A Constitutional Right to learn: The Uncertain Allure of Making a Federal Case out of Education

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A CONSTITUTIONAL RIGHT TO LEARN:  
THE UNCERTAIN ALLURE OF MAKING A FEDERAL CASE OUT OF EDUCATION

DANIEL S. GREENSPAN*

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I. INTRODUCTION

For decades, some scholars, reformers, and elected officials have advocated for a federal right to education.1 But in light of the Supreme Court’s recent rulings, including its decisions invalidating race-conscious school integration plans2 and deferring to agency officials on matters of school funding,3 the federal courts do not appear to be the best forum for securing every student a quality education. Instead, advocates should seek reform from state courts, which have been more receptive to recognizing a right to education, as such a strategy avoids the legal and political pitfalls of making a federal case out of education.4

In Brown v. Board of Education5 (Brown I), the Supreme Court famously declared that education, “where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”6 Ever since, there have been fierce debates regarding the best means to fulfill Brown I’s promise that all children must have an equal opportunity to learn. Proponents have alternatively argued for

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1. See, e.g., Student Bill of Rights Act, S. 2189, 110th Cong. §§ 102, 401 (2007) (providing for adequate and equitable educational opportunities for public school students and the right to bring civil actions in federal court if a state fails to provide sufficient resources or comply with state school finance decisions); CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 13, 234 (2004) (noting the inclusion and importance of “the right to a good education” in President Franklin D. Roosevelt’s Second Bill of Rights); Susan H. Bietsky, Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis, 86 NW. U. L. REV. 550, 574 (1992) (arguing that the Constitution contains several provisions that can support an “implied positive right to education”); Julius Chambers, Adequate Education for All: A Right, an Achievable Goal, 22 HARV. C.R.-C.L. L. REV. 55, 69–72 (1987) (positing that the Equal Protection Clause forms the basis for recognizing a fundamental right to education); Erwin Chemerinsky, The Deconstitutionalization of Education, 36 LOY. U. CHI. L.J. 111, 123 (2004) (concluding that federal courts have been “tragically wrong” in failing to find a constitutional right to education); Goodwin Liu, Education, Equality, and National Citizenship, 116 YALE L.J. 330, 334 (2006) (arguing that the federal government has a constitutional duty to ensure that every child has the opportunity to receive an education); Penelope A. Prevoros, Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education, 20 SANTA CLARA L. REV. 75, 75–76 (1980) (arguing that the recognition of a fundamental right to education is not inconsistent with notions of federalism); Kimberly Jenkins Robinson, The Case for a Collaborative Enforcement Model for a Federal Right to Education, 40 U.C. DAVIS L. REV. 1653, 1712–16 (2007) (urging Congress to recognize a federal right to education and enact it through spending legislation); Note, A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process, 120 HARV. L. REV. 1323, 1341–44 (2007) (arguing that substantive due process provides a means for recognizing education as a fundamental right); Michael Salerno, Note, Reading Is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education, 5 CARDozo PUB. L. POL’Y & ETHICS J. 509, 538–40 (2007) (arguing that by federalizing components of public education, the No Child Left Behind (NCLB) Act requires the recognition of education as a fundamental right).


4. See infra notes 81–89 and accompanying text.


6. Id. at 493.
class integration or greater resources, urged federal intervention, or promoted state-level strategies.

No matter which school of thought is embraced, scholars must squarely address the two Supreme Court decisions that have most influenced the debate about Brown I’s legacy and the fight for quality education: San Antonio Independent School District v. Rodriguez and Parents Involved in Community Schools v. Seattle School District No. 1. The former, in which the Court upheld disparities in school funding, has been widely viewed as closing the door on a federal constitutional right to education. The latter, in which the Court struck down the use of race in local efforts to integrate schools, suggests that this country is entering the end of the desegregation era.

What then is the next step in the movement to ensure a quality education for all children? At an April 2006 conference at the University of California at Berkeley law school, scholars explored various aspects of pursuing education as a fundamental right. At a November 2007 symposium at Columbia University, legal reformers reassessed recent federal efforts at school integration and state school funding litigation. Scholars appraising these developments have predicted that advocates might begin using the No Child Left Behind (NCLB) Act and

8. See Sunstein, supra note 1, at 153 (noting that the Supreme Court, as constituted prior to President Nixon’s appointments, continuously required the federal government to provide adequate opportunities for the nation’s poor).
16. For a collection of the research abstracts of the conference participants, see Chief Justice Earl Warren Inst. on Race, Ethnicity & Diversity, Rethinking Rodriguez: Education as a Fundamental Right (2006), http://www.law.berkeley.edu/centers/ewi-old/research/k12equity/rodriguez_abstracts.pdf.
18. Joshua Dunn & Martha Derthick, Adequacy Litigation and the Separation of Powers, in School Money Trials: The Legal Pursuit of Educational Adequacy 322, 341 (Martin R. West & Paul E. Peterson eds., 2007) (suggesting that amendments to NCLB could provide access to federal courts for those parties that routinely lose in state courts).
successful state school funding decisions\(^{19}\) to “secure a foundation in federal law” for a right to education.\(^{20}\)

This Article addresses these issues in two ways. First, Part III of this Article aims to correct a deep misunderstanding about \textit{Rodriguez}, even among experts, by demonstrating that the Court’s decision and subsequent legal and political developments make a federal constitutional right to an education viable. Unlike recent proponents, however, Part IV of this Article urges advocates not to pursue a federal right to education at this time. Because state-level school funding litigation has been successful, and the federal judiciary has withdrawn from the education arena, and the Supreme Court has placed renewed emphasis on federalism, now is not the time to make a federal case out of education. Instead, advocates should work with state courts, legislators, and interested citizens, as they have for the last several decades, to ensure that public schools receive funding based on student need. To reach these conclusions, Part II of this Article documents the inequities in school funding, their costs, and efforts in the last fifty years to remedy the problems in state and federal court.

II. **ORIGINS OF A RIGHT TO EDUCATION**

\textbf{A. Unequal Funding for Public Schools}

According to the most recent data, close to 49 million students—one in six Americans—are enrolled in public schools.\(^{21}\) America’s schools are funded almost entirely by state and local taxes,\(^{22}\) predominantly property taxes, which are products of local wealth.\(^{23}\) Under this funding scheme, property-rich districts can tax themselves at lower rates and still produce more revenue than property-poor districts.\(^{24}\) This decentralized system provides students with significantly different educational opportunities based on where they live, creating “some of the best- and worst-financed schools in the developed world.”\(^{25}\) Federal, state, and local funding exacerbates these inequities through perverse formulas that provide the neediest states, school districts, and local schools fewer dollars per student.\(^{26}\)

\begin{footnotesize}
19. Andrew Rudalevige, \textit{Adequacy, Accountability, and the Impact of the No Child Left Behind Act, in School Money Trials: The Legal Pursuit of Educational Adequacy, supra note 18, at 243}, 255 (recognizing the recent rise of national school funding institutes that disseminate information about state suits at universities such as Columbia and UC Berkeley).
20. Dunn & Derthick, \textit{supra} note 18.
23. \textit{Id.} at 130.
24. \textit{See id.} at 152–53.
25. \textit{Id.} at 482.
\end{footnotesize}
The result of this unequal investment is a shortage of quality teaching, textbooks, and facilities in many of our nation’s schools. Schools in some states operate with significantly fewer resources, as per pupil spending ranges from $5,216 in Utah to $14,117 in New Jersey. Within every state, there are equally significant disparities: in twenty states, the highest spending 5% of school districts expend more than twice as many dollars per student than the lowest spending 5%. In Montana, for example, the most highly-funded schools spent $22,242 per student, while the poorest schools only spent $5,714. When expanded to the classroom and school levels, funding gaps of thousands of dollars per student can amount to overall disparities of hundreds of thousands of dollars per classroom or millions of dollars per school.

