court in California. See Erik LeRoy, *The Egalitarian Roots of the Education Article of the Wisconsin Constitution: Old History, New Interpretation, Buse v. Smith Criticized*, 1981 WIS. L. REV. 1325, 1353.

44. Grubb, *supra* note 40, at 471.

Wisconsin Supreme Court.<sup>45</sup> Three years after the law's passage, in *Buse v. Smith*,<sup>46</sup> the Wisconsin court held that "the state cannot compel one school district to levy and collect a tax for the direct benefit of other school districts, or for the sole benefit of the state."<sup>47</sup> The plurality opinion placed a heavy emphasis on the supposed constitutional "rights of the local districts."<sup>48</sup> Although the state constitution education provisions nowhere speak of any such right, and although none of the constitutional convention history canvassed by the Wisconsin Supreme Court referred to one, the court located this so-called right of "local control" in the interplay of two constitutional provisions. The first provision directed the legislature to "provide . . . for the establishment of district schools";<sup>49</sup> the second "required" each "town and city" to raise taxes "for the support of common schools therein."<sup>50</sup> From this, the court gleaned a "clear implication" that districts must "possess some measure of local control."<sup>51</sup>

The Wisconsin Supreme Court brushed aside the requirement (in the same state constitutional provision) that schools "be as nearly uniform as practicable"<sup>52</sup>—as well as the general principle, which the court acknowledged, that "[s]chool districts are . . . but arms of the state, carrying out state duties"—by reasoning that state "efforts toward [uniformity] must fall within the dictates of the criteria set forth in art. X, sec. 3."<sup>53</sup> This "slender textual reed"—the lone, adjectival use of "district" to modify "schools"—transformed, in the eyes of the plurality, a provision requiring the creation of free public schools into one strictly limiting legislative options to remedy stark disparities between schools in different districts.<sup>54</sup> The plurality opinion did not attempt to answer the dissent's reasoning that Wisconsin law accords no special status to school

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45. Petition for Leave to File an Original Action, *Buse v. Smith*, 247 N.W.2d 141 (Wis. 1976) (No. 75-552).

46. 247 N.W.2d 141 (Wis. 1976).

47. *Id.* at 155.

48. *Id.* at 151–52.

49. WIS. CONST. art. X, § 3.

50. *Id.* § 4.

51. *Buse*, 247 N.W.2d at 150.

52. WIS. CONST. art. X, § 3.

53. *Buse*, 247 N.W.2d at 148, 151. Past decisions had established that uniformity referred not to the composition of school districts but rather to "the character of instruction that should be given in those schools after the districts were formed[, and] the training that these schools should give." *State ex rel. Zilisch v. Auer*, 221 N.W. 860, 862 (Wis. 1928). Notably, the court quoted this passage but thereafter reiterated multiple times that the "'character of instruction' was all that was required to be 'as nearly uniform as practicable' under the mandate of the constitution," thereby stripping "training" from the formulation. *Buse*, 247 N.W.2d at 148 (quoting *Joint School Dist. No. 10 v. Sosalla*, 88 N.W.2d 357, 363 (Wis. 1958)).

54. Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 782 (1992).

districts,<sup>55</sup> instead regarding them as merely “quasi corporations, variable in organization and extent,” with “only the powers given to [them] by statute.”<sup>56</sup> The plurality opinion bolstered its textual analysis with a reference to one comment in the constitutional convention debates suggesting that “if nothing was contributed by the town, the common schools languished” because “[n]o adequate interest was felt by the people, in common schools, unless they contributed to their support.”<sup>57</sup> Although the statement says only that financial contribution is necessary to secure “interest,” the plurality’s gloss on the passage was that it “recognized the importance of local interest and some measure of *local control*.”<sup>58</sup> This approach to the power of localities ran counter to accepted doctrine concerning the powers and subordinate nature of localities vis-à-vis the state.<sup>59</sup> Finally, the plurality found additional support in a post-ratification law permitting school district boards to supplement required curricula with additional subjects of instruction, which, the plurality reasoned, “manifested a construction of the state-local division of power.”<sup>60</sup> Having elevated “local”—meaning district-level<sup>61</sup>—control to the status of a state-constitutionally-protected right, the Wisconsin Supreme Court struck down the “negative-aid” payments as violative of another state

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55. *Buse*, 247 N.W.2d at 165 n.18 (Abraham, Day & Heffernan, JJ., dissenting).

56. *State ex rel. Van Straten v. Milquet*, 192 N.W. 392, 394 (Wis. 1923) (quoting *Stroud v. City of Stevens Point*, 37 Wis. 367, 371 (Wis. 1875)).

57. *Buse*, 247 N.W.2d at 151 (quoting Eastabrook Speaking at the Wisconsin Constitutional Convention, in *JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN*, 335, 335 (Madison, W.T. Tenney, Smith & Holt, Printers, ed. 1848)).

58. *Id.* (emphasis added).

59. Briffault, *supra* note 54, at 782 (“*Buse*’s use of local control as a sword to invalidate equalizing state laws is unusual.”).

60. *Buse*, 247 N.W.2d at 151.

61. Notably, Wisconsin law distinguishes districts from cities and towns, and, because the requirement of “uniformity” is not interpreted to apply to the composition of school districts, the state would be free to redraw school districts as it saw fit. *See State ex rel. Harbach v. Mayor of Milwaukee*, 206 N.W. 210, 212–13 (Wis. 1925). As such, while the tax-raising requirement in Section 4 pertains to cities and towns, there is no inherent link between city/town and district: a district could overlay many towns/cities, few, or one. *Id.* (“[A]lthough the boundaries of a school district may be coterminous with the boundaries of a city, there is no merger of the school district affairs with the city affairs. They remain separate and distinct units of government for the purpose of exercising separate and distinct powers and for the accomplishment of separate and distinct purposes.”). That school districts do not necessarily correspond to cities/towns and that the Wisconsin Supreme Court relies on a notion of “local control under art. X, sec. 4,” *Buse*, 247 N.W.2d at 150, further undermines the coherence of the plurality’s elevation of school district to the level of a constitutionally sacrosanct unit within which any tax dollars raised in the district must be spent. Indeed, the approach to local district autonomy in *Buse* is especially questionable, as the plurality does not even acknowledge that Article X, Section 4 refers to cities and towns rather than school districts. *See id.* at 150–52.

constitutional provision requiring taxation.<sup>62</sup> The state's modest redistributive measure thus was invalidated just three years after passage, the same year negative aid payments were set to take effect.<sup>63</sup>

The Wisconsin Supreme Court's approach to local district autonomy in *Buse* is irreconcilable with its approach to the Wisconsin Home Rule Amendment, which, together with the 1921 adoption of the general charter law for municipalities, aimed at granting local governments "significant powers apart from legislative largesse."<sup>64</sup> In *State ex rel. Harbach v. Mayor of Milwaukee*,<sup>65</sup> the Wisconsin Supreme Court upheld the constitutionality of a state law that raised the required millage of local taxes for the repair of school buildings in Milwaukee against a challenge that it violated the state's Home Rule Amendment, a provision that stated, "Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this Constitution and to such enactments of the Legislature of state-wide concern as shall with uniformity affect every city or every village."<sup>66</sup> The Wisconsin court found that the amendment continued to subordinate local control to state regulation of education:

[T]he so-called Home Rule Amendment imposes no limitation upon the power of the Legislature to deal with the subject of education, and this applies to every agency created or provided, and to every policy adopted by the Legislature, having for its object the promotion of the cause of education throughout the state.<sup>67</sup>

As the court explained,

One article of the Constitution is devoted to municipal affairs and the organization of cities and villages. Another article of the Constitution is devoted to education, and provides for the establishment of district schools. With reference to the interest of the state in the two fields there is a wide difference. Local municipalities are organized for the purpose of dealing with matters of local concern. In such matters the state has little or no

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62. *Buse*, 247 N.W.2d at 152, 155.

63. *Id.* at 143–44. William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1176 (2004) ("The legislature was hamstrung from using the innovative recapture provision to control costs and create finance equity, while local control was elevated to a constitutional principle.").

64. Michael P. May, *Rejected: Municipal Home Rule Powers in Milwaukee Cases*, WIS. LAW., Nov. 2016, at 38, 40.

65. 206 N.W. 210 (Wis. 1925).

66. *Harbach*, 206 N.W. at 211, 213 (quoting WIS. CONST., art. XI, § 3 (1924)).

67. *Id.* at 213.

interest. The state, however, does have an interest in the education of its entire citizenship—an interest so deep and substantial that the framers of the Constitution not only made provision for the establishment of district schools, but made provision for the creation of a school fund, the income of which should be devoted to the maintenance of district schools throughout the state.

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School buildings are an essential agency in the state's educational scheme, and to allow municipalities a voice in the construction, repair, control, or management of the school buildings within their borders is to yield to them the power to frustrate the state's plan in promoting education throughout the state. If power be granted to interfere in this respect, there would be no logical limitation to municipal interference with the district schools.<sup>68</sup>

Conceptually, *Harbach* is in many respects a mirror-image of *Buse*. On one side of the ledger in *Harbach* is the state's interest in education, backed by one constitutional provision. On the other is the municipal interest in local control, backed by a provision that expressly provides for municipal autonomy over local affairs, subject only to uniformly applied enactments of the legislature. Insofar as there is daylight between the cases, *Buse* presented a stronger case for the predominance of the state power and duty to enact laws that promote functional, and not merely formal, uniformity of public schooling. First, the relevant "local" unit in *Buse* was the district, not the city, but, as discussed earlier, districts are administrative units with no powers or rights independent of their legislative grants.<sup>69</sup> Second, unlike in *Buse*, *Harbach* involved a provision with express text providing for local control rather than a provision that can be read to speak to local control only by virtue of tenuous inferences.<sup>70</sup> The court made no attempt to reconcile its position in *Buse* with the consistent result under cases like *Harbach*.<sup>71</sup> But the Wisconsin court's approach could easily be reconciled with *Rodriguez*, which spoke repeatedly about the importance of maintaining local control over public schools—even when the locality lacked the fiscal means to exercise meaningful choice over the substance of the schooling provided.<sup>72</sup>

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68. *Id.* at 212.

69. *See supra* Section I.B.

70. *See supra* Section I.B.

71. *Harbach* is illustrative, not exceptional. *See generally* May, *supra* note 64, at 40.

72. *See infra* Section II.A.1.

C. *Wisconsin School Funding Litigation, Round Two*

*Buse* led to the enactment of a new school finance regime and a second round of school funding litigation begun in 1979, culminating in the 1989 decision in *Kukor v. Grover*.<sup>73</sup> By 1979, state constitutional challenges had been decided in fourteen states, and although the success rate was mixed, some state courts had indeed interpreted their state constitutional provisions outside the orbit of federal doctrine.<sup>74</sup> Not so in Wisconsin. Whereas *Buse* foreclosed one key legislative pathway to addressing school finance disparities, *Kukor* applied *Buse*'s reasoning to foreclose another key pathway, this time a judicial one.<sup>75</sup> At issue in *Kukor* was the state's post-*Buse* formula for state aid to public school districts.<sup>76</sup> Under this scheme, state aid guaranteed a per-pupil floor of the property tax base, such that if the district tax base fell below the floor, state aid supplemented the base so that it reached a guaranteed tax base level.<sup>77</sup> Unlike in *Buse*, there was no "negative aid" component that directly redistributed funds from areas with high property values to those with lower property values; the state aid came from general state tax revenues.<sup>78</sup>

Plaintiffs—parents with children in Milwaukee public schools—alleged that the state's approach violated the educational uniformity requirement of the Wisconsin Constitution, as well as the state equal protection clause.<sup>79</sup> Central to plaintiffs' theory was the notion of "educational overburden," a term for the additional services schools in impoverished areas had to provide to "compensate for poverty effects on education."<sup>80</sup> These additional, "greatly needed" services forced schools to "redirect[] funds from regular programs" and thus resulted in "an inability to provide regular programs of instruction equal to those of higher

73. 436 N.W.2d 568 (Wis. 1989).

74. See Perry A. Zirkel, *An Updated Tabular Overview of the School Finance Litigation*, 379 EDUC. L. REP. 453 (2020) (providing "a box-score table that showed the outcomes of the school finance litigation at the state level in the wake of the Supreme Court's decision" in *Rodriguez*).

75. *Kukor*, 436 N.W.2d 568.

76. *Id.* at 570.

77. *Id.* at 571.

78. *Id.* at 571–72.

79. *Id.* at 573.

80. *Id.* (discussing the "financial burden of providing for the following services more greatly needed in poverty districts: early childhood education; compensatory education; dropout prevention programs; vocational education; and supportive services, including the provision of social workers and psychologists" that results from high numbers of poor students in the school). A related concept of "[m]unicipal overburden" captured the additional costs that flowed from high costs of education in certain municipal districts. *Id.* (discussing "high maintenance and energy costs," costs related to security, and higher labor costs).

expenditure districts.”<sup>81</sup> Plaintiffs argued that the uniformity clause called for evaluating educational needs and opportunities, not merely the property tax base.<sup>82</sup> Relying on *Rodriguez* as well as the U.S. Supreme Court’s decision in *Milliken v. Bradley*<sup>83</sup>—and *Buse*’s endorsement of those cases’ political philosophy—the state argued that plaintiffs’ position ran afoul of the tradition and constitutional requirement of local control.<sup>84</sup> Indeed, the attorney general’s argument drew a straight line from *Milliken* and *Rodriguez* through *Buse* to the conclusion that not only was the existing funding scheme constitutional, but also that a central state funding scheme—the other proposal under consideration by the gubernatorial task force before the adoption of the power equalization scheme invalidated in *Buse*—would in fact violate the constitutional prerogative of local control.<sup>85</sup>

Adopting the formal approach of federal equality doctrine, the Wisconsin Supreme Court found the uniformity requirement satisfied because state aid permits “all districts . . . to provide for the *basic education* of its pupils,” noting the absence of allegations that resource inequality prevented plaintiffs’ districts from meeting “*minimum standards for teacher certification, minimal number of school days, and standard school curriculum.*”<sup>86</sup> In so concluding, the plurality reasoned, “while greater uniformity in educational opportunities is . . . desirable . . . it is not something which is constitutionally mandated under the

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81. *Id.*

82. *Id.* at 573–74.

83. *Milliken v. Bradley*, 418 U.S. 717 (1974) (invalidating interdistrict remedies notwithstanding a finding of unconstitutional segregation in Detroit’s public schools).

84. *Kukor*, 436 N.W.2d at 574.