In addition to local inequities, states often allocate funding to schools based on political motivations rather than actual student need. As a result, according to a recent study, poor districts with the most at-risk children are provided with fewer resources, with high-poverty districts, on average, spending $907 less per student than low-poverty districts. For example, according to a recent study, $12,896 is spent per pupil in New York City, one of the state’s most impoverished school districts, while $23,344 is spent per pupil educating students in one of the state’s low-poverty suburbs. Regardless of these and similar disparities, most public schools have less than $7.44 to spend per hour to educate a single child. Even in the highest-spending state, only $12.07 per hour is invested, on average, to prepare a student for the workforce and productive citizenship.

27. See Schrag, supra note 13, at 6–7. See generally Jonathan Kozol, Savage Inequalities: Children in America’s Schools (1991) (describing the understaffed and overcrowded schools serving poor and minority students); Jonathan Kozol, The Shame of the Nation: The Restoration of Apartheid Schooling in America (2005) (describing the extreme condition of various schools across the country lacking basic resources).
28. Nat’l Ctr. for Educ. Statistics (Apr. 2007), supra note 21. According to the latest data, median spending per elementary and secondary school student in this country is $8,701. Id. at 2, 8 tbl. 3.
30. Id.
32. Rebell, supra note 9, at 1523.
33. Id. at 1476.
34. Id. at 1477.
35. This calculation is based on an average per student spending of $8,701, Nat’l Ctr. for Educ. Statistics (Apr. 2007), supra note 21, a 180-day school year, and a 6.5-hour school day, see Nancy Zuckerbrod & Melissa Trujillo, Length of School Day Under Review, Mobile Reg., Feb. 25, 2007, at A5 (noting that on average students spend 6.5 hours per day and 180 days per year in school). See generally Number of Instructional Days/Hours in the School Year, StateNotes (Edc. Comm’n of the States, Denver, Colo.), July 2004, http://www.ecs.org/clearinghouse/5526/5526.doc (listing the differences in the length of the school year in various states).
36. Per pupil expenditure in the highest-spending state, New Jersey, was $14,117 in 2005. Nat’l Ctr. for Educ. Statistics (Apr. 2007), supra note 21. When divided by 1,170 hours (180 days per year multiplied by 6.5 hours per day spent in school), the average amount spent per hour on each student equals $12.07.
The results of this underinvestment are well documented in lawsuits from over forty states challenging state methods of funding public schools. Students in some of the poorest districts in Alabama were forced to use outhouses, while some of their counterparts in New York who were required to pass a lab-science exam to graduate had to attend schools without functioning labs. Rural South Carolina schools, built as long ago as 1896, must contend with ancient plumbing that leaks raw sewage into classrooms and libraries stocked with books professing that “one day man will land on the moon.” And in one Arkansas school district, not a single student was prepared for college at graduation. In short, these resource shortages prevent educators from providing appropriate teachers, curricula, facilities, technology, libraries, counseling services, and drop-out prevention programs.

Because of funding inequalities, poor and minority students get “the fewest experienced and well-educated teachers, the least rigorous curriculum, and the lowest quality facilities.” These students are less likely to meet basic academic standards and less likely to graduate from high school than their wealthier white peers. Blacks and Latinos comprise 80% of the student population in extreme-poverty schools and 63% of the student population in high-poverty schools. As a result, the achievement gaps between white and minority students, as well as low and average income students, have persisted in recent years. Decades after Brown I, “the quality and quantity of education that children receive remain tied to the race and economic status of their family.”

37. Rebell, supra note 9, at 1500.
38. Lewin & Herszenhorn, supra note 7.
41. See, e.g., Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989) (noting the impact that increased spending has on such school characteristics in wealthy school districts in Texas).
42. THE EDUC. TRUST, supra note 26.
43. Rebell, supra note 9, at 1473–74; Robinson, supra note 1, at 1657.
44. See GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY 22 tbl.10 (2005), available at http://www.civilrightsproject.ucla.edu/research/deseg/Why_Segreg_Matters.pdf. Extreme poverty schools are those in which 90%–100% of the student population is considered poor.
45. See id. at 21 tbl.9. High poverty schools are those in which 50%–100% of the students are considered poor.
46. See, e.g., NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., THE CONDITION OF EDUCATION 2007, at 39, 144 tbl.14-1 (2007), available at http://nces.ed.gov/pubs2007/2007064.pdf (finding little to no change in math and reading achievement gaps between 1992 and 2005 among white, black, and Hispanic students); Richard Rothstein & Tamara Wilder, Beyond Educational Attainment: A Multifaceted Approach to Examining Economic Inequalities, in THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 21, 23–24 (Clive R. Belfield & Henry M. Levin eds., 2007) (noting the persisting gaps in reading, math, and social studies achievement levels between black and white students); Ross Weiner, Opportunity Gaps: The Injustice Underneath Achievement Gaps in Our Public Schools, 85 N.C. L. REV. 1315, 1317 (2007) (citation omitted) (noting a study that found that less than 50% of low income fourth graders had demonstrated basic reading and math skills, while over 75% of their nonpoor peers had surpassed such levels).
47. Chambers, supra note 1, at 55.
The costs of inadequate education are clear. As the Supreme Court has stated, “[t]he inability to read and write will handicap the individual deprived of a basic education each and every day of his life.” For example, a high school dropout will earn about $260,000 less during his lifetime and live 9.2 fewer years than a high school graduate. The failure to provide all students with an adequate education also has a high public cost: the government spends significantly more in terms of social services on those who have received a poor education. Health-related losses for high school dropouts amount to $58 billion a year, and annual tax losses exceed $50 billion. Furthermore, a 1% increase in high school graduation rates could reduce annual crime costs by $1.4 billion per year. One state has even projected its future need for prison beds based on local student illiteracy rates. In summary, the failure to provide every student with a meaningful opportunity to learn undermines America’s civic competence and competitiveness in the global economy.

To address these consequences, advocates of equal educational opportunity have fought in classrooms, state legislatures, and courthouses across the country for successful schools with sufficient resources. These advocates generally seek to transform convoluted, unpredictable, and politically-motivated school funding schemes into systems that provide resources based on the actual cost of educating each student. As noted above, some advocates have proposed suing in federal court to vindicate the right to a quality education. Yet, the fight for equality in school funding has largely been waged in state courts and legislatures.

48. Such costs include lower earnings, which result in significant losses in federal and state income taxes; increased criminal activity, drug use, teenage pregnancy rates, and use of public assistance; as well as poorer health. HENRY M. LEVIN, COLUMBIA UNIV., TEACHERS COLL., THE SOCIAL COSTS OF INADEQUATE EDUCATION 16–17 (2005), available at http://www.tc.columbia.edu/i/a/3082_socialcostsofinadequateEducation.pdf.
50. LEVIN, supra note 48, at 2.
51. See SWANSON & KING, supra note 22, at 18.
52. See LEVIN, supra note 48, at 2.
53. Id.
55. Rebell, supra note 9, at 1475; see also Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 330 (N.Y. 2003) (acknowledging that a sound basic education includes “the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury” (quoting Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 2003)) (internal quotation marks omitted)).
57. See SCHRAEGER, supra note 13, at 5–7.
58. See sources cited supra note 1.
B. Fighting for Education in the Courts

The legal fight for quality education is not new. Reformers have fought vigorously for decades in federal and state courts to ensure that all students have the opportunity to receive a meaningful education.60

1. Brown I and the Legal Basis for a Right to Education

In Brown I,61 the Supreme Court unanimously struck down racial segregation in public schools.62 The Court declared that education, “where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”63 Brown I became the foundation for guaranteeing every student an opportunity to receive an education without regard to gender,64 immigrant status,65 or ability to speak English.66 In a landmark decision exempting the Amish from compulsory education laws after completion of the eighth grade,67 the Supreme Court emphasized “that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom.”68 Taken together, these decisions formed the beginning of a recognizable right to an education.

2. Courts Begin to Consider School Funding

In 1969 and 1970, the Supreme Court affirmed two decisions that refused to strike down school funding systems challenged under the Fourteenth Amendment.69 In both cases, the lower courts had identified a lack of judicially manageable standards for remedying funding disparities and had endorsed deference to the state legislature in making such alleged policy decisions.70

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60. Id.
62. Id. at 493–95 (citations omitted).
63. Id. at 493. Brown I, of course, was not the first Supreme Court case to protect education from government discrimination or intrusion. See, e.g., Pierce v. Soc’y of Sisters, 268 U.S. 510, 534–35 (1925) (citing Meyer v. Nebraska, 262 U.S. 390 (1923)) (protecting parents’ right to send their children to private schools); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (striking down a ban on teaching languages other than English in schools).
68. Id. at 221.
70. See Burrell, 310 F. Supp at 574 (“[T]he courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State.”); McInnis v. Shapiro, 293 F. Supp. at 336 (“Even if there were some guidelines available to the judiciary, the courts simply cannot provide the empirical research and consultation necessary for educational planning.” (citation omitted)).
Yet within a few years, the California Supreme Court\(^7\) and a federal judge in Minnesota\(^2\) struck down educational funding systems in their respective states because of the resulting disparities.\(^3\) Key scholarly publications at that time argued that school funding schemes that discriminated between students living in wealthy and poor districts based on “arbitrary geographical lines” were unconstitutional.\(^4\) A 1972 estimate indicated that school districts invested between 15% and 20% more on the average white student’s education than on that of a black student.\(^5\) This split between legal scholars and the courts over appropriate funding for education led to the landmark Supreme Court case of *San Antonio Independent School District v. Rodriguez.*\(^6\)

3. **Rodriguez: Foreclosing a Federal Right to Education?**

In its 1973 five-to-four ruling in *Rodriguez,* the Supreme Court declared that the state of Texas was not required to ensure that poor and wealthy school districts spend equal amounts on their students.\(^7\) The Court noted that the right to an education was neither explicitly nor implicitly guaranteed by the Constitution and distinguished it from other fundamental rights, such as the right to vote and the right of free speech.\(^8\) The Court also cited the tradition of state and local control over education as a principal reason for its deference to Texas officials.\(^9\) If *Brown I* required education to be available to all on equal terms, then *Rodriguez* announced the limitation that “the Equal Protection Clause does not require absolute equality or precisely equal advantages” in school funding.\(^10\)

4. **School Funding Litigation Shifts to the States**

In the wake of *Rodriguez,* advocates flocked to state courts to challenge state school funding systems.\(^11\) Their challenges were supported by provisions in each state constitution calling for a free, thorough, and efficient system of public schools.\(^12\) Until the late 1980s, state defendants won about two-thirds of the cases,


\(^{72}\) Van Dusart v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971).

\(^{73}\) *Id.* at 876–77; *Serrano,* 487 P.2d at 1244.


\(^{75}\) Christopher Jencks et al., *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLDING IN AMERICA* 28 (1972).

\(^{76}\) 411 U.S. 1 (1973).

\(^{77}\) *Id.* at 54–55 (footnotes omitted).

\(^{78}\) *Id.* at 35–37.

\(^{79}\) *Id.* at 42–43 (footnotes omitted).

\(^{80}\) *Id.* at 24 (footnote omitted).

\(^{81}\) See National Access Network, supra note 59.

\(^{82}\) See Michael A. Rebell, *Education Adequacy Litigation and the Quest for Equal Educational Opportunity,* *STUD. IN JUD. REMEDIES & PUB. ENGAGEMENT*, Nov. 1999, at 1, 3–4, 13; see the Appendix for  a list of state constitution education clauses and school funding cases.
which had largely raised equal protection—“equity”—claims.\textsuperscript{83} Equalized funding was resisted by wealthier school districts fearing that, absent new funding streams, their local funds would be redistributed to poorer districts under “Robin Hood” plans.\textsuperscript{84} Since 1989, however, plaintiffs have won 74%, or 20 out of the 28 final school funding decisions; these results have been in part due to a shift away from equity-based arguments to claims emphasizing the right to an adequate education—“adequacy” claims.\textsuperscript{85}

Adequacy suits have demanded that states meet their constitutional duties by providing the basic resources necessary to ensure that each student has an opportunity to meet state education standards.\textsuperscript{86} Because many states require students to pass important standardized tests to graduate but have failed to determine the cost of preparing students for these exams, courts have been sympathetic to demands to hold states accountable.\textsuperscript{87} State courts in New York, for example, ordered school funding increases totaling $3 billion, in part, because New York students must pass a laboratory-science exam to graduate, even though many attend high schools with no functioning labs.\textsuperscript{88} Similar suits have recently led to a $755 million increase in spending for schools in Kansas and a $1.25 billion increase in educational investments in Arkansas.\textsuperscript{89}

III. A RETURN TO FEDERAL COURT?

\textbf{A. Practical Reasons to Pursue a Federal Right to Education}

Despite significant successes in state courts, some advocates and reformers suggest pursuing a federal right to education.\textsuperscript{90} Leading legal scholars Cass Sunstein, Erwin Chemerinsky, and Goodwin Liu are among those who argue that the federal government has a constitutional duty to guarantee every child an education.\textsuperscript{91} These scholars and others have identified four key reasons to consider returning to federal court to pursue a federal right to education.

\textsuperscript{83} See National Access Network, \textit{supra} note 59.


\textsuperscript{86} \textit{Schrag}, \textit{supra} note 13, at 5–6.

\textsuperscript{87} \textit{Id.} at 6.

\textsuperscript{88} \textit{Lewin & Herszenhorn}, \textit{supra} note 7.

\textsuperscript{89} \textit{Id.}

\textsuperscript{90} See sources cited \textit{supra} note 1.

\textsuperscript{91} \textit{Sunstein}, \textit{supra} note 1, at 99; Chemerinsky, \textit{supra} note 1, at 123; Liu, \textit{supra} note 1, at 334.
1. **Greater Uniformity in Educational Standards and Funding**

All citizens of a just society should have the same basic rights regardless of where they live.⁹² Children, in particular, should not be subjected to a substandard education solely because of their residence, a matter over which they have no control. Only a federally enforceable right can provide a basic national standard in education⁹³ and overcome funding disparities between states, disparities which comprise the majority of educational inequities.⁹⁴

Furthermore, the federal government is also in a better position to coordinate interstate steps towards more uniform standards and equitable funding.⁹⁵ It has “the greatest ability to redistribute wealth” and “address substandard academic performance of students nationwide.”⁹⁶ Thus, the argument goes, educational shortcomings across the country require a national response, not piecemeal and protracted litigation in each of the fifty states.⁹⁷

2. **Growing Federal Participation in Education**

The second reason for returning to federal courts to pursue a federal right to education involves federal legislation regulating certain aspects of public education. NCLB and related laws have sufficiently federalized education so that our national government must accept a corollary responsibility to provide students and schools with the resources necessary to meet heightened accountability requirements.⁹⁸ For these reasons, the Sixth Circuit recently revived a suit in which the plaintiffs argued that NCLB imposes financial obligations on states and school districts without providing enough funding to cover the associated costs.⁹⁹

States facing sanctions and negative publicity for not meeting achievement targets under NCLB have strong incentives to preemptively lower their educational standards.¹⁰⁰ A “race to the bottom”¹⁰¹ can best be avoided by holding the federal

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⁹³. See Behn, *supra* note 84, at 450–51 (noting that federal involvement is preferable because it “create[s] a pool of intellectual resources . . . but impose[s] no binding obligations to develop uniform success between states”); *cf. Robert B. Schwartz, Professor at Harvard Univ. Graduate Sch. of Educ., Standards, Tests and NCLB: What Might Come Next, at 12–16 (Nov. 13, 2006), http://devweb.tc.columbia.edu/manager/symposium/Files/102_Schwartz_STANDARDS%20AND%20EQUITY1.pdf (arguing that although the federal government should not create national standards, national standards are preferable because of wide variations in state proficiency standards).