85. The attorney general argued,

[L]ocal control is essential to a quality educational system. In *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974), the Supreme Court acknowledged that “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.” (Emphasis added.) The United States Supreme Court has defined local control as “the freedom to devote more money to the education of one’s children” and the opportunity to participate in the “decisionmaking process that determines how those local tax dollars will be spent.” *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 49–50 (1973). . . . [T]he constitutional right of local control [was] recognized in *Buse* . . . . There can be no viable local control in the absence of local funding. . . . Local control—the power to raise revenues and make policy decisions—is a constitutional right of local school districts.

*Amicus Curiae Brief of the Wisconsin Association of School Boards, Inc.* at 6–8, *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989) (No. 86-1544) (emphasis in original).

86. *Kukor*, 436 N.W.2d at 577–78 (emphasis added).

uniformity provision.”<sup>87</sup> Uniform, in the eyes of the Wisconsin court, required only uniformity in meeting a bare minimum.<sup>88</sup>

Although its uniformity and equal protection analysis evinced a highly permissive approach to any funding scheme that leaves in place large wealth-based disparities, the *Kukor* court, in dicta, doubled down on *Buse*’s skepticism of school finance systems that actively combat such disparities. Citing *Buse*, the Wisconsin Supreme Court stated in dicta in *Kukor* that not only is equality of expenditure not *mandated* by the uniformity clause, but such equality may also be *prohibited* because of local control rights: “complete equalization is constitutionally prohibited to the extent that it would necessarily inhibit local control.”<sup>89</sup> In so reasoning, the Wisconsin court effectively enshrined large wealth-based disparities as the constitutional baseline and made deviations from that baseline constitutionally suspect—just as the attorney general had argued, relying upon *Rodriguez*.

#### D. Wisconsin School Funding Litigation, Round Three

After a decade more experience under the funding mechanism at issue in *Kukor* and its statutory successor,<sup>90</sup> parents and educators launched another significant challenge in 1995, *Vincent v. Voight*,<sup>91</sup> again under the state uniformity and equal protection clauses, to Wisconsin’s state funding formula for public schools.<sup>92</sup> Plaintiffs included more than one hundred school districts (large and small, urban and rural), as well as parents and students from “almost every area of the State,”<sup>93</sup> and post-filing, teachers and officials of the Wisconsin Education Association Council intervened

87. *Id.* at 577.

88. *See id.* at 577–78. Commentators have noted that the court significantly misconstrued or overlooked key premises of the constitutional convention debate in reaching this conclusion. For example, the framers presumed there “would be an excess above the wants of the primary and common schools,” such that uniformity would have been understood to include uniformity of funding. Joshua S. Wyner, *Toward a Common Law Theory of Minimal Adequacy in Public Education*, 1992/1993 ANN. SURV. AM. L. 389, 400–05 (1994) (quoting Kilbourn Speaking at the Wisconsin Constitutional Convention, in JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN, 342, 342 (Madison, W.T. Tenney, Smith & Holt, Printers, ed. 1848)); *see also* Suzanne M. Steinke, Comment, *The Exception to the Rule: Wisconsin’s Fundamental Right to Education and Public School Financing*, 1995 WIS. L. REV. 1387; LeRoy, *supra* note 43, at 1354–57.

89. *Kukor*, 436 N.W.2d at 579.

90. For a discussion of developments after the early decisions discussed in this section, see *infra* Part III. WIS. STAT. § 121.01 (2019–20).

91. 614 N.W.2d 388 (2000).

92. *Id.* at 395–96.

93. Brief of Plaintiffs-Co-Appellants-Petitioners at 1, *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000) (No. 97-3174).

as plaintiffs.<sup>94</sup> After losing at the trial and intermediate appellate levels in decisions that brushed aside the dispute as a repeat of *Kukor*, petitioners presented two challenges to the Wisconsin Supreme Court: *first*, intervenors sought to overturn *Kukor*, relying on the text and history of the education provisions and encouraging the Wisconsin court to follow the spate of high court decisions from other states recognizing the right to a *quality* education;<sup>95</sup> and *second*, plaintiffs argued that *Kukor* left open the possibility that a disparity-based theory could succeed if plaintiffs showed that one district was “not [] comparable to other districts, [so that] the legislature would be required to take action under art. X sec. 3.”<sup>96</sup> Plaintiffs also argued that their challenge, unlike in *Kukor* and *Buse*, did not pertain solely to the equalization provision, but rather targeted the funding scheme as a whole, including “disequalizers” found elsewhere in the school finance system such as integration aid, a new “hold-harmless” provision that ensured even wealthy districts received aid under the new system, and tax credits.<sup>97</sup> To this list of inequities, intervenors added a concern that charter schools and the Milwaukee Parental School Choice Program “pull students out of the public schools,” thereby decreasing the number of in-district pupils (in turn decreasing the state funding the district received).<sup>98</sup> Plaintiffs and intervenors placed slightly different emphasis on the remedies they sought: while plaintiffs sought to redress tax base disparities so that “districts that tax the same (at whatever level they choose), spend the same,” intervenors urged the Wisconsin Supreme Court to re-cast uniformity in equitable rather than formal terms so that it was tailored to meet a district’s resource needs in light of the educational needs of the children who attended the district’s schools (such that property-poor districts with schools attended by “high needs” students would necessitate distributing greater resources to those districts and students).<sup>99</sup>

The *Vincent* court largely rebuffed these efforts, hewing closely to the analysis in *Kukor*. As in *Kukor*, the Wisconsin Supreme Court cast the fundamental right to education as protecting only the equal right to a constitutional minimum.<sup>100</sup> Thus, absent a showing that the “right to an

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94. Brief of Intervening Plaintiffs-Appellants-Petitioners at 4, *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000) (No. 97-3174).

95. *Id.* at 22, 27. *See, e.g., Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976), *as modified on denial of rehearing*, 569 P.2d 1303 (Cal. 1977); *see also* Hershkoff & Yaffe, *supra* note 3.

96. Brief of Plaintiffs-Co-Appellants-Petitioners at 56, *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000) (No. 97-3174) (quoting *Kukor v. Grover*, 436 N.W.2d 568, 587 (Wis. 1989) (Steinmetz, J., concurring)) (emphasis omitted).

97. *Id.* at 13–18.

98. *Vincent*, 614 N.W.2d at 400.

99. *Id.* at 408 (quoting Brief of Plaintiffs-Co-Appellants-Petitioners at 71, *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000) (No. 97-3174)).

100. *Id.* at 411.

equal opportunity for a sound basic education” had been denied based on wealth, any wealth-based classification shaping access to education beyond the constitutional minimum was subject only to rational basis review.<sup>101</sup> The court did, however, go beyond *Kukor* insofar as it gave some additional content to the constitutional minimum:

An equal opportunity for a sound basic education is one that will equip students for their roles as citizens and enable them to succeed economically and personally. The legislature has articulated a standard for equal opportunity for a sound basic education . . . as the opportunity for students to be proficient in mathematics, science, reading and writing, geography, and history, and for them to receive instruction in the arts and music, vocational training, social sciences, health, physical education and foreign language, in accordance with their age and aptitude. An equal opportunity for a sound basic education acknowledges that students and districts are not fungible and takes into account districts with disproportionate numbers of disabled students, economically disadvantaged students, and students with limited English language skills.<sup>102</sup>

Having announced a new standard without previous recognition by the state judiciary, the Wisconsin Supreme Court immediately faulted plaintiffs for failing to meet it.<sup>103</sup> The majority brushed aside evidence of “deteriorating school facilities, limited curricula, and lack of computer technology” in “property poor” districts as not showing “those school districts fail to offer a basic education,” noting that plaintiffs introduced no evidence of “poor standardized test scores [or] college entrance rates.”<sup>104</sup> Because plaintiffs’ allegations and evidence did not demonstrate that their schools fell below the constitutional minimum (now defined as

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101. *Id.* at 414.

102. *Id.* at 396–97. The court repeatedly stressed its deference to legislative policy with respect to defining the minimum required under the constitution, explaining that its decision in *Kukor* “laid the foundation for the right” to a sound basic education it recognized in *Vincent*. *Id.* at 406, 411. Of course, its adherence to the analysis in *Kukor* and *Buse* cuts both ways. While schemes such as those at issue in *Kukor* and *Vincent*, which largely preserve wealth-based disparities, receive deference on the theory that the legislature defines what the constitutional minimum of the fundamental education right entails, schemes that are meaningfully redistributive or that are perceived to impinge on local rights are constitutionally suspect, if not presumptively invalid. *See infra* Section II.A.1.

103. *Vincent*, 614 N.W.2d at 415. Justice Abrahamson, writing for three, joined the opinion insofar as it set forth this new standard but would have remanded the case to develop additional facts if needed, in light of the unfairness of announcing the standard and then holding plaintiffs to it in the same case. *Id.* at 415–16 (Abrahamson, J., concurring in part and dissenting in part).

104. *Id.* at 411–12.

a sound basic education), both the uniformity and equal protection clause challenges failed.<sup>105</sup>

## II. ASSESSING THE IMPACT OF *RODRIGUEZ* ON WISCONSIN STATE SCHOOL FINANCE LITIGATION

Commentators who celebrate *Rodriguez* claim that it has had democracy-enhancing effects evidenced by the success of state constitutional education lawsuits throughout the country.<sup>106</sup> The win-loss rate of state challenges to inequitable and inadequate public schools lends meaningful support to this view.<sup>107</sup> But these state court victories should not obscure the more dominant trend: that state courts interpreting state constitutional provisions overall generally have borrowed wholesale from the U.S. Supreme Court and afford no greater protection under state law than federal doctrine would provide.<sup>108</sup> And while some posit that litigation involving state constitutional provisions with no federal analog forces states to adjudicate independently of federal influence,<sup>109</sup> in this Part we discuss how the U.S. Supreme Court's rights-minimalism may have influenced state constitutional interpretation of education rights in Wisconsin that, obviously, have no federal counterpart. Further, we explore how U.S. Supreme Court doctrine worked to narrow legislative options in Wisconsin by mobilizing local opposition to state reform seeking to equalize and improve school funding.<sup>110</sup>

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105. *Id.* at 411, 415.

106. *See* Sutton, *supra* note 14, at 1986.

107. *See* Zirkel, *supra* note 74. For disclosure, one of the authors of this Essay appeared as counsel or as amicus curiae in some of these state constitutional actions on behalf of the plaintiff-children. *See, e.g.*, Helen Hershkoff, *School Finance Reform and the Alabama Experience*, in STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY 24 (Marilyn J. Gittell ed., 1998).

108. *See, e.g.*, James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183 (2000); *see also* Steinke, *supra* note 88, at 1394 (“Generally, Wisconsin has adopted the United States Supreme Court’s standards for evaluating equal protection challenges under the state constitution.”). In Wisconsin, as a former justice of the Wisconsin Supreme Court candidly observed, Justice Brennan’s approach to rights enforcement more often was argued in concurrence or dissent than in the state court’s majority decisions. Sykes, *supra* note 4, at 375 (recognizing and applauding “[t]he general practice . . . to follow doctrinal developments in federal constitutional law” when state texts were the same or almost the same as federal).

109. Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 391 (1998) (“Most provisions in state constitutions have no federal analogue, and with regard to these dissimilar clauses, a court has no choice but to interpret the provisions independently, without reference to the Federal Constitution.”).

110. For a discussion of how politics and ideology may have impacted the Wisconsin court’s later school funding decisions, see Koski, *supra* note 63, at 1184 (discussing the governor’s judicial appointments and their support of “the State’s position in *Vincent*”). We acknowledge the Wisconsin Supreme Court’s current reputation for deep

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We see three interpretive effects following the U.S. Supreme Court's decision in *Rodriguez*, all of which blunted the potency of the state constitutional right to public schooling: the elevation of local control to quasi-constitutional status; the dilution and even elimination of public schooling as a fundamental right; and the acceptance of the federal court's "federalism discount" as a matter of state separation-of-powers doctrine. To the extent these interpretive efforts opened up political space in Wisconsin for educational policy reform, they channeled local political activity toward a national conception of education that relieved the state of financial responsibility, sought to replace public schools with private schools, and entrenched wealth and race distinctions in the availability of educational opportunities.

1. LOCHNERIZING LOCAL CONTROL

The decision in *Buse*—overturning a reasonable legislative effort to reform the state's school finance formula—appears highly anomalous in the context of Wisconsin constitutional doctrine. Commentators have found the decision difficult to support on its face, at odds with accepted rules of local sovereignty, and nearly inexplicable when juxtaposed with the Wisconsin Supreme Court's past treatment of similar issues.<sup>111</sup> In our view, *Buse* reflects the indirect interpretive influence of *San Antonio Indep. School Dist. v. Rodriguez*, which elevated local control to a quasi-constitutional status and enabled the Wisconsin court to leverage the principle as justification for striking down state equalization efforts, notwithstanding the fact that the Wisconsin Constitution nowhere refers to local control of education and state law makes localities subordinate to

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political division. See, e.g., Ruth Conniff, *Why Shirley Abrahamson Mattered*, URB. MILWAUKEE (Dec. 22, 2020, 4:22 PM), <https://urbanmilwaukee.com/2020/12/22/op-ed-why-shirley-abrahamson-mattered/> [<https://perma.cc/NPB7-B23S>] ("We now have a court where the majority banded together to oppose ethics standards that would make justices recuse themselves from cases involving their own campaign donors, who pony up millions to get friendly treatment when they have business before their pet judges."). And although the Wisconsin court overturned legislative reform efforts in *Buse*, it since has manifested a consistent pattern of legislative deference associated with partisan politics and not rule of law values. See Jay McDivitt, *This Toothless Court: Judicial Review in Wisconsin Post-Mayo*, 104 MARQ. L. REV. 1215, 1227 (2021) (discussing the Wisconsin court's "relinquishment of judicial review along party lines" and questioning "if the Republican-controlled Wisconsin Supreme Court would be so deferential to a Democratic Party-controlled legislature").

111. See generally Briffault, *supra* note 54, at 782.

state educational authority.<sup>112</sup> The U.S. Supreme Court doubled down on its veneration of localism the following year in *Milliken*, this time using it to strike down the federal district court's ordering of interdistrict remedies for segregated schooling.<sup>113</sup> Together, the pair of federal decisions treated local control as a background principle to the Federal Constitution, embedding a broad, atextual vision of local autonomy into the Fourteenth Amendment that counsels against federal interference with local affairs and blocks the state from regulating local practices. Any deviations from the "natural" state of local control are to be seen as suspect and violative of tradition; the decisions also carried more than a hint of skepticism about the viability of centrally planned remedial measures for educational inequalities.<sup>114</sup>

As Richard Briffault has shown in a series of now-canonical articles, "[t]he ground rule of state-local relations is state control and local powerlessness, not local control."<sup>115</sup> Far from respecting federalism, *Rodriguez* and *Milliken* upended state sovereignty in favor of a federal vision of state-local relations that supplanted state law and significantly curtailed the state's power to redress state problems. "Local control" came to function as an irrebuttable presumption to defeat state equalization efforts, serving to give permanent, quasi-constitutional status to existing school district boundaries notwithstanding their segregative effect and their role in withholding quality and equal education from Black, Brown, and poor children.