⁹⁴. See Liu, *supra* note 1, at 332; Robinson, *supra* note 1, at 1672–73.

⁹⁵. See Behn, *supra* note 84, at 453.


⁹⁷. See id. at 1734.


⁹⁹. Sch. Dist. of Pontiac v. Sec’y of the U.S. Dep’t of Educ., 512 F.3d 252, 256–57 (6th Cir. 2008); *see also* Rudalevige, *supra* note 19, at 250–52 (describing the widespread state dissatisfaction with NCLB as an unfunded mandate).


government accountable for a uniform educational baseline, impartial evaluation of state education data, and oversight of states’ progress.102

3. Fulfilling Brown I’s Unfinished Legacy

The third reason for returning to federal court to pursue a federal right to education focuses on fulfilling the unfinished legacy of Brown I. Brown I’s declaration that education be made available to all on equal terms is one of the Supreme Court’s most well-known pronouncements; yet fifty years later, its vision of equal opportunity remains incomplete. For some, school integration was inherently an indirect and ineffective means of ensuring every student received a quality education.103 For others, including realists and race theorists, desegregation faced insurmountable barriers, including racial housing patterns, white flight, social resistance, and racism.104 Brown I’s vision has also been limited by the Supreme Court’s own concerns about “race-conscious decision-making” in public education,105 most recently in the Parents Involved decision in 2007.106 Although Justice Kennedy’s concurrence suggested some potentially acceptable race-conscious actions by educators,107 the plurality opinion was adamant in its color-blind insistence that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”108

A race-neutral federal right to education sidesteps these limitations but still provides valuable assurance that the national struggle for equal educational opportunity is not over. Furthermore, increased resources, in contrast to racial integration, directly ensures quality teaching, school facilities, and instructional materials.109 Although some scholars still believe that integration plays a key role

102. See Robinson, supra note 1, at 1715–22.
103. Derrick A. Bell, Jr., Brown Reconsidered: An Alternative Scenario, in BROWN AT 50: THE UNFINISHED LEGACY 59, 68 (Deborah L. Rhode & Charles J. Ogletree, Jr. eds., 2004); see also Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470, 477–80 (1976) (criticizing the integration-only focus of civil rights lawyers as coming at the expense of education for the poorest black students).
107. Id. at 2792. (Kennedy, J., concurring in part and concurring in the judgment) (noting that such race-conscious measures could include selecting school sites, drawing attendance boundaries, allocating programs and resources, “recruiting students in part and faculty in a targeted fashion,” and tracking and reporting data).
108. Id. at 2768 (plurality opinion).
109. See JENCKS, supra note 75, at 93 (noting that increased education spending usually goes to pay for higher salaries for teachers, “better facilities,” and “newer textbooks,” among other things); cf. Robinson, supra note 1, at 1720 (arguing that “[f]ederal financial assistance would serve as an incentive for states to take action to guarantee the federal right to education).
in boosting academic achievement, a growing consensus views resources as the critical tool for improving our nation’s worst public schools. Focusing on greater funding also benefits parents tired of underresourced schools without engendering as much opposition from those who are apprehensive about racial integration in their own communities. Finally, pursuing a race-neutral federal right to education avoids the Court’s exacting scrutiny with regard to race. In short, it is a right with a greater capacity to make education available to all on equal terms.

4. Continuing to Help the Students Most in Need

The fourth reason for returning to federal court to pursue a federal right to education emphasizes assisting the most disadvantaged students. Federal funding is highly directed towards helping educate students with the greatest needs. For example, funding provided by Title I of the Elementary and Secondary Education Act of 1965 targets school districts with high student poverty levels, and funding provided by the Individuals with Disabilities Education Act (IDEA) helps educators teach students with disabilities. A federal right to education would further guarantee that students at a true disadvantage are provided resources commensurate with their needs. As a policy matter, targeting greater educational resources to schools with disadvantaged students will boost student performance irrespective of race. Fighting for an adequate education for every student also has political advantages. A federal right to education avoids alienating the support of poor Whites, exacerbating white racism, or merely benefiting minority elites because it focuses on the opportunity for all children, not just children of a certain race or class. Such a right would promise Internet access to poor white students in the rural Midwest, quality bilingual instruction to Hispanic immigrant children in the Southwest, and fewer crowded classrooms to impoverished Blacks in urban East Coast schools. A right to learn builds on a societal consensus that those most in need deserve a chance at a quality education, without regard to the color of their skin.

110. See, e.g., James E. Ryan, Schools, Race, and Money, 109 YALE L.J. 249, 296–307 (1999) (comparing educational and long-term benefits of racial integration to those achieved as a result of increased funding, which merely accepts “ghetto schools” for poor minority students).

111. See Lewin & Herszenhorn, supra note 7 (noting several court decisions providing poor schools with more money and resources).

112. See Jonathan D. Glater & Alan Finder, School Diversity Based on Income Segregates Some, N.Y. TIMES, July 15, 2007, at A24 (noting the success of programs implemented in various major cities that use integration plans based on class or socioeconomic standing of their students rather than race).


114. Id. §§ 1400–1487.

115. Rebell, supra note 9, at 1481–82 (citing Kristen Harknett et al., Do Public Expenditures Improve Child Outcomes in the U.S.? A Comparison Across Fifty States 17 (Ctr. for Policy Research, Working Paper No. 53, 2003), available at http://www.cpr-maxwell.syr.edu/cprwps/pdf/wp53.pdf) (noting that several recent studies have concluded that “educational expenditures are correlated with positive student outcomes”).

Practical benefits aside, an immediate legal barrier confronts those who wish to pursue a federal right to education. Rodriguez has been broadly viewed as denying a right to an education under the Constitution.\textsuperscript{117} Scholars characterize the decision by the “abrupt halt it marked in federal judicial support of major educational reform.”\textsuperscript{118} Federal appellate\textsuperscript{119} and district courts,\textsuperscript{120} as well as state courts,\textsuperscript{121} have almost uniformly construed Rodriguez as foreclosing a constitutionally protected federal right to education. Despite these assumptions, Rodriguez stands for a more nuanced proposition: the Court in Rodriguez “did not decide that education is not a fundamental right, but that the facts of Rodriguez did not violate that right.”\textsuperscript{122}

Justice Powell’s opinion for the Court explicitly distinguished the relative differences in education spending in Rodriguez, which did not interfere with fundamental rights, from a hypothetical inadequate system\textsuperscript{123} that “fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the

\textsuperscript{117} See, e.g., Derek W. Black, Turning Stones of Hope into Boulders of Resistance: The First and Last Task of Social Justice Curriculum, Scholarship, and Practice, 86 N.C. L. REV. 673, 723 (2008) (asserting that the Rodriguez Court “squarely held that education was not a fundamental right”); Rudalevige, supra note 19, at 243 ("[T]he Supreme Court held in 1973 that education was not a fundamental right under the U.S. Constitution . . . .").

\textsuperscript{118} Rebell, supra note 82, at 1.