The *Buse* plurality's vindication of the rights of residents of negative-aid districts—wealthy districts required to make payments to support the state's administration of public schooling—aligns very closely with *Rodriguez*'s localism philosophy and in ways that produce similar

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112. See *Buse v. Smith*, 247 N.W.2d 141, 165–66 (Wis. 1976) (Abrahamson, J., dissenting).

113. *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

114. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 41 n.85 (1973) (noting that petitioners "offer little guidance as to what type of school financing should replace [Texas's system]" and casting doubt on district power-equalization formulas because "commentators are in disagreement as to whether it is feasible, how it would work, and indeed whether it would violate the equal protection theory underlying appellees' case"); *Milliken*, 418 U.S. at 743–44 (finding lower court's remedy would require either "complete restructuring of the laws" or else force it to act as "legislative authority" to resolve these complex questions, and then the 'school superintendent' for the entire area").

115. Briffault, *supra* note 54, at 773; see also Richard Briffault, *Our Localism* (pts. 1–2), 90 COLUM. L. REV. 1, 346 (1990) (explaining the power of local governments in America).

results.<sup>116</sup> The *Rodriguez* majority sang the praises of state systems in which “[e]ach locality is free to tailor local programs to local needs,”<sup>117</sup> even going so far as to opine that an “analogy to the Nation-State relationship in our federal system seems uniquely appropriate” for understanding the benefits of state laws that encourage “[p]luralism.”<sup>118</sup> In the Court’s eyes, “local control means . . . the freedom to devote more money to the education of one’s children.”<sup>119</sup> *Buse* made explicit the unspoken, but necessary, corollary of *Rodriguez*’s reasoning: that local control in the *Rodriguez/Buse* sense *also* means not being asked to pay into a state fund that supports *other* (poorer) districts’ children, at least not unless people in every district pay in at the same rate.<sup>120</sup>

Although the *Buse* court acknowledged the overwhelming evidence that most “interdistrict disparities” resulted not from different political choices by districts, households, or parents about how much to fund education, but were instead “attributable to differences in the amount of assessable property available within any district[.]”<sup>121</sup> it resisted the logical conclusion that the system offered autonomy only to the wealthy.<sup>122</sup> Instead, the court resorted to a non sequitur: while property-poor districts “have reduced ability to make free decisions with respect to how much they spend on education,” they nonetheless have significant “authority as to how available funds will be allocated” and “with respect to the operation

116. Indeed, Petitioners would have had the Wisconsin Supreme Court go even further. Relying on *Rodriguez*, Petitioners pressed an equal protection claim that, in light of the fact that education was a recognized fundamental right under Wisconsin state constitutional law (unlike under federal constitutional law), the equalization formula “interfere[d] with and adversely affect[ed] the fundamental educational rights of residents of negative aid [i.e., wealthier] districts by making it unconstitutionally more difficult for negative aid districts to provide an educational offering equivalent to that provided by positive aid [i.e., poorer] districts.” Brief of Petitioners at 36, *Buse v. Smith*, 247 N.W.2d 141 (Wis. 1976) (No. 75-552). The Wisconsin Supreme Court’s rejection of this argument worked at a similar result through its embrace of *Rodriguez*’s vindication of local control. *Buse*, 247 N.W.2d at 155.

117. *Rodriguez*, 411 U.S. at 50.

118. *Id.*

119. *Id.* at 49.

120. *Buse*, 247 N.W.2d at 154 (“[T]he demands of charity, springing from dire distress in some foreign jurisdiction, or any outside of the particular taxing unit, are not a legitimate basis for taxation of property in the particular jurisdiction, because of the absence of reciprocal obligations and benefits, in a governmental sense.”). As noted, the court in *Buse* did not grapple with the issue that the taxes were either state or city/town-level taxes, but not district taxes, and that even where the district is geographically coterminous with the city, governmentally and legally it is wholly distinct. *See supra* note 57 and accompanying text.

121. *Rodriguez*, 411 U.S. at 46 (“Those districts that have more property, or more valuable property, have a greater capability for supplementing state funds.”).

122. The court did not square its account that “local control means . . . the freedom to devote more money to the education of one’s children,” *id.* at 49, with its recognition that the legislature is powerless when it comes to the issue of property values.

of the schools.”<sup>123</sup> The *Buse* plurality displayed all of *Rodriguez*’s enthusiasm for local control without any regard to the resources districts need to provide educational opportunities and in effect constitutionally enshrined wealth disparities in school financing. Because *Buse* read *in* a requirement not found in the constitutional text (that of local control) while effectively reading *out* (or at least vitiating) the express language of the uniformity clause, the subsequent failure of challenges premised on the theory that the school finance system’s dependence on local property taxes rendered it too unequal is unsurprising. Indeed, the state’s brief in *Kukor* argued—with some plausibility—that *Buse* foreclosed any legislative approach to school finance that did more to equalize expenditures across districts.<sup>124</sup>

## 2. DILUTING AND EVEN ELIMINATING EDUCATION AS A FUNDAMENTAL STATE RIGHT

In the standard federalism story, *Rodriguez* offers the twin benefits of fostering state constitutional development and enabling local communities to adapt public schools in light of residents’ preferences. The Wisconsin experience questions that account; in that state, *Rodriguez* effectively shut down egalitarian state constitutional experimentation by “federalizing” the state judiciary’s approach to public schooling—not on a retail, case-by-case basis, but wholesale, making it impossible for the Wisconsin legislature to reform its school financing mechanism in ways that could improve educational opportunities for children in low-wealth districts. *Kukor* made clear that the veneration of localism and concomitant downgrading of education as a fundamental right that the Wisconsin Supreme Court had announced in *Buse* would apply to block not only novel legislative arrangements, but also the run-of-the-mill type of state constitutional claim that is said to justify federal rights minimalism. Keep in mind that the claim in *Kukor* did not seek an order that one district directly bear another’s costs or give up any autonomy. Nevertheless, the Wisconsin court expanded on the interpretive-borrowing approach in *Buse* to abdicate responsibility for scrutinizing state education finance schemes under the uniformity and equality clauses, again following federal suit in its approach to the state constitution. Local control operated not as an analytic category, but as an irrebuttable presumption that ousted the state legislature of authority to redress urgent state problems. This result runs directly counter to the theory of state legislative authority, which is considered to be plenary unless the state constitutional text explicitly

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123. *Id.* at 51.

124. *See supra* note 85 and accompanying text.

divests majoritarian politics of the specific power.<sup>125</sup> Again, local control nowhere is mentioned in the education provisions of the Wisconsin Constitution, but, under the influence of *Rodriguez*, it became hard wired as a background principle.

*Kukor* presented the Wisconsin Supreme Court with a straightforward claim under the state constitution, building on an equity theory that, although criticized in some scholarly quarters, had met success in some state courts where education was recognized to be a fundamental right under the state constitution.<sup>126</sup> To reject the claim, the Wisconsin court had to vitiate precedent that indeed treated public schooling as fundamental—which would have triggered strict scrutiny of the challenged law<sup>127</sup>—under the state constitution.<sup>128</sup> As a formal matter, the court recited that “equal opportunity for education is a fundamental right” but held that the right was not at issue in the case.<sup>129</sup> To implicate that fundamental right, the plurality reasoned, plaintiffs would need to have alleged either “denial of a right to attend a public school free of charge”; failure to meet the minimum standards it construed uniformity to demand; or failure to distribute state aid faithfully to districts below the guaranteed base pursuant to the financing scheme—an approach consistent with *Rodriguez* under the Federal Constitution, but not under state law.<sup>130</sup> Charitably, we might say that the *Kukor* plurality saw the right to equal educational opportunity as fundamental, but not in toto; rather, its fundamental nature extends only up to the minimum, after which it is a matter of private means or legislative largesse (and largesse constrained by the court’s federalized notion of uniformity and local control).<sup>131</sup> In reaching this conclusion, the court relied heavily on *Rodriguez* and the Supreme Court’s later decision in *Papasan*,<sup>132</sup> from which it seemingly

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125. See Helen Hershkoff, “Just Words”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1539 (2010) (stating that “the plenary nature of state legislative power is its central characteristic”).

126. See Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 760 (2012).

127. *Kukor v. Grover*, 436 N.W.2d 568, 578–80 (Wis. 1989).

128. *Id.* at 578–79. The Wisconsin court noted that plaintiffs had not alleged that wealth was a suspect classification. But it stated in dicta that, even if they had, the Wisconsin court would have rejected the claim.

129. *Id.* at 579.

130. *Id.*

131. *Id.* at 580 (“[E]ducation is, to a certain degree, a fundamental right.”) (emphasis added).

132. *Papasan v. Allain*, 478 U.S. 265 (1986); see *Kukor*, 436 N.W.2d at 580 (emphasizing that “allegations asserting the denial of a minimally adequate education were rejected in *Papasan*, where the claim focused upon spending ‘disparities’ rather than alleging that the school children ‘are not taught to read or write . . . [or] that they receive no instruction on even the educational basics’”) (alteration in original) (citing *Papasan*, 478 U.S. at 286).

took the principle that, as a general proposition, funding-disparities claims merit only rational basis review—explicitly relying upon the federal standard, which is premised on the absence of a fundamental right to education.<sup>133</sup> Essentially, as long as the state ensured that schoolhouse doors were open, the requirement of equality was met—a view consistent with federal doctrine but one that ignored the unique status of education under the Wisconsin Constitution.

### 3. ADOPTING THE FEDERALISM DISCOUNT AS A MATTER OF STATE LAW

*Vincent v. Voight*<sup>134</sup>—the third of the Wisconsin school cases—in one sense marked an important development in the Wisconsin court’s approach to the state constitution education provisions. Four justices attempted to give content to the legal requirement of a “sound basic education,”<sup>135</sup> associating it—at the least—with providing students with equal opportunities to become proficient in ways needed “to succeed economically and personally.”<sup>136</sup> In this part of the opinion, the Wisconsin court relied upon state constitutional decisions from other states that had indeed employed interpretive independence with respect to public schooling provisions.<sup>137</sup> Four other justices found that the school finance formula did not fail under this standard and described their decision as effectively a rerun of *Kukor*.<sup>138</sup> Yet in our view, the majority expanded the Wisconsin court’s borrowing of U.S. Supreme Court doctrine in ways that seriously impede the state court’s ability to enforce any right that goes beyond the formal establishment of public schooling.

*Rodriguez* made clear that its reticence in recognizing a federal right was in part motivated by respect for federalism: the view that federal courts should “refrain from imposing on States inflexible constitutional restraints” that may not fit conditions in a particular state.<sup>139</sup> As commentators have recognized, this so-called “federalism discount” of federal rights ought not to apply in state court—especially when a state

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133. *Kukor*, 436 N.W.2d at 580 (“[W]e apply, as did the United States Supreme Court in *Rodriguez*, a rational basis standard because the rights at issue in the case before the court are premised upon spending disparities and not upon a complete denial of educational opportunity.”).

134. 614 N.W.2d 388 (Wis. 2000).

135. *Id.* at 396.

136. *Id.*

137. *Id.* at 410–11.

138. *Id.* at 415–21 (Abrahamson, C.J., concurring in part and dissenting in part); *id.* at 421–25 (Bablitch, J., concurring in part and dissenting in part); *id.* at 425–29 (Prosser, J., concurring in part and dissenting in part); *id.* at 429–35 (Sykes, J., concurring in part and dissenting in part).

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

court is interpreting a state constitutional right.<sup>140</sup> Moreover, because a state constitution may reflect versions of separation of powers different from that of the Federal Constitution,<sup>141</sup> federalism does not compel a state court to approach a state legislature with the same level of deference owed by a federal court either to Congress or to the state legislature.<sup>142</sup> At the least, the concerns voiced in *Rodriguez* are less salient in state than in federal court. Looking specifically to Wisconsin law, the state's modes of legislative deliberation,<sup>143</sup> legislative and executive override powers,<sup>144</sup>

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140. Hershkoff, *supra* note 35, at 1161–65 (discussing why concerns over the “seeming finality of constitutional pronouncement” may apply with less force in the state constitutional context (quoting Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 499 (1982))).

141. For a description of separation of powers under the Wisconsin Constitution, see Shirley S. Abrahamson, Commentary, *Remarks of the Hon. Shirley S. Abrahamson Before the American Bar Association Commission on Separation of Powers and Judicial Independence*, Washington, D.C., December 13, 1996, 12 ST. JOHN’S J. LEGAL COMMENT. 69, 71–75 (1996).

142. See Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833, 1890–93 (2001) (discussing structural features of state institutional arrangements that justify different levels of judicial deference to legislative enactments).

143. For example, the Wisconsin legislature uses study committees to develop legislation. Although many states use study committees, Wisconsin is one of the only states that permits members of the public to sit on study committees as voting members. The governor is permitted to call a special session to deal with specific issues warranting additional consideration. WIS. LEGIS. COUNCIL STAFF, A CITIZEN’S GUIDE TO PARTICIPATION IN THE WISCONSIN STATE LEGISLATURE (2017), <https://www.dhs.wisconsin.gov/wcmh/citizen-intro.pdf> [<https://perma.cc/5GYA-UG9E>].

144. The Wisconsin governor has the strongest veto power in the United States. Lawrence Andrea, *Tony Evers Proves Once Again That Wisconsin Governors Have the Broadest Veto Powers in the U.S.*, MILWAUKEE J. SENTINEL (July 3, 2019, 6:33 PM), <https://www.jsonline.com/story/news/politics/2019/07/03/tony-evers-shows-wisconsin-governors-have-broadest-veto-powers/1638797001/> [<https://perma.cc/3F9X-LBVA>]; RICHARD A. CHAMPAGNE, STACI DUROS & MADELINE KASPER, WIS. LEGIS. REF. BUREAU, THE WISCONSIN GOVERNOR’S PARTIAL VETO (2019), [https://docs.legis.wisconsin.gov/misc/lrb/reading\\_the\\_constitution/reading\\_the\\_constitution\\_4\\_1.pdf](https://docs.legis.wisconsin.gov/misc/lrb/reading_the_constitution/reading_the_constitution_4_1.pdf) [<https://perma.cc/8NP2-WHZV>]. To override a veto, both houses of the legislature must accrue two-thirds of the voters present at the session. See Patrick Marley & Molly Beck, *Assembly Comes Up Short in Trying to Override Veto by Evers that Halted a Mental Health Center*, MILWAUKEE J. SENTINEL (Nov. 7, 2019, 6:23 PM), <https://www.jsonline.com/story/news/politics/2019/11/07/wisconsin-republicans-try-override-vetoes-despite-shortage-votes/2510112001/> [<https://perma.cc/FVR8-3HL7>]. A recent change to the Assembly rules now permits the Assembly to engage in multiple veto override votes as compared to just one attempt at veto overrides. Given that state law only requires two-thirds of the vote present at the time of the vote, Democrats have complained that this multi-veto override rule will make it easier for Republicans to override Democratic Governor Tony Evers’ vetoes with fewer votes than usual. Laurel White, *‘Drunk With Power’: State Assembly Approves Gubernatorial Veto Change*, WIS. PUB. RADIO (Oct. 10, 2019, 4:30 PM), <https://www.wpr.org/drunken-power-state-assembly-approves-gubernatorial-veto-change> [<https://perma.cc/EUL2-3ZFK>].

and judicial term limits<sup>145</sup> are factors that suggest caution before a state court applies federal separation of powers as a matter of state law.