\textsuperscript{119} See, e.g., Toledo v. Sanchez, 454 F.3d 24, 33 (1st Cir. 2006) ("[P]ublic education is not a fundamental right.” (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973))); Angstadt v. Midd–West Sch. Dist., 377 F.3d 338, 343 (3d Cir. 2004) ("[T]he right to education is constitutionally protected . . . .” (citing Rodriguez, 411 U.S. at 35)); Smith v. Severn, 129 F.3d 419, 429 (7th Cir. 1997) ("[T]he Court determined that the right to an education was not guaranteed, either explicitly or implicitly, by the Constitution, and therefore could not constitute a fundamental right.” (citing Rodriguez, 411 U.S. at 35-37)); Cary v. Bd. of Educ., 598 F.2d 535, 543 (10th Cir. 1979) ("We must recognize that the Supreme Court has ruled there is no constitutional right to an education.” (citing Rodriguez, 411 U.S. at 35)); Guadalupe Org. v. Tempe Elementary Sch. Dist. No. 3, 587 F.2d 1022, 1026 (9th Cir. 1978) (“The Supreme Court in [Rodriguez:] taught us that education, although an important interest, is not guaranteed by the Constitution.” (citing Rodriguez, 411 U.S. at 35)). But cf. Sch. Bd. v. La. State Bd. of Elementary & Secondary Educ., 830 F.2d 563, 568 (5th Cir. 1987) (recognizing that deprivation of minimally adequate education requires heightened scrutiny), superseded by constitutional amendment, L.A. CONST. art. VIII, § 13, cl. B.

\textsuperscript{120} See, e.g., Manbeck v. Katonah–Lewisboro Sch. Dist., 435 F. Supp. 2d 273, 276 n.2 (S.D.N.Y. 2006) ("[I]t is well established, however, that there is no fundamental right to education.”); Boone v. Boozman, 217 F. Supp. 2d 938, 957 (E.D. Ark. 2002) ("[I]t is firmly established that the right to an education is not provided explicit or implicit protection under the Constitution and is not a fundamental right or liberty.” (citing Rodriguez, 411 U.S. at 35)); Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 78 F. Supp. 2d 812, 822 (C.D. Ill. 2000) ("[T]he right to an education is not guaranteed, either explicitly or implicitly, by the Constitution, and therefore could not constitute a fundamental right.” (second alteration in original) (quoting Smith, 129 F.3d at 429) (internal quotation marks omitted)).

\textsuperscript{121} See, e.g., Citizens of Decatur for Equal Educ. v. Lyons–Decatur Sch. Dist., 739 N.W.2d 742, 757 (Neb. 2007) (“The federal Constitution does not provide a fundamental right to education.” (citing Rodriguez, 411 U.S. at 35)); Kahn v. Griffin, 701 N.W.2d 815, 830 (Minn. 2005) ("[T]he United States Supreme Court held that education is not a fundamental right under the U.S. Constitution.” (citing Rodriguez, 411 U.S. at 35)); Lewis E. v. Spagnolo, 710 N.E.2d 798, 805 (Ill. 1999) ("We note that education is not a fundamental right protected by the federal constitution.” (citing Rodriguez, 411 U.S. at 35)).

\textsuperscript{122} Preoovlos, supra note 1, at 83.

\textsuperscript{123} Rodriguez, 411 U.S. at 36–37.
enjoyment of the rights of speech and of full participation in the political process.”124 The Court implied that some level of education is required when it noted that the Constitution does not guarantee citizens “the most effective speech or the most informed electoral choice.”125 The Court conceded that there might be “some identifiable quantum of education [that] is . . . constitutionally protected.”126

Subsequent Supreme Court decisions confirm that Rodriguez left open the possibility that some level of education is a constitutionally protected fundamental right. In Plyler v. Doe,127 the Court struck down a Texas law that barred children of illegal immigrants from attending public schools as a violation of the Fourteenth Amendment’s Equal Protection Clause.128 Concerned about the severe cost to the nation resulting from a permanent underclass of illiterate youth,129 the Court applied a heightened scrutiny130 that it developed further in the years following Rodriguez.131 Although the Plyler Court stated education was not a right guaranteed by the Constitution,132 the Court did insist that neither was it “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”133 Education, the Court confirmed, was unique because of its importance to the basic institutions of our democracy and the lasting effect on children who are deprived of schooling.134

In the 1980s, the Court explicitly stated, “As Rodriguez and Plyler indicate, this Court has not yet definitively settled . . . whether a minimally adequate education is a fundamental right . . . .”135 But, in dicta in another opinion, Justice Powell affirmed that the Court’s decision in Rodriguez left room for the recognition of “a constitutional right to a minimal level of free public education.”136 For thirty-five years, the possibility of a right to an adequate education arguably has lain dormant in Rodriguez, despite widespread perceptions to the contrary.137

Furthermore, each reservation the Rodriguez Court provided about expressly recognizing a right to education has dissipated since 1973. Political support is an important factor in judicial recognition of any right because the judiciary relies on Congress, the executive branch, and state and local officials to implement its

124. Id. at 38.
125. Id. at 36 (first and third emphases added).
126. Id.
128. Id. at 230.
129. Id. at 223–24.
130. See id. at 216–18 & 218 n.16.
131. See id. at 218 n.16 (citing Lalli v. Lalli, 439 U.S. 259 (1978); Craig v. Boren, 429 U.S. 190 (1976)).
132. Id. at 221.
133. Id.
134. Id.
137. See sources cited supra note 1 (noting various authorities arguing that the federal government should recognize a federal right to education because Rodriguez did not recognize one).
decisions.138 While there has been historical opposition to federal involvement in education, opposition faced by the Rodriguez Court in 1973, recent bipartisan efforts at the federal level to improve the nation’s public school systems demonstrate current support for recognizing a federal right to education.139 One of the Court’s primary concerns in Rodriguez was local control of public schools,140 perhaps because even thirty-five years ago, federal involvement in education was considered radical.141 Not until the launch of Sputnik in 1957 and the threat of Russian superiority did the federal government begin investing in public schools.142 Even after the Elementary and Secondary Education Act of 1965 first offered federal funding,143 there was still widespread demand for local control of schools, especially given the prickly issues of desegregation and religion in schools.144 As recently as the 1980s, President Reagan campaigned for the abolition of the Office of Education, which was part of the former United States Department of Health, Education, and Welfare.145

Signifying a shift in policy, the enactment of NCLB in 2001 has been the most significant federal intervention in education in United States history, notably receiving the broad support of a Republican-controlled Congress.147 NCLB proclaims that one of its chief goals is to provide for the right of every student to

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138. See Robinson, supra note 1, at 1732–33 (citations omitted) (implying that the Court is unable to effect social change absent support from the legislative and executive branches). See generally GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (arguing that inherent structural limits on judicial power inhibit the courts’ ability to bring about social change absent support from the elected branches).


142. See James L. Sundquist, For the Young, Schools, in POLITICS OF EDUCATION, supra note 141, at 326.


144. See Bailey, supra note 141, at 361.


146. Robinson, supra note 1, at 1679.

147. See Library of Congress, Final Vote Results for Roll Call 497, http://clerk.house.gov/evs/2001/roll497.xml (recording an overall vote of 381 “ayes” and 41 “noes” in the House of Representatives, with 183 “ayes” and 33 “noes” from House Republicans, and 198 “ayes” and 6 “noes” from House Democrats); United States Senate, Record Vote Number 371, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00371 (recording an overall vote of 87 “yes” and 10 “nays” in the Senate, with 44 “yes” and 3 “nays” from Senate Republicans, 43 “yes” and 6 “nays” from Senate Democrats, and 1 “nay” from the only Independent).
an adequate education.148 NCLB has also fueled bipartisan efforts at state and local levels to hold the federal government responsible for providing the resources necessary to meet the law’s stricter accountability requirements.149 In 2007, the Supreme Court accepted an analogous call for educational accountability150 under the Individuals with Disabilities Education Act151 (IDEA) a bipartisan-supported federal statute governing special education. Thus, it is clear that today’s Court has less to fear from the elected branches in endorsing a federal right to education than the Court in 1973.

The Court in Rodriguez was also concerned that if education was ruled a fundamental right, the Court would have to rule that food, clothing, and housing were also fundamental rights because they are indistinguishable from education in terms of importance for participation in the political process.152 Such apprehensions were entirely justifiable at a time when education was administered and overseen by the United States Department for Housing, Education, and Welfare.153 Yet, after the 1979 creation of an independent cabinet-level Department of Education,154 the Court reversed its course, noting that education is not “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”155 Others have noted that education is distinguishable from other government benefits because it is the only institution for which the government compels attendance of all of its citizens.156

148. 20 U.S.C. § 6301 (Supp. V 2005) (“The purpose of this subchapter is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging [s]tate academic achievement standards and state academic assessments.”); see also West & Peterson, supra note 84, at 16 (“NCLB gives statutory recognition to the adequacy movement’s argument that states have a duty to educate all students to proficiency.”).

149. See, e.g., Sch. Dist. v. Sec’y of the U.S. Dep’t of Educ., 512 F.3d 252, 260 (6th Cir. 2008) (finding standing in a suit alleging that federal funding is insufficient to cover the increased costs of compliance with the accountability requirements of NCLB); Michael A. Rebell & Jessica R. Wolff, Campaign For Educ. Equity, Opportunity Knocks: Applying Lessons from the Education Adequacy Movement to Reform the No Child Left Behind Act 5–7 (2006), available at http://www.schoolfunding.info/resource_center/OpportunityKnocks.pdf (discussing states’ and local school districts’ frustration in meeting requirements imposed by NCLB without adequate federal funding, and the various suits instituted to obtain adequate resources); Robinson, supra note 1, at 1740 (“[I]nadequate funding to implement NCLB’s extensive changes has been a common lament among states.” (citing David J. Hoff, Debate Grows on the Costs of School Law, Educ. Wk., Feb. 4, 2004, at 1)); Salerno, supra note 1, at 538 (noting that states are generally unable to fund education without federal resources).

150. Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 2006–07 (2007) (granting parents the right to pursue special education claims under the IDEA because the statute entitles their children to a free and appropriate education); see also Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 52 (2005) (noting that the IDEA gives states “the primary responsibility” for educating handicapped children but also “imposes significant requirements” in discharging that responsibility (quoting Bd. of Educ. v. Rowley ex rel. Rowley, 458 U.S. 176, 183 (1982)) (internal quotation marks omitted)).


153. See Bailey, supra note 141, at 358–59.


156. See Cynthia Newsome, Pay Attention: A Survey and Analysis of the Legal Battle over the Integration of Forced Television into the Public School Curriculum, Rutgers L.J. 281, 288 (2002) (noting that “the state is the only body which has the power to compel school attendance” and that “the state has the power to compel attendance only for the purpose of education”). As of 2004, all states required attendance for a duration ranging from eleven to fourteen years. Thomas D. Snyder et al.
In Rodriguez, the Court had also fretted over the lack of manageable standards or alternative financing schemes that could remedy funding disparities between school districts. At the time, federally funded educational research was just beginning with projects like the National Institute for Education and the National Center for Education Statistics, and the United States Department of Education did not yet exist. Aside from the California Supreme Court’s ruling in Serrano v. Priest, federal courts had little precedent for crafting a remedy for inadequate school funding.

The standards-based education reform movement that began in the early 1980s has provided two decades of measurable educational goals, which have been used extensively in state school funding cases and which now offer viable solutions. As a result, state courts have had clear guidelines in defining the contours of an adequate education, including both inputs, such as school funding, and outputs, such as test scores. State litigation has helped produce numerous studies and state revenue models to measure the costs of educational reforms and ensure their implementation. State lawsuits have thus yielded judicially manageable standards and illustrated that the process of fixing school funding inadequacies can be shared by courts and legislatures.

In summary, modern advocates pursuing a federal right to education can arguably overcome Rodriguez. A closer and more nuanced analysis suggests that Rodriguez and subsequent Supreme Court decisions have preserved the possibility of a federal right to an education. The Rodriguez Court’s chief concerns, such as local control and a lack of tested remedies, have diminished with over three decades of growing federal involvement in education and successful state school funding litigation. Although Rodriguez is still a barrier to advocates seeking entry

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158. See Vinovskis, supra note 154 (noting the formation of the National Center for Education Statistics in 1965 and the National Institute of Education in 1972).
159. See id. (noting that the U.S. Department of Education was formed in 1979).
160. 487 F.2d 1241 (Cal. 1971).
161. See, e.g., Mclnnis v. Shapiro, 293 F. Supp. 327, 336 (N.D. Ill. 1968) (expressing the concern that courts cannot generate the necessary research for “intelligent educational planning”).
162. See Rudalevige, supra note 19, at 244; Rebell, supra note 82, at 10–11.
165. See Rebell, supra note 9, at 1526–29.
167. See id. at 42–43, 56.
168. See supra notes 142, 146–51 and accompanying text.
169. See discussion supra Part II.B.4.
into the federal courts, it is not as impenetrable as many commentators and courts have argued.

C. Articulating a Viable Modern Federal Right to Education

Education advocates can draw on the successes of state litigation, but in order to return successfully to federal court, they must have a jurisdictional hook. Advocates’ best ground for a federal right to an education may be found in the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.

First, although the Constitution is silent on education, the Court has found many unenumerated fundamental rights over the years. Furthermore, where the Constitution is silent, the Court has relied on “notions of a constitutional plan . . . to make the Constitution a workable governing charter.” Ensuring that all students have access to a basic education can be viewed as both integral to the democratic process because it promotes responsible citizenship and vital to the protection of the rights of children who, because of their age, are unable to defend their own interests at the ballot box. Underscoring the importance of elementary and secondary schooling in preparing students for work and citizenship, the Court reiterated in 2003 that education plays “a fundamental role in maintaining the fabric of society.”

The Due Process Clause prohibits all states from “depriv[ing] any person of life, liberty, or property, without due process of law.” At its core, the provision imposes procedural duties on state actors, such as the duty to provide students with a hearing prior to expulsion. However, some Justices on the Court have argued

170. Id.
171. Proponents have suggested other constitutional hooks for a federal right to education, such as the Privileges and Immunities Clause, Chambers, supra note 1, at 68–69 (citing Philip B. Kurland, The Privileges or Immunities Clause: “It’s Hour Come Round at Last”?, 1972 WASH. U. L. REV. 405, 420 (1972)), and the Citizenship Clause, see Liu, supra note 1, at 344–48. However, because those clauses have seldom served as an accepted grounds for recognizing a substantive right similar to a federal right to education, they are not addressed by this Article.
177. See, e.g., Goss v. Lopez, 419 U.S. 565, 573–74 (1975) (citations omitted) (holding that a state must provide students with fundamentally fair procedures before withdrawing the right to an education on “grounds of misconduct”).
that the Clause also protects substantive rights, including “freedom from all substantial arbitrary impositions and purposeless restraints.”  

For education advocates, “[i]nvoluntary placement of students by the state in a program not designed to provide the skills that the state has articulated as the purpose of compulsory education could be viewed as a deprivation of liberty without due process of law.”  

Aside from jury duty, education is the only institution in which government requires attendance of all its citizens. However, unlike jury duty, education is required by every state for anywhere between eleven and fourteen years. For those who cannot afford private school, there is no viable alternative to public education, and in many districts, there is little or no opportunity to choose a specific school. In fact, almost 74% of students in the United States have no choice as to the school they attend.  

The mandatory school attendance policy imposed by the state requires “a concomitant responsibility on the state’s part to provide a meaningful return for the time and effort exacted.” Based on due process arguments in criminal law, the Court has found that “the nature and duration of commitment” of an incarcerated individual must “bear some reasonable relation to the purpose for which the individual is committed.” By analogy, the Court could recognize a due process right to education to ensure that every student receives a meaningful education, provided that every student attended school for a certain number of years.  

The Equal Protection Clause prohibits states “deny[ing] to any person within its jurisdiction the equal protection of the laws.” At its essence, it mandates equal treatment of individuals in similar circumstances. When state laws do not treat similarly-situated individuals in a similar fashion, however, the Court generally defers to legislatures, so long as the classification bears a rational relationship to a legitimate public purpose. But the Court treats suspect classifications, such as race, or infringements of fundamental rights, such as speech, as “presumptively invidious.”