The *Vincent* court, however, effectively incorporated a federalism discount into its account of state separation-of-powers doctrine. The majority not only went to great lengths to emphasize its deferential approach, but also provided a road map to the legislature to avoid further scrutiny by articulating minimum standards and meeting them.<sup>146</sup> To reach this result, *Vincent* paralleled, although it did not expressly rely on, a line of federal precedent related to the federal courts' reputed lack of expertise or institutional competence with respect to questions of "positive" rights.<sup>147</sup> In *Rodriguez*, the Court reasoned that its "lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels."<sup>148</sup> The majority in *Vincent* began its analysis reaffirming *Kukor*'s dicta that "fiscal decisions regarding education are entitled to great deference" "because [the legislature] is uniquely equipped to evaluate and respond to such policy concerns;"<sup>149</sup> praised other state high courts that articulated adequacy standards by merely adopting recently codified legislative criteria;<sup>150</sup> and, in its first sentence of application to the facts of the dispute, reiterated its deferential approach again.<sup>151</sup> Three of the four opinions in *Vincent* are replete with references to the need for courts to show deference to the legislature in this area—again, effectively surrendering any

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145. Under Article 7, Section 4 of the Wisconsin Constitution, the Wisconsin Supreme Court is composed of seven justices, each of whom serve ten-year terms, with terms commencing August 1 after the election. WIS. CONST. art. VII, § 4. Although the elections are, in a formal sense, nonpartisan elections, Wisconsin Supreme Court elections involve an extensive amount of partisan political spending, with studies showing an increasing surge in spending. See *infra* notes 185–86 and accompanying text.

146. *Vincent v. Voight*, 614 N.W.2d 388, 396–97 (Wis. 2000).

147. See generally Hershkoff & Yaffe, *supra* note 3.

148. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973); see also *Milliken v. Bradley*, 418 U.S. 717, 743–44 (1974).

149. *Vincent*, 614 N.W.2d at 406–07 (quoting *Kukor v. Grover*, 436 N.W.2d 568, 583 n.14 (Wis. 1999)).

150. *Id.* at 406. The *Vincent* court quoted Peter Enrich's descriptions of Washington and Massachusetts court decisions: "the insistence by these courts that they were not attempting to usurp the proper responsibilities of the legislative branch but were simply insisting that the political branches do their job turns out to be far more than a ritualistic incantation of judicial passivity. Their role truly was limited." Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 176–77 (1995).

151. *Vincent*, 614 N.W.2d at 411 ("We now turn to the evidence presented in this case. The legislature is entitled to deference in its 'legislative policy involving fiscal-educational decisions.'" (quoting *Kukor*, 436 N.W.2d at 582)).

independent role for the court in ensuring the state's fulfillment of a state constitutional commitment.<sup>152</sup>

*B. Incentivizing Conservative Mobilization*

That federal doctrine affected the Wisconsin court's interpretation of the state education right is in some sense not surprising; the literature on state constitutional interpretation frequently discusses the "lock-step" approach that many state judiciaries take with federal constitutional doctrine even when the state provision is unique to the state text.<sup>153</sup> As Robert F. Williams has put it, "[t]he lockstep approach . . . inevitably treats the state constitution as having no legal effect."<sup>154</sup> *Rodriguez* declined to recognize a federal education right on the view that control of education should be left to local choice; the Wisconsin court ignored a state constitutional right to education on the same ground—giving localities license to evade state duties.

Yet *Rodriguez's* impact was not limited to state judicial interpretation—its effects were not confined to the courthouse, but rather extended to the state house, and seriously limited the legislature's ability to reform a property tax system that was known to generate unfair and unequal results. By refusing to recognize education as a fundamental federal constitutional right, *Rodriguez* did not simply open up political space for state-specific reform. It altered the shape and content of that space by incentivizing national conservative groups to work with energized localities to defeat even modest egalitarian reforms and to devise policies that reinforced conservative national norms that seek to displace the democratic model of the public school in favor of a market-based approach to education. In effect, while purporting to pluralize the nation's approach to education, *Rodriguez* helped to solidify a particular national approach to questions of public schooling that ran counter to the state's own constitutional commitments and served to entrench wealth distinctions, solidify racial segregation, and encourage a libertarian approach to government policy aimed at deregulation and withdrawal of public services.

Some context is needed. Around the time of the *Rodriguez* and *Milliken* decisions, the conservative public interest lawyering community was in the midst of a transformation that would come to have profound

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152. See, e.g., *Vincent*, 614 N.W.2d at 406–07, 411, 415; see also *id.* at 415 (Wilcox, J., concurring); *id.* at 434 (Sykes, J., concurring) (arguing the issue is nonjusticiable because "the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion").

153. See Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine*, 24 CONN. L. REV. 675, 678 (1992).

154. *Id.*

implications for education rights and policy throughout the United States. Spurred in part by future Supreme Court Justice Lewis Powell's 1971 memo to the Chamber of Commerce calling on the Chamber to fund scholarship and litigation to protect and extend free market policies,<sup>155</sup> the early- and mid-1970s saw an explosion of conservative business and religious public interest law groups spring up across the country.<sup>156</sup> In addition to litigation shops, conservative groups undertook a more concerted effort to influence judges, legal education, and professional groups during this period.<sup>157</sup> The Supreme Court's pivotal retrenchment on school finance (*Rodriguez*) and desegregation remedies (*Milliken*) occurred at the beginning of this period of conservative awakening about the importance of organized national litigation efforts to achieve political goals and to constitutionalize the results to the extent possible.

The Supreme Court's *Rodriguez* decision helped lay the foundation for an energized conservative movement to focus attention on Wisconsin, generating immediate local political effects. When *Rodriguez* was decided, the Wisconsin legislature was nearing the end of a fifteen-month process, largely steered by a gubernatorial task force and its legislative allies, to pass the "district power equalization" measure invalidated in *Buse*.<sup>158</sup> Prior to the decision, proponents of power equalization bolstered their case for the virtue of the reform with a prediction that court-ordered equalization was likely imminent.<sup>159</sup> Opponents of reform, such as

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155. See Kirk A. Kennedy, *Thurgood Marshall's Enduring Legacy: A Prescription for the 1990s Public Interest Lawyer*, 38 *How. L.J.* 383, 389 (1995) (book review). Justice Powell is known to have played a role in this movement. See *id.* (discussing the 1971 "Powell Memorandum" that urged "the American business community to engage in organized litigation to counter the liberal 'frontal assault' on 'our government, our system of justice, and the free enterprise system'" (quoting Oliver A. Houck, *With Charity for All*, 93 *YALE L.J.* 1415, 1457 (1984))).

156. Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 *L. & SOC. INQUIRY* 1698, 1701 (2018); see also Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law,"* 52 *UCLA L. REV.* 1223, 1243 (2005).

157. STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 110–18 (2008) (describing the founding of the Liberty Fund academic conference series in 1975 and Henry Manne's Economics Institute for Judges in 1976); see also Elliott Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences: The Effect of Law and Economics on American Justice* (Mar. 24, 2021) (unpublished manuscript), <https://www.law.nyu.edu/sites/default/files/ash-chen-naidu-2021-03v1.pdf> [<https://perma.cc/DK6Q-5FAZ>] (demonstrating empirical impact of Manne's Economics training on decision-making of judicial attendees relative to other judges).

158. See generally Terry G. Geske, University of Wisconsin–Madison, *The Politics of Reforming School Finance in Wisconsin at the 1976 Annual Meeting of the American Educational Research Association Conference Paper* (Apr. 19–23, 1976).

159. Indeed, Wisconsin Governor Patrick Lucey argued, "[t]he possibility that the *Serrano* (equal opportunity) decision will become the law of the land in the near future provides us with a compelling practical reason for doing that which we ought to do

education policy lobbyist George Tipler, urged legislative delay, emphasizing that absent federal compulsion, wealthier school districts would resist state funding reforms. As Tipler stated, “[W]e’re galloping off in one direction [toward district power equalizing] in fear of a court making a decision that hasn’t been made yet. . . . [N]o one has said we have to go that far.”<sup>160</sup> Sensing the tides turning toward power equalization, Tipler advised the legislature to wait to enact the reform “until the [*Rodriguez*] decision has been made,”<sup>161</sup> apparently in hopes that an unfavorable decision could spur further opposition.

As Tipler hoped, and contrary to the optimistic accounts of today’s “New ‘New Judicial Federalism,’” the *Rodriguez* decision immediately catalyzed late-stage opposition to power equalization.<sup>162</sup> A Wisconsin newspaper editorial heralded, “[p]roperty tax relief through shifting the burden of local education to some other form of taxation? Forget it, the U.S. Supreme Court has ruled.”<sup>163</sup> After briefly announcing the demise of a federal constitutional right to education, the editorial quickly pivoted to an extended discussion of local political ramifications:

[W]ealthy school districts have no obligation under the law to bear some of the costs of education in poorer districts. Although Gov. Lucey quickly denied it would have an effect, the Supreme Court decision knocks the props from under the “equal opportunity” principle outlined in his February budget message  
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anyway” and urged the legislature to “act now to improve [school finance], rather than be caught later trying to raise the state funds necessary to respond to court-ordered changes.” Clement F. Rogers, Editorial, *Property Tax Still Pays School Bills*, WAUKESHA DAILY FREEMAN, Mar. 23, 1973, at 8.

160. Terry G. Geske, *The Politics of Reforming School Finance in Wisconsin* 132 (July 21, 1975) (Ph.D. dissertation, University of Wisconsin–Madison) (on file with authors). Tipler headed an organization called the Wisconsin Association of School Boards, which participated as amicus in *Kukor* in support of neither party, but rather to urge the Wisconsin court not to rule in a manner that undermined the principle of local control.

161. *Lucey Spending Curb Irks School Boards’ Lobbyist*, CAP. TIMES, Mar. 15, 1973, at 35, <https://newscomwc.newspapers.com/image/519817290> [<https://perma.cc/QBK7-NXVM>].

162. Geske, *supra* note 160, at 133, 135 (“[A] number of legislators believed that the *Rodriguez* decision would probably ‘kill’ the controversial power equalization provision. . . . [T]he *Rodriguez* decision prompted the loser school districts to increase their efforts to eliminate the power equalization provision.”). Governor Lucey reacted defensively, putting out a statement and holding a press conference to defend his finance plan. *Id.* at 133 (“With the Supreme Court’s decision reinforcing the opposition’s position, [Governor] Lucey immediately held a press conference to reaffirm his commitment to power equalization.”).

163. Rogers, *supra* note 159.

The Supreme Court didn't rule as he had expected, so he will be obliged to go it alone—without the force of federal law—to average out the wealth of school districts so the “haves” are obliged to give to the “have-nots.”<sup>164</sup>

Even Wisconsin Governor Patrick Lucey—a leading proponent of the state's district power equalization reform—acknowledged that the unexpected result in *Rodriguez* undermined one rationale for his legislation: the expectation that equalizing school funding across districts would be required as a matter of federal law.<sup>165</sup> Despite expressing continued “enthusiasm” for district power equalization, he tailored public statements promoting it to the terms set by the U.S. Supreme Court, emphasizing that the reform comported with *Rodriguez*'s vision of state-level efforts to address inequities paired with local control of the schools.<sup>166</sup> Meanwhile, Republican opponents in the state legislature were reportedly “heartened” by the ruling, regarding it as vindication of the status quo.<sup>167</sup> Although the legislature ultimately passed the measure one month after *Rodriguez*, contemporaneous interviews with state legislators suggest that the budget package implementing the measure was diluted in light of the U.S. Supreme Court's decision.<sup>168</sup>

The immediate political reverberations of the *Rodriguez* decision in Wisconsin politics hint at the expressive effects of law.<sup>169</sup> Recent research on the effect of high-profile, value-laden judicial opinions lends empirical support to the view that a case as closely watched as *Rodriguez* very well may have had an “expressive effect,” “changing [] perceptions of the social norm.”<sup>170</sup> For example, *Rodriguez* may have undermined the

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164. *Id.*

165. Diane Sherman & Matt Pommer, *Ruling on Schools Doesn't Faze Lucey*, CAP. TIMES, Mar. 21, 1973, at 1.

166. *Id.*

167. *Id.* at 4.

168. Geske, *supra* note 160, at 194 (“Because of the *Rodriguez* decision, however, Lucey and the Democrats may have had to compromise the budget package more extensively in order to retain the power equalization provision.”).

169. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2032 (1996) (“With or without enforcement activity, . . . laws can help reconstruct norms and the social meaning of action.”). For an overview of different strands of literature, see Hershkoff, *supra* note 125, at 1553 (“The expressive theory builds on a large interdisciplinary literature about norms that helps to explain the important, noncoercive function of law in creating incentives, influencing attitudes, shaping relations, and conveying the importance of particular values over others.”).