180. See Newsome, supra note 156.
181. See SNYDER ET AL., supra note 156.
183. Id.
184. Preovolos, supra note 1, at 101.
186. See, Note, supra note 1, at 1342 (“[T]he restraint of compulsory education laws is unreasonable [where] the restraint is not achieving its asserted purpose of educating students . . . .”).
189. Id.
190. Id. at 216–17.
Although the Court refused to declare education a fundamental right in Plyler, it did apply heightened scrutiny in analyzing the Texas law barring children of illegal immigrants from attending public schools. Although intermediate scrutiny was an unformulated standard in 1973, “[s]ince Rodriguez, [it] . . . has become an accepted part of the equal protection doctrine.” As a result, the Supreme Court may scrutinize a deficient educational system more closely. Just as the Plyler Court rejected permanently subjecting children of illegal immigrants to a fate of illiteracy, the current Court could now similarly conclude that subjecting students in poor districts to a wholly inadequate education based on “arbitrary geographical lines” is unconstitutional under the Equal Protection Clause. Thus, while both the Due Process Clause and the Equal Protection Clause could provide the basis for a federal constitutional right to an education, reformers must consider whether it is worth advocating for such a right in federal court.

IV. REASONS NOT TO PURSUE A FEDERAL RIGHT TO EDUCATION

Advocates and reformers must acknowledge that there are significant limitations in pursuing a federal right to education. The biggest risk of returning to the federal courts is that the Supreme Court could explicitly deny a right to an adequate education, fully closing the door Rodriguez left partially open. Advocates must be cautious, however, as an unfavorable decision in federal court could lead to prolonged setbacks in pursuing the right successfully.

A. Withdrawal of the Federal Judiciary from Education

Pursuing a federal right to education poses a significant challenge, given that federal courts have weakened constitutional protections in public schools in several areas, including desegregation, school funding, free speech, and student privacy. In fact, the Supreme Court recently reiterated its view that students’ constitutional rights “are not automatically coextensive with the rights of adults in other settings.”

191. Id. at 223.
192. Id. at 218 n.16 (citing Lalli v. Lalli, 439 U.S. 259 (1978); Craig v. Boren, 429 U.S. 190 (1976)).
195. Kurland, supra note 74, at 586.
196. For a discussion of the door Rodriguez left partially open, see supra Part III.B.
198. Chemerinsky, supra note 1, at 113; see also Rebell, supra note 9, at 1496–1500 (discussing the Supreme Court’s decreased efforts to enforce meaningful educational opportunities for poor and minority children and a trend of resegregation in public schools).
As a result of the Court’s decisions effectively decreasing federal involvement in desegregation efforts, a nationwide cycle of resegregation has followed. As a result, the average student today, whether white, black, or Hispanic, attends a school with a majority of students of similar race. In 2007, ending its long foray into desegregation, the Court concluded that race-conscious integration plans, like those it once imposed on schools, are now off-limits even in communities that adopt them voluntarily, for benign purposes, and with broad public support.

The Court has also narrowed students’ free speech and privacy rights. It has given school officials greater authority to curb student expression that involves sexual innuendo, addresses teen pregnancy, or, as treated in its 2007 “Bong Hits for Jesus” decision, celebrates illegal drug use. Furthermore, the Court has limited student privacy rights by permitting schools to search students without meeting the Fourth Amendment’s probable cause requirement, conduct random drug testing of students who participate in extracurricular activities, and use corporal punishment without providing any due process protections.

After chronicling these trends, constitutional law scholar Erwin Chemerinsky concluded that the federal courts have begun a “deconstitutionalization of education.” A documented retreat in judicial policing of students’ rights in our nation’s public schools makes it unlikely that those same federal courts would breathe life into a dormant constitutional right to education.

B. Revival of Judicial Federalism and Deference in Education

A reinvigorated federalism supportive of state and local sovereignty has accompanied the withdrawal of federal courts from cases alleging constitutional violations in public schools. The Court has invalidated federal commandeering of

200. See, e.g., Missouri v. Jenkins, 515 U.S. 70, 100 (1995) (limiting the acceptable methods of remedial desegregation measures); Freeman v. Pitts, 503 U.S. 467, 471 (1992) (authorizing the discontinuance of judicial oversight of desegregation measures in school districts that had complied with federal desegregation orders); Bd. of Educ. v. Dowell, 498 U.S. 237, 244–46 (1991) (ordering that federal courts end their desegregation orders once integration is achieved, even if a return to local control results in subsequent resegregation); Robinson, supra note 1, at 1663–65 (documenting the retreat of the Supreme Court from desegregation).

201. See generally ORFIELD & LEE, supra note 104, at 9–19 (documenting the resegregation of American schools since the early 1990s).

202. Id. at 16–17 & 17 tbl.6.


204. Id. at 2800–02 (Breyer, J., dissenting) (citations omitted).


211. Chemerinsky, supra note 1, at 112 (internal quotation marks omitted).

the state legislative process,213 conscription of state officers,214 and regulation of areas traditionally left to the states.215 Furthermore, the Court has strengthened and reinforced its commitment to state sovereign immunity216 and has continued to defer to state and local governments under the tenure of Chief Justice Roberts.217

While the Court has traditionally preferred to avoid judicial intrusion in the area of education by deferring to local school officials,218 its recent decisions highlight even higher levels of such deference. Federal efforts to limit gun use near schools were invalidated because the Court deemed schooling a local matter,219 a decision which constrained Congress’ previously expansive Commerce Clause powers. The Court upheld state vouchers even where 96% of parents used them to send their children to parochial schools.220 And, perhaps of greatest relevance, the Supreme Court has declined to hear appeals from state supreme court decisions addressing school funding deficiencies in each of the last four decades,221 most recently in 2003.222

In its recent federalist era, the Court has, on occasion, invalidated state action related to education but only to rectify overriding constitutional violations, such as


215. See, e.g., Morrison, 529 U.S. at 627 (noting that remedies for gender violence should be provided by the states).


217. See, e.g., United Haulers Ass’n v. Oneida–Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1790 (2007) (citing C&A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994)) (upholding a state ordinance, challenged under the dormant Commerce Clause, that required haulers to bring waste to state-owned facilities because waste collection is a traditional state function and the ordinance treated in-state and out-of-state private businesses equally).


gender discrimination in single-sex institutions.\footnote{223} Even then, the Court faced a scathing dissent from Justice Scalia, which emphasized the Constitution’s silence with respect to education and criticized the Court for imposing its policy view on all fifty states.\footnote{224} Given the Court’s recent increased recognition of state sovereignty, it is unlikely that the federal judiciary would now allow preemption in the area of school funding litigation, as education has long been considered the province of state and local governments.

C. \textit{Rise of a Conservative Roberts Court}

Changes in the composition of the Court also make it unlikely that the Court would accept a “new” right not explicitly grounded in the text of the Constitution. The recent appointments of alleged “strict constructionists,” such as Chief Justice Roberts and Justice Alito, raise doubts that the Court would be receptive to a previously unarticulated federal right to education.\footnote{225} Similar changes, after all, led a five-to-four Court to uphold school funding disparities in \textit{Rodriguez}.\footnote{226} Justices Warren, Fortas, Black, and Harlan all retired between 1969 and 1971 and were replaced by four Nixon appointees, Justices Burger, Blackmun, Powell, and Rehnquist, making the Court more “conservative” by 1973.\footnote{227} That change marked a new era of federalism that encouraged judicial restraint and relied on states “to secure rights unavailable under the U.S. Constitution.”\footnote{228}

A parallel development exists today.\footnote{229} A majority of the Roberts Court likely shares the view of its 1970s counterpart that “the Constitution does not provide judicial remedies for every social and economic ill.”\footnote{230} The late Chief Justice Rehnquist, for example, cautioned the Court against acting as “a small group of fortunately situated people with a roving commission” to address societal problems.\footnote{231} And Justice Scalia, the modern Court’s most strident textualist, has noted that absent an explicit protection, the Court must admit that the Constitution “takes no sides in this educational debate.”\footnote{232} Even if the current Court is not mired in desegregation cases and dealing with the massive resistance the \textit{Rodriguez} Court...
faced in 1973, it still may be averse to becoming involved in another thorny education issue.