170. Netta Barak-Corren, *A License to Discriminate? The Market Response to Masterpiece Cakeshop*, 56 HARV. C.R.-C.L. L. REV. (forthcoming 2021) (manuscript at 34–46) (on file with the Hebrew University of Jerusalem); *see also id.* (manuscript at 6) (finding through field experiment that “the Court's decision in *Masterpiece* significantly reduced the willingness of businesses to serve same-sex couples”); Margaret E. Tankard &

perception of an emerging consensus around school finance reform—which, before the Supreme Court decided *Rodriguez*, was suggested by lower court rulings in favor of plaintiffs’ Equal Protection claims, as well as by the number of states contemplating legislation to implement various finance equity schemes.<sup>171</sup> The Supreme Court also helped to signal the vitality and viability of a robust challenge to state-level school finance reforms based on a theory of local control. In addition to affecting the perception of social norms—which can itself have a mobilizing effect<sup>172</sup>—constitutional pronouncements from the U.S. Supreme Court may change personal attitudes or preferences<sup>173</sup> or embolden people to pursue preferences they already hold.<sup>174</sup> The brief survey of commentary contemporaneous to the *Rodriguez* decision suggests that the “function of law in ‘making statements’” was felt in Wisconsin on the subject of localism and public schools.<sup>175</sup> Significantly, under the banner of local control, *Rodriguez* served to ratify market-based distribution as the appropriate basis for apportioning educational opportunity, setting the stage for greater efforts at privatization of public schooling, abandonment of integration as a constitutional goal, and a severe erosion of education’s democratic foundation.<sup>176</sup>

With the federal judiciary adopting a less interventionist stance—and bringing along some states, including Wisconsin, which adopted the

Elizabeth Levy Paluck, *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes*, 28(9) PSYCH. SCI. 1334 (2017) (documenting that *Obergefell* increased perceptions that social norms support same-sex marriage).

171. See *supra* text accompanying notes 18–23 and Section I.A.

172. Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1651 (2000) (describing how one outcome of law’s expressive function is to “guide behavior merely by influencing expectations about how others will behave”).

173. Eugene K. Ofose, Michelle K. Chambers, Jacqueline M. Chen & Eric Hehman, *Same-Sex Marriage Legalization Associated with Reduced Implicit and Explicit Antigay Bias*, 116 PNAS 8846, 8846–47 (2019) (finding decrease in homophobic bias after *Obergefell*); see also Emily Kazyak & Mathew Stange, *Backlash or as Positive Response?: Public Opinion of LGB Issues After Obergefell v. Hodges*, 65 J. HOMOSEXUALITY 2028 (2018) (finding increase in personal support for same-sex marriage after *Obergefell*).

174. Barak-Corren, *supra* note 170 (manuscript at 45).

175. Sunstein, *supra* note 169, at 2024 (describing the expressive function of law as “the function of law in ‘making statements’ as opposed to controlling behavior directly”).

176. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2051 (2002) (“Both school desegregation and school finance reform have foundered on the shoals of local control—or *suburban* local control, to be more precise.”); see also Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195, 210 (2014) (observing that “[a] brief move in the direction of constitutional guarantees of minimum social benefits and equal protection scrutiny of policies that ill-served the poor, such as inequitable public-school funding tied to property taxes, collapsed between 1970 and 1973, leaving such policies almost entirely to legislative discretion” (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973))).

federal judiciary's downgrading of education rights and its veneration of district-level autonomy in the name of localism—developments in the 1970s created an opening for the affirmative advancement of a national conservative agenda with respect to public schooling at the local level. For example, in 1974 the Heritage Foundation hired a dedicated education policy analyst to support parents'-rights organizing; supported local parents' associations objecting to the use of state-mandated textbooks on grounds of local autonomy; and started, as early as 1975, arguing against compulsory public schooling and in favor of education vouchers.<sup>177</sup> American Legislative Exchange Council (ALEC), founded in 1974, immediately began promoting legislative efforts to curtail state funding for education, oppose busing and integration, and advance religious interests in schooling.<sup>178</sup> Conservative foundations began producing voluminous works questioning whether additional funding even improved school quality or students' life outcomes.<sup>179</sup> With serious equalization efforts off the table and with the Supreme Court's shutdown of further desegregation efforts, an emergent conservative movement could switch from defense to offense, moving full throttle in favor of an education model that was market-driven and libertarian in spirit.

Federal jurisprudential developments indirectly aided the emergent conservative movement in two other ways. First, the Supreme Court's decisions provided, or at least legitimized and made more potent, a vocabulary and normative framework for minimizing (or rejecting outright) state or federal involvement in public education.<sup>180</sup> Second, these

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177. Eileen White, *Power, Visibility Come to Heritage Foundation*, EDUC. WEEK (Sept. 28, 1981), <https://www.edweek.org/education/power-visibility-come-to-heritage-foundation/1981/09> [<https://perma.cc/J39A-AKB6>]. Paul Weyrich, one of the Heritage Foundation's founders, later became prominent in the fight to preserve tax-exempt status for "segregation academies." Amanda Marcotte, *It Wasn't Abortion That Formed the Religious Right. It Was Support for Segregation*, SLATE (May 29, 2014, 12:15 PM), <https://slate.com/human-interest/2014/05/the-religious-right-formed-around-support-for-segregation-not-against-abortion.html> [<https://perma.cc/LKZ3-K5AK>].

178. See, e.g., ALEXANDER HERTEL-FERNANDEZ, *STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION* 98–99 (2019). A few years later, ALEC would release its first model bill promoting school vouchers to "introduce normal market forces" into education. DAN KAUFMAN, *THE FALL OF WISCONSIN: THE CONSERVATIVE CONQUEST OF A PROGRESSIVE BASTION AND THE FUTURE OF AMERICAN POLITICS* 127 (2018).

179. See, e.g., SOLVEIG EGGERZ, *ACU EDUC. & RSCH. INST., FEDERAL AID FOR SOCIAL ENGINEERING IN THE PUBLIC SCHOOLS* (1976); HERBERT J. WALBERG, MICHAEL J. BAKALIS, JOSEPH L. BAST & STEVEN BAER, *WE CAN RESCUE OUR CHILDREN: THE CURE FOR CHICAGO'S PUBLIC SCHOOL CRISIS – WITH LESSONS FOR THE REST OF AMERICA* (1988); Patrick J. Keleher, Jr., *Business Leadership and Education Reform: The Next Frontier, in THE HERITAGE LECTURES* 257 (1990).

180. ONALEE MCGRAW, HERITAGE FOUND., *SECULAR HUMANISM AND THE SCHOOLS: THE ISSUE WHOSE TIME HAS COME* 19–20 (1976) ("Parents, teachers, and citizens across the nation, concerned with the drift in the tax-supported schools toward

decisions hamstringing robust legislative or judicial remedies and so prevented necessary reforms to public schools, leaving problems in place and creating the appearance of the inefficacy of progressive interventions.<sup>181</sup> In turn, these policy failures contributed to disillusionment among Black and Brown parent groups that initially were pushing for funding equalization and/or desegregation remedies but now were more receptive to the promises of privatization, charters, and choice.<sup>182</sup> Broadly, the political moment represented an opportunity to delegitimize the capacity of state government to provide quality public schooling, to erode state and federal involvement in schooling, and to advance concerns of the faithful within an education agenda.

These trends came to a head in Wisconsin with the work of the Bradley Foundation starting in the 1980s, which led to the launch of the country's first school voucher program in Milwaukee.<sup>183</sup> In 1985, the Bradley Foundation hired Michael Joyce—who previously worked at the Olin Foundation, where he funded and helped launch both the Federalist Society and Henry Manne's campaign to popularize law and economics—who used his new perch at Bradley to characterize public schools as “socialism” and to pursue “school choice” as a means to encourage support for privatization of public schooling, while allowing private schools to draw from public funds.<sup>184</sup> The Wisconsin state courts became an

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humanistic education and academic decline, are confronting the question in their local communities . . . . The public is growing more aware of the inequity of using tax dollars for the support of nontheistic religion.”); *see also* CONNAUGHT COYNE MARSHNER, HERITAGE FOUND., FEDERAL CHILD DEVELOPMENT: WHAT'S DEVELOPING? 1–2 (1974) (questioning whether public policy issues under the umbrella of “child development” and “child advocacy” adequately address the “need for services and current extent of Federal involvement”).

181. *See* JACK DOUGHERTY, MORE THAN ONE STRUGGLE: THE EVOLUTION OF BLACK SCHOOL REFORM IN MILWAUKEE 182–93 (2004).

182. *See id.*

183. The Bradley Foundation was established in Milwaukee in the 1940s. However, it remained small until Allen-Bradley was sold to a defense contractor, yielding \$1.65 billion, in 1985. Thereafter, the Bradley Foundation became a major player in national, as well as Wisconsin, politics. *See* KAUFMAN, *supra* note 178, at 117–21. Notably, some Black lawmakers and education advocates, frustrated by the failure of desegregation and school funding equality efforts, initially aligned with the school choice movement as a potential path forward—although many later recanted that support. *See* Bruce Murphy, *The Legacy of Annette Polly Williams*, URB. MILWAUKEE (Nov. 11, 2014), <https://urbanmilwaukee.com/2014/11/11/murphys-law-the-legacy-of-annette-polly-williams/> [<https://perma.cc/W9AT-AMXN>] (describing Black lawmaker who supported vouchers initially); *see generally* DOUGHERTY, *supra* note 181.

184. As Barbara Miner writes,

Joyce wielded pivotal power in the service of a highly conservative agenda of vouchers, deregulation, privatization, lower taxes, reduced social services, and attacks on progressive initiatives such as affirmative action.

important forum for these ideological battles, with conservative groups outside of the state joining in-state groups to contribute extreme amounts of money—much of it on negative ads—in judicial election races,<sup>185</sup> and the court today is seen as one of the most partisan-divided in the country.<sup>186</sup>

### *C. Questioning Public Schooling as a Democratic Commitment*

*Rodriguez* affected the course of Wisconsin law for a simple reason: it is a fiction to assume that when the Supreme Court rejects a right, it leaves the states free of federal influence. *Rodriguez* was decided during a period of increasing political assault on programs associated with the War on Poverty and racial justice, and as the previous Section showed, it played an important signaling role for an emergent conservative public interest community. It also impacted judicial decision-making in Wisconsin by establishing structures and principles for evaluating education claims,

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During his 15-year tenure, Joyce built Bradley into the most powerful conservative foundation in the country. Perhaps more than any other person, he was responsible for the voucher legislation under which Wisconsin became the first state providing public dollars for private schools.

A staunch ideological conservative who likens public schools to “socialism,” Joyce is a prime example of the conservative orientation — and money — that lies at the heart of the voucher movement.

Barbara Miner, *Voucher’s Money Man*, RETHINKING SCHS.: AN URB. EDUC. J., Fall 2001, at 8, 8.

185. The 2008 Supreme Court election appears to be a watershed moment for Wisconsin judicial politics, with over ninety percent of the money spent on ads coming from noncandidate sources. BILLY CORRIHER, CTR. FOR AM. PROGRESS & LEGAL PROGRESS, FIXING WISCONSIN’S DYSFUNCTIONAL SUPREME COURT ELECTIONS (2013), <https://www.americanprogress.org/wp-content/uploads/2013/07/CorriherWisconsinSupremeCourt-2.pdf> [<https://perma.cc/Q65C-XYMP>]. In 2015, spending on the Wisconsin Supreme Court election was \$1.196 million (the majority of which came from candidate fundraising directly, \$1.149 million), while in 2016, spending amounted to \$4.273 million (outside spending, \$2.474 million; candidate spending, \$2.249 million). ALICIA BANNON, CATHLEEN LISK & PETER HARDIN, BRENNAN CENT. FOR JUST. & NAT’L INST. ON MONEY & ST. POL., WHO PAYS FOR JUDICIAL RACES? 5 (2015–16), <https://judicialpolitics.org/app/uploads/BCJ-PJE2015-16-Web.pdf> [<https://perma.cc/UFW6-JE9Y>]. By 2019, combined spending by candidates and outside groups included more than \$6 million. Douglas Keith, *Wisconsin’s Most Expensive Supreme Court Election in a Decade*, BRENNAN CENT. JUST. (Apr. 10, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/wisconsins-most-expensive-supreme-court-election-decade> [<https://perma.cc/N9Z2-P9E5>].

186. One measure of judicial partisanship is the number of unanimous decisions. In general, the number of unanimous decisions of the Wisconsin Supreme Court has been in decline. As for unanimous decisions, “the Wisconsin Supreme Court issued 284 decisions in 1940; 181 in 1980; 87 in 2000; and 68 in 2010.” Ranney, *supra* note 7, at 957 n.248. In 2003, the percentage of unanimous opinions was 50.5, which was below the 74 percent median of the unanimous decision rate of state high courts across the country. Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. REV. 1451, 1483–84 (2009).

setting in train a series of arguments that came to dominate the Wisconsin court's state constitutional analysis—as we have seen, arguments relating to local control,<sup>187</sup> to judicial competence,<sup>188</sup> and to conceptions of equality.<sup>189</sup> And it led to a serious narrowing of state legislative power to remedy acknowledged problems in the state's public school system.

We see another impact of the Supreme Court's refusal to recognize education as a fundamental federal right: in our view, it contributed to downgrading the status of education as a democratic commitment and formed part of a larger project in which the Court articulated a baseline vision for constitutional rights that did not support affirmative claims to material benefits.<sup>190</sup> While acknowledging “the undisputed importance of education,”<sup>191</sup> the *Rodriguez* Court characterized state laws establishing public schools as among a number of “a State's social and economic legislation.”<sup>192</sup> Further, the Court described education as an aspect of the state's “fiscal policy” and not as part of a larger democratic commitment or egalitarian project.<sup>193</sup> Looking back, some commentators have come to see the decision as a fountain stone for social and economic policies based on the ideology of neoliberalism, with its emphasis on “negative liberty, laissez-faire market distributions and the minimal state,”<sup>194</sup> as well as part of a political effort for “rollbacks in social services.”<sup>195</sup> As Anne L. Alstott has explained, “When individuals have sweeping rights to negative liberty but no rights at all to challenge market distributions,” the legal space that is created is simply that of “individuals to exercise negative liberty.”<sup>196</sup> The rights of individual or local choice purportedly advanced by this emphasis on negative liberty are in fact predicated on access to capital; rendering “market” distributions impervious to challenge simply translates to accepting legally supported inequalities as natural and beyond change.

These principles have had an impact in the Wisconsin court's decisions that go far beyond the school-funding trilogy already discussed. Applying the logic of *Buse*, the Wisconsin court held that the state

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187. See *supra* Section II.A.1.

188. See *supra* Section II.A.3.

189. See *supra* Section II.A.2.

190. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

191. *Id.*

192. *Id.*

193. *Id.* at 42.

194. Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 25 (2014).

195. Deborah Dinner, *Beyond “Best Practices”: Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059, 1067–68 (2017).

196. Alstott, *supra* note 194, at 26.

constitution did not require uniform access to kindergarten;<sup>197</sup> did not bar localities from withholding schooling from children who are suspended or expelled;<sup>198</sup> and permitted public funding for private school vouchers.<sup>199</sup> Dissenting in *Davis v. Grover*,<sup>200</sup> in which the Wisconsin court upheld the state's voucher program,<sup>201</sup> Justice Abrahamson warned that the program

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197. The state constitution requires that district schools “shall be free and without charge for tuition to all children between the ages of 4 and 20 years.” WIS. CONST. art. X, § 3. In *Zweifel v. Joint Dist. No. 1, Belleville*, 251 N.W.2d 822 (Wis. 1977), the Wisconsin Supreme Court held that this provision was not violated by the practice of having “early admission to Kindergarten for exceptional students” available in some but not all school districts in the state, provided an opportunity to apply for admission was made available, even if the application for admission was denied. *Id.* at 824, 827. The court further explained that the constitution contains “no specific direction that the schools be open to all children between four and twenty years, or that the schools accommodate all such children, or that education be provided for all such children.” *Id.* at 826. Rather, “[t]he only limitation contained in the constitutional provision . . . is that for persons falling within the designated age groups, if education is provided, it must be provided free of charge.” *Id.* at 827. Earlier, the Wisconsin court held in *Pacyna v. Bd. of Educ., Joint Sch. Dist. #1, Stevens Point*, 204 N.W.2d 671 (Wis. 1973), that uniformity did not require a school board to “establish a kindergarten” but that “if a school board does exercise its discretion to do so, it must, among other things, follow a uniform-age-admission date to maintain uniformity.” *Id.* at 673.

198. The Wisconsin Supreme Court upheld the right of localities to refuse public schooling to children who are expelled or suspended from school; rather, a school district has “explicit statutory authority to refuse to provide educational services to a juvenile who has been expelled pursuant to a valid expulsion order.” *Madison Metro. Sch. Dist. v. Cir. Ct. for Dane Cnty.*, 800 N.W.2d 442, 453 (Wis. 2011). In a later unpublished decision, the Wisconsin Court of Appeals affirmed the grant of summary judgment in favor of the Oregon School District, rejecting the claim that the district violated due process when, without notice or a hearing, it refused to enroll or to provide alternative educational services to a child who was subject to expulsion from another school district. See *Patricia L. v. Or. Sch. Dist.*, 847 N.W.2d 425 (Wis. Ct. App. 2014).

199. Wisconsin led the nation in its support of public funding for private school vouchers. See Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 *FORDHAM URB. L.J.* 703, 705–06 (2015) (explaining that “the prevalence of voucher and voucher-like programs has steadily increased since the Wisconsin Legislature enacted the first publicly funded private school voucher plan . . . in 1990”).

200. 480 N.W.2d 460 (Wis. 1992).

201. *Id.*; *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998), expanded and entrenched the rationale in *Davis*. Where *Davis* held that “the mere appropriation of public monies to a private school does not transform that school into a district school,” *id.* at 627, subject to state constitutional requirements for public schools, *Jackson* clarified that “the amount of public funds a private school receives” makes no difference. *Id.* Notably, whereas in the school funding trilogy, state aid payments to certain schools were constitutionally suspect, *Jackson* invoked parental choice to insulate aid payments from constitutional scrutiny. *Id.* at 618 (“We recognize that under the amended MPCP the State sends the checks directly to the participating private school . . . . Nevertheless, . . . the importance of our inquiry here is not to ascertain the path upon which public funds travel under the amended program, but rather to determine who ultimately chooses that path.”). The decision was influential not only in Wisconsin in facilitating the expansion of

pitted “publicly financed private schools . . . in competition with the district schools in delivering basic education,” underscoring that the program “does not augment but instead supplants the education programs the constitution requires.”<sup>202</sup> Indeed, the program as of 2015 had a price tag of \$191,000,000, while public funding for public schools has been subject to deep cuts, with those cuts disproportionately affecting districts with high concentrations of poverty.<sup>203</sup> Meanwhile, evidence shows that most of the benefits of subsidizing private school education through voucher programs and tax benefits go to families with high income and not to the less wealthy or poor.<sup>204</sup>

*Rodriguez* frequently is discussed in the federalism literature on school reform separate and apart from the Supreme Court’s approach to racial integration,<sup>205</sup> but Wisconsin shows that the two doctrinal strands were intertwined in significant ways. A year after *Rodriguez*, the Court decided *Milliken v. Bradley*,<sup>206</sup> which directly impacted local efforts to integrate Wisconsin’s schools.<sup>207</sup> Wisconsin’s leading desegregation suit was filed in 1965, a decade after *Brown v. Board of Education*.<sup>208</sup> Eleven

vouchers, but also in other states that adopted reasoning from *Jackson* and *Davis*. See Steven L. Nelson, *Still Serving Two Masters? Evaluating the Conflict Between School Choice and Desegregation Under the Lens of Critical Race Theory*, 26 B.U. PUB. INT. L.J. 43, 68 (2017).

202. *Davis*, 480 N.W.2d at 482 (Abrahamson, J., dissenting).

203. See Julie F. Mead, *Private in Name Only: A Statutory and Constitutional Analysis of Milwaukee’s Private School Voucher Program*, 21 WASH. & LEE J. C.R. & SOC. JUST. 331, 333, 372–74 (2015) (arguing that financial support for the voucher program “has undercut adequate funding for the constitutionally mandated support of a system of district schools as nearly uniform as practicable”).

204. Matthew DeFour, *Top 13 Percent of Earners Receiving Two-Thirds of Private School Tax Benefit*, WIS. ST. J. (Jan. 26, 2017), [https://madison.com/wsj/news/local/govt-and-politics/top-13-percent-of-earners-receiving-two-thirds-of-private-school-tax-benefit/article\\_351e9c72-fc0a-573f-b075-52d82f0a0aff.html](https://madison.com/wsj/news/local/govt-and-politics/top-13-percent-of-earners-receiving-two-thirds-of-private-school-tax-benefit/article_351e9c72-fc0a-573f-b075-52d82f0a0aff.html) [<https://perma.cc/8QA8-ETZ7>] (“Almost \$8 million of the total cut went to families in the top 13 percent of income earners in the state in 2015. A total of 20,560 tax filers making more than \$100,000 claimed the exclusion.”); *Most with Wisconsin Vouchers Didn’t Come from Public Schools*, PIONEER PRESS (Nov. 7, 2015, 8:27 PM), <https://www.twincities.com/2013/10/29/most-with-wisconsin-vouchers-didnt-come-from-public-schools/> [<https://perma.cc/8XRZ-GTB8>] (“Nearly 80 percent of students who received a taxpayer-subsidized voucher to attend private school this year did not go to a Wisconsin public school last year.”).

205. For an exception, see James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 254 (1999) (“Very little scholarly attention has been devoted to the relationship between school finance and desegregation or to the role that race plays in school finance reform.”).

206. 418 U.S. 717 (1974).

207. *Amos v. Bd. of Sch. Dirs.*, 408 F. Supp. 765, 823 (E.D. Wis. 1976).

208. *Id.* See Irvin B. Charne, *The Milwaukee Cases*, 89 MARQ. L. REV. 83, 83 (2005) (“In Milwaukee nothing happened to implement the decision [in *Brown*] until 1965, when attorney Lloyd A. Barbee brought a class action in the United States District Court

years after filing, the Seventh Circuit Court of Appeals affirmed the district court's finding that the defendant school district had "engaged in practices with the intent and for the purpose of creating and maintaining a segregated school system, and that such practices had the effect of causing current conditions of racial imbalance in the Milwaukee public schools."<sup>209</sup> The following year, the U.S. Supreme Court vacated the decision and remanded<sup>210</sup> in light of intervening decisions.<sup>211</sup> While the case was pending, the Wisconsin legislature adopted a special-transfer program, known as Chapter 220, effective 1976–77, and districts other than those involved in the court case could choose to participate.<sup>212</sup> Continuing racial segregation and educational disparities prompted a new federal action, filed in 1984, and in 1985 another settlement was reached, reauthorizing a voluntary interdistrict transfer program allowing Milwaukee students to attend suburban schools and vice versa.<sup>213</sup> White households in the suburbs largely chose not to participate in this program but, faced with the influx of Black students—even small numbers of Black students—began to push for programs that would enlarge the use of public

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for the Eastern District of Wisconsin challenging actions of the Milwaukee School Board, which he alleged created a segregated school system.”). Charne served as counsel in the Milwaukee desegregation case. *Id.* at 83. See also Phoebe Weaver Williams, *Reflections on Wisconsin's Brown Experience*, 89 MARQ. L. REV. 1 (2005) (providing an overview of race and public schooling in the years leading up to *Brown* and then afterward in Wisconsin).

209. *Amos*, 408 F. Supp. at 818; accord *Armstrong v. Brennan*, 539 F.2d 625 (7th Cir. 1976), *aff'g sub nom.*, *Amos*, 408 F. Supp. 765.

210. *Brennan v. Armstrong*, 433 U.S. 672 (1977) (per curiam). The Court vacated for reconsideration under *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (requiring showing of racially discriminatory intent or purpose as motivating factor for local authority's refusal to alter zoning to permit multi-family housing construction that would have facilitated racial integration); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) (invalidating systemwide desegregation remedy to redress continuing violation supported only by “cumulative” showings of substantial racial imbalance).

211. *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 471 F. Supp. 800, 818 (E.D. Wis. 1979) (providing a court-approved settlement containing a sunset clause of 1984).

212. Matthew C. Greene, Note, *Unsuspected Shoals in Equal Protection: Adapting Wisconsin's Special-Transfer Program to Survive Parents Involved*, 2008 WIS. L. REV. 1201, 1224 (reporting the voluntary participation of “many suburban” districts).

213. *Bd. of Sch. Dirs. of City of Milwaukee v. Wisconsin*, 649 F. Supp. 82 (E.D. Wis. 1985). See Greene, *supra* note 212, at 1212–14 (reporting that in 1985 Chapter 220 was renewed until June 30, 1993, and subsequently extended to June 30, 1995, and that after that date, “suburban school districts have come to separate settlements with Milwaukee Public Schools regarding Chapter 220”) (citing RUSS KAVA, WIS. LEGIS. FISCAL BUREAU, INFO. PAPER 28, SCHOOL INTEGRATION (CHAPTER 220) AID 9 (2007), [https://docs.legis.wisconsin.gov/misc/lfb/informational\\_papers/january\\_2007/0028\\_school\\_integration\\_chapter\\_220\\_aid\\_informational\\_paper\\_28.pdf](https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2007/0028_school_integration_chapter_220_aid_informational_paper_28.pdf)).

money for private schools, whether parochial or secular.<sup>214</sup> In 1987, twenty-three school districts agreed to participate in the transfer program.<sup>215</sup> Participation had been steadily declining,<sup>216</sup> and after the Supreme Court’s decision in *Parents Involved*, all districts dismantled their programs.<sup>217</sup> Effectively, federal doctrine has closed off legislative options that potentially could improve public schooling for Black, Brown, and poor children—leaving only the option of publicly funded vouchers for private schools on the table.

### III. JUDICIALLY ENTRENCHED RACIAL AND WEALTH DISPARITIES IN WISCONSIN SCHOOLS

Federalism often is theorized as creating pathways for states and localities to “pluralize our national life” and to give opportunities for minorities to participate more robustly in policy decisions.<sup>218</sup> Law and jurisprudential methods provide one such pathway: state courts have authority to diverge from the federal in their interpretive approach to many state-law questions. Most, however, stay close to the approach of the U.S. Supreme Court.<sup>219</sup> As the previous Parts have shown, the Wisconsin Supreme Court has remained “loyal” to federal constitutional doctrine,

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214. See Frank Zeidler, *Some Conditions in Milwaukee at the Time of Brown v. Board of Education*, 89 MARQ. L. REV. 75, 80 (2005) (reporting that “a dissatisfaction of people sending their children to schools with African American students was manifest . . . and resulted in the growth of parochial education. This in turn fostered a demand for public money to support parochial and even private education.”); see also *id.* at 81 (explaining that after 1988 “state law was changed over time to support parochial and private education systems, somewhat at the expense of the Milwaukee Public Schools”).

215. Greene, *supra* note 212, at 1217 (explaining that under the settlement, twenty-three of the suburban districts “agree[d] to fill a set percentage of their enrollment with Chapter 220 minority transfer students in exchange for dropping the suit”).

216. See Vada Waters Lindsey, *The Vulnerability of Using Tax Incentives in Wisconsin*, 88 MARQ. L. REV. 107, 112 (2004) (reporting that “[a]t its peak in 1993, there were 6,503 participants in the Chapter 220 program; . . . and during academic year 2002–03, there were only 4,864”).

217. See Erwin Chemerinsky, *Making Schools More Separate and Unequal: Parents Involved in Community Schools v. Seattle School District No. 1*, 2014 MICH. ST. L. REV. 633, 641 (explaining that “the reality . . . is that many school districts are simply abandoning their desegregation efforts,” just as “Justice Breyer predicted in his dissent in *Parents Involved*”).

218. Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1923 (2014); see also Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1313–14 (2019) (book review) (explaining that state constitutional litigation is theorized as a way to soften the risks of “winner-take-all” decision-making by the U.S. Supreme Court).

219. For an exhaustive review of state constitutional interpretive methods and the claim that states frequently follow the federal interpretive methods, see James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 366–73 (2016).

using many of its interpretive techniques and reading the state constitution education clause in the orbit of federal law notwithstanding the state document's distinct text, history, and purpose.<sup>220</sup> Interpretive loyalty holds important consequences for the protection of education rights. When state courts use a lockstep approach to interpret state constitutional provisions with a federal analog, state protection must at least meet a federal constitutional floor. State education clauses are different, for there is no federal floor—the Supreme Court does not recognize a right to free, equal, and quality public schooling and does not apply equality doctrine to protect against radically divergent distributions of education.<sup>221</sup> As with rights to housing, income support, or other material rights that are absent from the Federal Constitution, a state court's mimicking of federal doctrine either blocks recognition of the right as a matter of state law or limits a state legislature's options to devise state-specific protection—outcomes fully illustrated by the Wisconsin court's approach to the state's education provisions.<sup>222</sup> In this Part we sketch out some of the real-world consequences of federal and state education decisions for Black, Brown, and poor children in Wisconsin. We recognize the complexity of making causal claims about the effect of legal doctrine, especially doctrine establishing positive claims to government services.<sup>223</sup> But, at the least, educational trends in Wisconsin are important data points for any theory of federalism that places optimism in local solutions that are tied to existing distribution of market and racial power.<sup>224</sup>

Public schooling in Wisconsin is a study in contrasts.<sup>225</sup> Headlines tell a persistent story: “No state worse than Wisconsin for black children, says

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220. Our use of the word “loyal” owes a debt to Heather Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1349, 1360–62 (2013) (“Why do we make much of exit and voice but utterly neglect loyalty?”) (citing ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970)).

221. See Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN STATE L. REV. 923, 969–71 (2011) (explaining that state court adherence to federal doctrine constrains judges from ruling in a manner that socioeconomic state constitutional provisions may allow).

222. See *id.* at 924–25.

223. For a survey of some of the literature on how enforcement of education rights may affect education outcomes, see Hugh Spitzer & Andy Omara, *Catalytic Courts and Enforcement of Constitutional Education Funding Provisions*, 49 GA. J. INT'L & COMP. L. 45, 48–53 (2021).

224. Cf. Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 905 (2006) (raising questions in a related context of “[w]hether there is sufficient empirical basis for . . . optimism about state politics”).

225. See McKenna Kohlenberg, *Booked but Can't Read: “Functional Literacy,” National Citizenship, and the New Face of Dred Scott in the Age of Mass Incarceration*, 44 N.Y.U. REV. L. & SOC. CHANGE 213, 216–17 (2020) (highlighting “a tale of two

new national study” (2014),<sup>226</sup> “Legislators: Wisconsin horrible for black kids” (2018).<sup>227</sup> In 2020, Wisconsin was ranked eleventh in the United States in terms of the quality of public education, with a high school graduation rate of 88.6% and preschool participation rate of 37.1%.<sup>228</sup> At the top-ranked school—for gifted learners, in Green Bay—student proficiency ranked at 97% in math and 94% in reading, in contrast to a state average of 42% and 41%, respectively.<sup>229</sup> Two years earlier, Wisconsin ranked thirteenth in the country and number two in the Midwest.<sup>230</sup> Statewide statistics camouflage the state’s differential distribution of educational benefits.

Over the last generation, racial segregation has increased in Wisconsin schools. Between 1995 and 2000, students attending hyper-segregated schools in Milwaukee (i.e., schools where at least 90% of the student body are non-white) doubled from 29.1% to 58.5%.<sup>231</sup> Data from the 2017–2018 school year show that 70% of Milwaukee students attend hyper-segregated schools.<sup>232</sup> Another 35.4% attend schools in which 99% of the students classify as non-white.<sup>233</sup> These findings mirror other metrics on segregation in the city. For example, a Brookings Institution

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Madisons” as the “best city to raise a family in the country” and “the political hub of ‘the worst state for Black Americans’”).

226. Mike Ivey, *No State Worse Than Wisconsin for Black Children, Says New National Study*, CAP. TIMES (Apr. 1, 2014), [https://madison.com/ct/news/local/writers/mike\\_ivey/no-state-worse-than-wisconsin-forblack-children-says-new-national-study/article\\_7ec1a1fc-b923-11e3-828c0019bb2963f4.html](https://madison.com/ct/news/local/writers/mike_ivey/no-state-worse-than-wisconsin-forblack-children-says-new-national-study/article_7ec1a1fc-b923-11e3-828c0019bb2963f4.html) [<https://perma.cc/U9QA-L2C2>]; see also ANNIE E. CASEY FOUND., RACE FOR RESULTS: BUILDING A PATH TO OPPORTUNITY FOR ALL CHILDREN 12–13 (2014), <https://assets.aecf.org/m/resourcedoc/AECF-RaceforResults-2014.pdf> [<https://perma.cc/J39F-5V8M>] (reporting study results).

227. *Legislators: Wisconsin Horrible for Black Kids*, CHANNEL 3000 (Dec. 23, 2019, 1:38 AM), <https://www.channel3000.com/legislators-wisconsin-horrible-for-black-kids/> [<https://perma.cc/YKJ6-22ME>].

228. See McKenna Alexander, *Wisconsin Ranks 11th in Nation in Public Education According to 24/7 Wall Street*, WQOW.COM (Feb. 25, 2020, 12:06 PM), <https://wqow.com/2020/02/25/wisconsin-ranks-11th-in-nation-for-public-education/>.

229. *Top 10 Best Public Schools in Wisconsin (2021-22)*, PUB. SCH. REV., <https://www.publicschoolreview.com/top-ranked-public-schools/wisconsin> [<https://perma.cc/EU8T-L783>] (last visited Sept. 22, 2021).

230. Samuel Stebbins & Thomas C. Frohlich, *Geographic Disparity: States with the Best (and Worst) Schools*, USA TODAY (Feb. 12, 2018, 9:02 AM), <https://www.usatoday.com/story/money/economy/2018/02/08/geographic-disparity-states-best-and-worst-schools/1079181001/> [<https://perma.cc/T3Z6-JQV6>].

231. MARK V. LEVINE, THE STATE OF BLACK MILWAUKEE IN NATIONAL PERSPECTIVE 74 fig.40 (2020), [https://dc.uwm.edu/cgi/viewcontent.cgi?article=1055&context=ced\\_pubs](https://dc.uwm.edu/cgi/viewcontent.cgi?article=1055&context=ced_pubs).

232. *Id.* at 75 fig.41.

233. *Id.* at 76 fig.42.

study found that Milwaukee has the highest level of Black-white housing segregation of major metropolitan areas in the United States.<sup>234</sup>

Racial segregation maps onto wealth disparities among local districts and their ability to fund necessary education programs, which further correlate with educational outcomes. In 2020, Wisconsin reported the highest overall gap in educational outcomes in the United States.<sup>235</sup> In terms of racial disparity, it ranked forty-sixth in standardized-test scores; forty-eighth in ACT scores; fiftieth in public high school graduation rates; forty-seventh in its share of adults with at least a high school degree; and forty-seventh in its share of adults with at least a bachelor's degree.<sup>236</sup> A study five years earlier found that racial achievement gaps had widened in Wisconsin over a twenty-year period, with Wisconsin ranking worst in the country in the divide between Black and white student performance on national standardized tests.<sup>237</sup> And we emphasize: the children are not the problem; the problem is the inadequacy and inequality of the state's educational programs.<sup>238</sup>

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234. William H. Frey, *Black-White Segregation Edges Downward Since 2000, Census Shows*, BROOKINGS: AVE. (Dec. 17, 2018), <https://www.brookings.edu/blog/the-avenue/2018/12/17/black-white-segregation-edges-downward-since-2000-census-shows/> [<https://perma.cc/G3L7-PZR6>] (displaying “Metro areas with highest black-white segregation” in Table 1). The Milwaukee Public Schools Board recently passed a solution calling for a plan to desegregate; officials have not taken further steps. See Annysa Johnson, *MPS Board to Begin Discussions on Desegregating Schools in Southeastern Wisconsin*, MILWAUKEE J. SENTINEL (June 30, 2020, 10:00 AM), <https://www.jsonline.com/story/news/education/2020/06/30/mps-board-begin-discussions-desegregating-schools-metro-milwaukee/3266815001/> [<https://perma.cc/L68H-D588>].

235. See Henry Redman, *Wisconsin Schools' Racial Inequality Worst in U.S.*, URB. MILWAUKEE (June 27, 2020, 10:42 AM), <https://urbanmilwaukee.com/2020/06/27/wisconsin-schools-racial-inequality-worst-in-u-s/> [<https://perma.cc/T8R9-V77U>].

236. Adam McCann, *2020 Best States for Racial Equality in Education*, WALLETHUB (June 24, 2020), <https://wallethub.com/edu/states-education-with-the-mostracial-equality/75962> [<https://perma.cc/CD6R-6KMX>]; see also Redman, *supra* note 235.

237. See Abigail Becker, *Wisconsin's Black-White Achievement Gap Worst in Nation Despite Decades of Efforts*, WIS. WATCH (Dec. 16, 2015), <https://wisconsinwatch.org/2015/12/wisconsins-black-white-achievement-gap-worst-in-nation/> [<https://perma.cc/AVK5-FNWK>].

238. See generally NAT'L BLACK CHILD DEV. INST., BEING BLACK IS NOT A RISK FACTOR: STATISTICS AND STRENGTH-BASED SOLUTIONS IN THE STATE OF WISCONSIN (2014), [https://www.nbedi.org/sites/default/files/uploads/SOBC%20Wisconsin.FINAL\\_.pdf](https://www.nbedi.org/sites/default/files/uploads/SOBC%20Wisconsin.FINAL_.pdf) [<https://perma.cc/8CNY-FLGB>] (describing programmatic successes) [hereinafter BCDI, BEING BLACK IS NOT A RISK FACTOR].

These educational disadvantages begin at an early age. In 2016, Wisconsin ranked sixth in the nation for access to preschool programs.<sup>239</sup> However, the quality of pre-K programs varies across the state, and two-thirds of Black children were less prepared for kindergarten than their white peers.<sup>240</sup> Moreover, Black children were five times “more likely to be suspended” than children of other races from pre-K programs.<sup>241</sup> Racially disparate suspensions continued throughout a student’s time in school: in 2015, 17.6% of Black students were suspended, more than 7.5 times the rate of white-student suspension.<sup>242</sup> Carceral practices within the schoolhouse are mirrored in a higher racially disparate rate of juvenile arrests in Wisconsin. Although the overall rate of juvenile arrests decreased 62% between 2002 and 2016,<sup>243</sup> the 2016 arrest rate for white youth was 57 per every 1,000 youth but 193 arrests per every 1,000 Black youth.<sup>244</sup> Under Wisconsin law, youths are placed in secure Juvenile Correctional Institutions (JCIs) when a court finds they have committed an offense that would subject them to at least six months of incarceration if they were an adult and a restrictive setting is required for community safety.<sup>245</sup> Black youth are detained in Wisconsin juvenile facilities at

239. Kyla Calvert Mason, *Report: Wisconsin Stands Out for Preschool Access*, WIS. PUB. RADIO (May 13, 2016, 7:22 AM), <https://www.wpr.org/report-wisconsin-stands-out-preschool-access> [https://perma.cc/E2LX-FSJQ]. For a history of kindergarten and Pre-K programs in Wisconsin, see *History of 4K and 5K in Wisconsin*, WIS. DEP’T OF PUB. INSTRUCT., <https://dpi.wi.gov/early-childhood/history-4k-and-5k-wisconsin> [https://perma.cc/CLN3-8YTM] (last visited Sept. 22, 2021).

240. See Dave Edie, *Wisconsin Kindergarten Readiness Study Shows Serious Disparities for Children of Color and Economically Disadvantaged*, KIDS FORWARD (Sept. 26, 2017), <https://kidsforward.org/wisconsin-kindergarten-readiness-study-shows-seriousdisparities-for-children-of-color-and-economically-disadvantaged/>.

241. WIS. OFF. CHILD.’S MENTAL HEALTH, 2017 REPORT TO THE WISCONSIN LEGISLATURE 57 (2017), <https://children.wi.gov/Documents/2017OCMHAnnualReport.pdf> [https://perma.cc/NF97-FL74].

242. *Id.*; see also David J. Johns, *Removing Barriers to Opportunity: Eliminating Preschool Suspensions*, in BCDI, BEING BLACK IS NOT A RISK FACTOR, *supra* note 238, at 6 (“Black students in Wisconsin were suspended 10X more often than white students in the three academic years from 2009–2012.”).

243. KIDS FORWARD, THE COMPLEX MAZE OF THE JUVENILE JUSTICE SYSTEM IN WISCONSIN AND ITS IMPACT ON YOUTH OF COLOR 6 (2018), <http://kidsforward.net/assets/The-Complex-Maze-of-the-Juvenile-Justice-System.pdf> [https://perma.cc/NRP3-CZ72].

244. *Id.*

245. Wisconsin currently has two secure facilities: the Lincoln Hills School for Boys and the Copper Lake School for Girls. In 2017, a federal court appointed a monitor as part of a class action lawsuit brought by the ACLU of Wisconsin. See Stipulation & Consent Decree & Permanent Injunction at 10–13, *J.J. v. Litscher*, No. 17-cv-47 (W.D. Wis. Oct. 31, 2018), ECF No. 107. The lawsuit alleged that the state violated class members’ Eighth and Fourteenth Amendment rights by holding juveniles in the facility in solitary confinement, restraining them, subjecting them to pepper spray, and conducting

higher rates than white children, and although the overall rate of youth detention has decreased, the racial disparity in detention has increased: Black youth were 8.2 times more likely to be involved in the juvenile justice system in 2003 but 15 times more likely to be involved ten years later.<sup>246</sup> Indeed, although Black youth comprise 10% of the Wisconsin youth population, they make up 47% of youth held in secure detention, and Wisconsin has one of the highest racial disparities on this metric in the country, placing fifth in the country.<sup>247</sup>

The metaphor of the school-to-prison pipeline describes conditions on the ground in Wisconsin. Wisconsin ranks among the states with the highest disparities in the incarceration rates of Black and white state residents. Although Black persons constitute 6% of the state's population, they make up 38% of those incarcerated.<sup>248</sup> Moreover, Wisconsin state prisons have among the highest disparities in incarceration between Black and white individuals in the United States, and Wisconsin incarcerates

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strip searches. *See* Class Action Complaint for Declaratory & Injunctive Relief at 2, *J.J. v. Litscher*, No. 17-cv-47 (W.D. Wis. Apr. 17, 2017), ECF No. 13. There also was evidence of staff abuse of the children. *Id.* In response to the lawsuit, the state legislature passed Act 185, a plan to close both secure facilities and replace them with regional community-based facilities. *See* Madeline Fox, 'An Absolute Atrocity': State to Miss Deadline To Close Juvenile Detention Facilities, Even As Conditions Worsen, WIS. PUB. RADIO (Feb. 1, 2021, 6:30 AM), <https://www.wpr.org/absolute-atrocity-state-miss-deadline-close-juvenile-detention-facilities-even-conditions-worsen> [<https://perma.cc/NFJ9-MR6Z>]; *see also* Assemb. B. No. 953, 103d Assemb. Reg. Sess. (Wis. 2018).

As of January 2021, it was reported that although the court-appointed monitor had found that the facility was not in compliance with the 2018 consent decree requirements, the state did not plan to meet the closing date of July 2021. *See* Fox *supra*; *see also* Eighth Report of the Monitor at 30–53, *J.J. v. Litscher*, No. 17-cv-47 (W.D. Wis. Jan. 25, 2021), ECF No. 121. On a parallel track, Wisconsin Republican lawmakers have sought to extend the reach of the juvenile justice system. *See* Briana Reilly & Abigail Becker, *Wisconsin Plan to Close Youth Prisons Hits More Snags as Some Counties Pull Back*, CAP. TIMES (Aug. 18, 2020), [https://madison.com/ct/news/local/govt-and-politics/wisconsin-plan-to-close-youthprisons-hits-more-snags-as-some-counties-pull-back/article\\_92af1d9b-3bdc-5e89-a841-2c0c724e6e2f.html](https://madison.com/ct/news/local/govt-and-politics/wisconsin-plan-to-close-youthprisons-hits-more-snags-as-some-counties-pull-back/article_92af1d9b-3bdc-5e89-a841-2c0c724e6e2f.html) [<https://perma.cc/99NA-D3RM>].

In 2020, Governor Evers vetoed a bill that would have expanded the types of crimes that juveniles could be incarcerated for after it passed both chambers of the state legislature. The governor's most recent budget includes several juvenile justice reform measures, but Republican lawmakers have stated the proposals are likely to be cut from the budget. *See* Corrinne Hess, *Evers Proposing Sweeping Changes to Juvenile Justice System*, WIS. PUB. RADIO (Feb. 17, 2021, 3:35 PM), <https://www.wpr.org/evers-proposingsweeping-changes-juvenile-justice-system>.

246. KIDS FORWARD, *supra* note 243, at 4 fig.1.

247. *Id.* at 7 fig.3, 8.

248. *See* *Wisconsin Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/WI.html> [<https://perma.cc/W89U-CAQE>] (last visited Feb. 21, 2021).

Black people at double the rate in the rest of the United States.<sup>249</sup> A 2016 report found Wisconsin had the second highest racial disparity in state incarceration rates in the nation.<sup>250</sup> Nationally, Black individuals are incarcerated at 5.1 times the rate of white individuals.<sup>251</sup> Wisconsin, with a racial disparity of 11.5,<sup>252</sup> is one of only five states with a disparity that is more than ten-to-one.<sup>253</sup> The racial disparity persists even when local jails and state prisons are considered separately.<sup>254</sup>

Educational deficits and high rates of carceral control translate into economic disparities,<sup>255</sup> constituting a vicious circle that impacts the wealth of a locality and its ability to raise revenue for public schooling.<sup>256</sup> Black persons make up about 6% of the Wisconsin population but 38% of

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249. See, e.g., MARC MAUER & RYAN KING, *UNEVEN JUSTICE: STATE RATE OF INCARCERATION BY RACE AND ETHNICITY* 10 tbl.5, 15 (2007), <https://www.sentencingproject.org/publications/uneven-justice-state-rates-of-incarceration-by-race-and-ethnicity/>; see also ASHLEY NELLIS, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 6, 17 tbl.C (2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

250. See NELLIS, *supra* note 249, at 8 tbl.3.

251. *Id.* at 4.

252. *Id.* at 6 tbl.3.

253. *Id.* at 3.

254. See VERA INST. FOR JUST., *INCARCERATION TRENDS IN WISCONSIN: INCARCERATION IN LOCAL JAILS AND STATE PRISONS* 1–2 (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-wisconsin.pdf> [<https://perma.cc/9UZC-LAB8>] (reporting 2015 and 2017 data that although Black persons were 7% of state residents, they made up 29% of detainees in local jails and 41% in state prisons).

255. See MARTIN CARNOY & EMMA GARCIA, *ECON. POL'Y INST., FIVE KEY TRENDS IN U.S. STUDENT PERFORMANCE* 8 (2017), <https://files.epi.org/pdf/113217.pdf> [<https://perma.cc/5HTY-KA6P>] (reporting performance gaps by race and class of children attending schools characterized as high poverty); John Shattuck & Mathias Risse, *Reimagining Rights and Responsibilities in the United States: Equal Access to Public Goods and Services* 4 (Carr Ctr. for Hum. Rts. Pol'y, Working Paper No. 21-007, 2021), <https://ssrn.com/abstract=3802093> (“Across the United States, it is clear that inequities in public schools are reinforcing racial and economic disparities.”); Brian A. Jacob & Jens Ludwig, *Improving Educational Outcomes for Poor Children*, 26 *FOCUS* 56, 56 (2009) (discussing relation between attendance at under-resourced schools and lifetime earnings). For the effect of carceral control on wealth, see SANETA DE VUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS & AZADEH ZOHRABI, *ELLA BAKER CTR. FOR HUM. RTS., FORWARD TOGETHER & RSCH. ACTION DESIGN, WHO PAYS?: THE TRUE COST OF INCARCERATION ON FAMILIES* 7–9 (2015), <http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf> [<https://perma.cc/S67T-48XK>] (describing costs borne by families when a loved one faces criminalization).

256. See Linda Darling-Hammond, *America's School Funding Struggle: How We're Robbing Our Future by Under-Investing in Our Children*, *FORBES* (Aug. 5, 2019, 1:43 PM), <https://www.forbes.com/sites/lindadarlinghammond/2019/08/05/americas-school-funding-struggle-how-were-robbing-our-future-by-under-investing-in-our-children/?sh=1e7bf8da5eaf> [<https://perma.cc/G7HT-GLGS>].

the population of Milwaukee.<sup>257</sup> Education disparities within Milwaukee translate into economic disparities across a number of different economic metrics.<sup>258</sup> Significantly, Wisconsin has the highest racial disparity in employment rates in the United States.<sup>259</sup> Wisconsin also is worst in the nation in its racial disparity in the rate of “prime age employment” (i.e., the share of persons aged 25–54 with a job). Eighty-five percent of prime age white Wisconsinites are employed, compared to 61% of Black residents of the same age.<sup>260</sup> Only two states show greater Black/white household income inequality than Wisconsin,<sup>261</sup> and home ownership patterns show a similar racial gap. Wisconsin has the eighth largest disparity between rates of home ownership between Black and white residents in the nation.<sup>262</sup> In Milwaukee, white residents own homes at a rate 40.7% greater than Black residents,<sup>263</sup> the city also has the highest level of residential racial segregation of any major metropolitan area in the United States.<sup>264</sup>

Racialized economic disparities go hand-in-hand with extreme racial gap disparities in health outcomes. For example, Wisconsin has the highest

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257. See *Milwaukee, WI & Wisconsin*, DATA USA, <https://datausa.io/profile/geo/milwaukee-wi/?compare=wisconsin> [<https://perma.cc/2SPG-EMTB>] (last visited Sept. 24, 2021).

258. See Vada Waters Lindsey, *The Vulnerability of Using Tax Incentives in Wisconsin*, 88 MARQ. L. REV. 107, 109–10 (2004) (citing research on association of education with an employable work base, and the fact that Milwaukee, at the turn of the century, had fallen in per capita income to forty-fourth among largest fifty cities in United States).

259. See COLIN GORDON, RACE IN THE HEARTLAND: EQUITY, OPPORTUNITY, AND PUBLIC POLICY IN THE MIDWEST 8 fig.8, 9 fig.9 (2019), <https://files.epi.org/uploads/Race-in-the-Midwest-FINAL-Interactive-1.pdf> [<https://perma.cc/K7YZ-W333>] (reporting 2017 unemployment rates of nearly 9% for Black residents and 3.3% for white residents). In 2011, the unemployment rate for Black residents in Dane County exceeded 25%, and white residents had an unemployment rate of almost 5%. See WIS. COUNCIL ON CHILD. & FAMS., RACE TO EQUITY: A BASELINE REPORT ON THE STATE OF RACIAL DISPARITIES IN DANE COUNTY 7 (2013) <http://racetoequity.net/wpcontent/uploads/2016/11/WCCF-R2E-Report.pdf> [<https://perma.cc/N2HM-3ABR>].

260. See GORDON, *supra* note 259, at 8 fig.8.

261. See *id.* at 10 fig.12.

262. See *id.* at 12 fig.14.

263. See Alanna McCargo & Sarah Stochak, *Mapping the Black Homeownership Gap*, URB. INST.: URB. WIRE (Feb. 26, 2018), <https://www.urban.org/urban-wire/mapping-black-homeownership-gap> [<https://perma.cc/SS27-7CS6>] (hover cursor over location of Milwaukee on map to access data).

264. Frey, *supra* note 234. For extended treatment of how government programs shaped the distribution of property wealth and segregation that anchored public school educational inequality, long past the time redlining formally ended, see KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

rate of Black infant mortality in the United States.<sup>265</sup> Although maternal mortality rates are lower than the national average in Wisconsin, the disparity in maternal mortality between Black and white mothers is greater than the national mean.<sup>266</sup> Communities of color in Wisconsin also have lower childhood vaccination rates and higher rates of risk factors for chronic disease.<sup>267</sup>

We underscore that we are not making a causal argument about *Rodriguez*, the Wisconsin court's education decisions, and racial and class conditions in the state. We recognize the complexity of these issues. Nor do we regard education as a panacea for entrenched social and economic problems. However, in considering the wisdom of the Supreme Court's refusal to recognize quality education as a fundamental federal right, we think it essential to consider whether that doctrine has blunted, rather than supported, legislative and judicial efforts to address unequal education and the social and economic problems known to follow in its wake. At the least, the Wisconsin experience raises questions about the normative superiority of federal rights minimalism and whether its theory of federalism fairly accounts for the role of power, race, and wealth in enabling or subverting self-governance and local autonomy.

#### CONCLUSION

For the record, we prepared this essay for a conference on "Public Law in the States," scheduled to take place in June 2020 but postponed because of the pandemic. A year later, the conference convened virtually by Zoom: by this time the United States was still reeling from the virus-related deaths of more than a half million Americans and an economic crisis that at its peak left almost fifteen percent of Americans unemployed.<sup>268</sup> The pandemic has not been neutral in its effects; Black and poor people have died at higher rates, have suffered higher rates of

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265. See T.J. MATTHEWS, DANIELLE M. ELY & ANNE K. DRISCOLL, NAT'L CTR. HEALTH STAT., NCHS DATA BRIEF NO. 295, STATE VARIATIONS IN INFANT MORTALITY BY RACE AND HISPANIC ORIGIN OF MOTHER 2013–2015 3, 5 (2018), <https://www.cdc.gov/nchs/data/databriefs/db295.pdf> [<https://perma.cc/SPY5-34SM>] (indicating that Black infant mortality in Wisconsin is 14%, compared to a national average of 11%).

266. See Mary Kate McCoy, *Proposed Legislation Aims to Address Racial Disparities in Maternal Health Care*, WIS. PUB. RADIO (Feb. 18, 2021, 6:00 AM), <https://www.wpr.org/proposed-legislation-aims-address-racial-disparitiesmaternal-health-care>.

267. See WIS. COLLABORATIVE FOR HEALTHCARE QUALITY, 2019 WISCONSIN HEALTH DISPARITIES REPORT 10, 17–18 (2019), [https://www.wchq.org/pdfs/Disparities\\_Report\\_2019\\_9-20\\_FINAL.pdf](https://www.wchq.org/pdfs/Disparities_Report_2019_9-20_FINAL.pdf).

268. Helen Hershkoff & Arthur R. Miller, *Courts and Civil Justice in the Time of COVID: Emerging Trends and Questions to Ask*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 324–25 (2021) (discussing economic effects of the COVID pandemic).

infection, and have suffered more grievous economic losses.<sup>269</sup> Black persons in Wisconsin had higher rates of infection, higher rates of hospitalization, higher fatalities, and delayed access to vaccinations.<sup>270</sup> So, too, Black and poor children have lost a greater-than-equal share of educational opportunities, as brick-and-mortar schoolhouses needed to pivot to remote instruction.<sup>271</sup> The pandemic has highlighted the brutality of structural racism and wealth disparities and their reinforcement by laws and policies that build upon existing entitlement structures and amplify the preferences of those with power and resources.<sup>272</sup> It also has shown the importance of involving the national government in matters of national concern when the states and localities cannot solve the problems alone.<sup>273</sup>

In our view, education is a national concern and deserves national support.<sup>274</sup> Efforts to ensure inclusive access to quality schooling cannot succeed if the provision of education continues to be limited by community wealth. As scholars and activists think about the goals of public law in the states, we invite state courts once again to “step into the breach”—but together with federal courts, Congress, and social movements—and to recognize and enforce a right to education that may be adapted in light of local needs. As we have argued elsewhere, the right we urge rests on a traditional notion of federal due process, drawing from

269. *Id.* at 330–31 (discussing disproportionate death rate of Black, Brown, and poor people from COVID).

270. See *COVID-19: Racial and Ethnic Disparities*, WIS. DEP’T OF HEALTH SERVS., <https://www.dhs.wisconsin.gov/covid-19/disparities.htm> [<https://perma.cc/TQT3-ABBP>] (last updated Sept. 10, 2021); *COVID-19: Vaccine Data*, WIS. DEP’T OF HEALTH SERVS. <https://www.dhs.wisconsin.gov/covid-19/vaccine-data.htm> (last updated Sept. 10, 2021).

271. See Redman, *supra* note 235 (reporting that students, including Wisconsin students, “could lose an average of seven months of learning because of the pandemic—but Black students could lose an average of ten months”); see also *Educating Minority Students: Obstacle Coursework*, *ECONOMIST*, Jan. 23–29, 2021, at 36, 36 (discussing disproportionate impact of the pandemic on Black children’s schooling because their schools “have fewer resources to deal with the virus”).

272. See Hershkoff & Miller, *supra* note 268, at 328 (analogizing the pandemic “to a famine, which Amartya Sen famously theorized as resulting not from crop failure or insufficient food supplies, but rather from institutional and legal decisions that, when based upon existing food entitlements, increase the likelihood of starvation by those who lack those entitlements”).

273. See Nancy J. Knauer, *The COVID-19 Pandemic and Federalism: Who Decides?*, 23 *N.Y.U. J. LEGIS. & PUB. POL’Y* 1, 25–31 (2021) (discussing the negative impact of leaving pandemic relief to the states without adequate federal support); see generally Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 *U. KAN. L. REV.* 1219, 1220 (1997) (stating that “federalism should be viewed as not being about limits on any level of government, but empowering each to act to solve difficult social issues”).

274. For a discussion of the superior fiscal capacity of the United States relative to the states, see David A. Super, *Rethinking Fiscal Federalism*, 118 *HARV. L. REV.* 2544, 2574–75 (2005) (discussing the “superior capacity model” of fiscal federalism).

state constitutional principles of human flourishing: that a state's system of public schooling violates the principle of equal liberty if it relegates students—usually Black, Brown, or poor—to schools that perpetuate persistent structural disadvantage that is characterized by race and wealth.<sup>275</sup>

*Rodriguez* aligned with and catalyzed a nascent movement comprising deregulatory business interests and religious groups. So, too, our project aligns with an emerging movement that calls for redistribution under an “invest-divest” framework that would remove resources from carceral institutions (or carceralism within existing institutions, such as the use of police in public schools) and invest those resources in public goods and public institutions that promote human flourishing. Our approach could be labeled maximalist or even unrealistic—but the same was said of groups proposing the privatization of education in 1972. The education right we envision stands in marked contrast to the prevailing approach of recognizing a right to basic literacy and connects more closely to those who see in public schooling the emancipatory potential of the Reconstruction Amendments. And we believe our approach reflects federalism at its best: a pluralistic process that extends material and participatory benefits not simply to states, but also to the people who live in those states, including Black, Brown, and poor households regardless of their wealth or status.

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275. Hershkoff & Yaffe, *supra* note 3, at 8.