The Supreme Court’s reluctance to umpire education debates has surfaced several times in the last few years. In 2004, the Court sidestepped the merits of a challenge to classroom recitation of the Pledge of Allegiance as a violation of the First Amendment by deciding the case on procedural grounds instead. In 2007, the Court’s decision in Zuni Public School District No. 89 v. Department of Education illustrated its reluctance to enter into the technical arena of school finance. In Zuni, the Court upheld New Mexico’s statewide redistribution of federal funds intended to offset a diminished local taxing capacity resulting from the presence of untaxed federal lands. The Court deferred to the United States Department of Education’s analysis of state school funding efforts, even though the Department’s method seemingly contravened the statute’s plain language. The Court ruled as it did, in part, to avoid disrupting the longstanding funding practices of school districts nationwide.

Although Zuni is of limited application, the decision suggests that the Court is generally reluctant to upset local decisions of school districts regarding the allocation of scarce educational resources. As a result of Zuni, there has been limited federal agency review of the distribution of federal funds to New Mexico public schools relative to ongoing state legislative review of school funding standards. Greater progress through state governments suggests another reason not to pursue a federal right to education in federal court.

D. Success of State School Funding Litigation

As a counterpoint to the risks of returning to federal court, there are benefits of continuing to litigate school funding cases at the state level. State constitutions, unlike the federal Constitution, explicitly recognize the right to an education. As

233. See Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court 258 (1979) (noting the slim majority ruling in Rodriguez and the hesitancy of the Court to become involved in education cases because of the possibility of an onslaught of litigation).
236. Id. at 1537–38.
237. Id. at 1541.
238. Id. at 1551 (Scalia, J., dissenting).
239. Id. at 1541 (majority opinion).
240. See Borkowski, supra note 105, at 508 (noting that the Court’s decision only affects school districts receiving aid under one particular program).
242. See In re Conklin, 946 F.2d 306, 323 (4th Cir. 1999) (noting that many state high courts found school funding schemes to violate their state constitutions but not the U.S. Constitution, in part because the state constitutions provided more expansive educational rights); Michael D. Blanchard, The New Judicial Federalism: Deference Masquerading as Disclosure and the Tyranny of the Locality in State Judicial Review of Educational Finance, 60 U. PITT. L. REV. 231, 232 (1998) (noting that the right to education is “expressly enumerated” in all state constitutions). For a list of state constitution education clauses and related school funding litigation, see Appendix.
a result, courts have been more willing to hold states accountable in providing the resources necessary to meet state-imposed educational standards.\textsuperscript{243}

State litigation, by most accounts, has been relatively successful, with plaintiff victories in twenty-eight states.\textsuperscript{244} Elected officials, following state court orders, have increased spending by 11\% on schools in the poorest districts and by 7\% in median districts.\textsuperscript{245} Increased funding for the neediest districts has increased student proficiency in states such as Kentucky and Massachusetts and improved school facilities in others, such as Arizona.\textsuperscript{246} Furthermore, studies prompted by litigation in more than thirty states have resulted in revisions to school funding formulas so that educational resources are delivered based on actual student need.\textsuperscript{247}

At the remedial stage, state-generated solutions also make it easier to tailor reforms to various educational shortcomings and local political realities than would be possible at the national level.\textsuperscript{248} Correcting sharp divides between New York City schools and its suburban counterparts, for example, raises very different challenges than does fixing the educational inadequacies facing rural communities in sparsely populated Alaska.\textsuperscript{249}

Furthermore, judicial activism at the state level is viewed as more tolerable because state judges, often elected, are accountable to state residents, and the citizens of the states can more easily amend their state constitutions in response to judicial decisions they believe are faulty.\textsuperscript{250} As a result, decisions of state courts tend to enjoy more legitimacy and are more likely to reflect community concerns than those of life-tenured federal judges often perceived as distant.

In the last three decades, state-level litigation has made important contributions in the field of school funding. Such litigation has documented the failures of unnecessarily complex state funding formulas that distribute resources based on

\begin{footnotes}
\footnote{243. See Schrag, supra note 13, at 5–7.}
\footnote{244. See National Access Network, Equity and Adequacy Decisions, supra note 85; Rebell, supra note 9, at 1500–01 (noting that challenges to school funding systems have been brought in more than forty states and plaintiffs have won major decisions in more than 60\% of them, and in particular, more than 75\% of adequacy decisions); Deborah A. Verstegen, Towards a Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems, 23 ST. LOUIS U. PUB. L. REV. 499, 508–12 (2004) (highlighting the success of adequacy litigation in various states).}
\footnote{245. Robinson, supra note 1, at 1670.}
\footnote{246. Rebell, supra note 9, at 1527 (citations omitted).}
\footnote{247. Id. at 1528.}
\footnote{248. See Schrag, supra note 13, at 232–33.}
\footnote{250. See Blanchard, supra note 242, at 260–61.}
\end{footnotes}
political motivations rather than student need.\textsuperscript{251} State litigation has spurred the development of innovative legal strategies, such as the shift from equity to adequacy, as well as the development of basic school funding principles, including transparency, predictability, and accountability.\textsuperscript{252} By coupling accountability and adequacy, state lawsuits have united liberals and conservatives, and “linked higher standards . . . to increased resources.”\textsuperscript{253} In addition, state litigation has produced judicially manageable standards,\textsuperscript{254} and has brought courts and legislatures together in fixing school funding inadequacies.\textsuperscript{255} State litigation is not a perfect solution to educational inadequacies,\textsuperscript{256} but it has been an effective tool that is preferable to the uncertainties of seeking redress in federal court.

E. Local Control over Education

Local control over education remains a reality and a touchstone of accountable government that weighs against a federal right to education. Federal participation in education has increased in recent years,\textsuperscript{257} but decisions regarding curriculum, personnel, and school administration are overwhelmingly made at the community level.\textsuperscript{258} The American tradition of decentralized education is viewed as “more responsive . . . [and] democratic” than an educational system controlled by a distant federal government.\textsuperscript{259} A policy of allowing wide-ranging local reforms encourages states, as individual laboratories, to work toward educational success.\textsuperscript{260}

State and local governments also provide funding for over 90% of public school expenditures.\textsuperscript{261} Brown I’s famous proclamation that “education is perhaps the most important function of state and local governments”\textsuperscript{262} still reflects modern

\textsuperscript{251} See, e.g., Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 347–48 (N.Y. 2003) (describing New York’s school funding formula as “needlessly complex, malleable and not designed to align funding with need”).
\textsuperscript{252} See id. at 345.
\textsuperscript{253} SCHRAG, supra note 13, at 13.
\textsuperscript{254} See, e.g., Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) (outlining seven components of educational adequacy).
\textsuperscript{255} See Rebell, supra note 9, at 1526–29 (noting the response of several state legislatures to court decisions and court involvement in school funding issues).
\textsuperscript{256} For several critiques of state school funding litigation, see Eric A. Hanushek, \textit{When School Finance “Reform” May Not Be Good Policy}, 28 \textit{Harv. J. on Legis.} 423, 425, 433–39 (1991) (arguing that additional resources for education gained from successful state litigation do not improve educational outcomes); Michael Heise, \textit{Litigated Learning and the Limits of Law}, 57 \textit{VAND. L. REV.} 2417, 2446–50 (2004) (condemning judicial involvement in educational decisionmaking because of courts’ inability to effect social change); Kenneth W. Starr, \textit{The Uncertain Future of Adequacy Remedies, in The Legal Pursuit of Educational Adequacy, supra note 18, at 307, 313–14 (criticizing judicial activism in state school funding decisions and recognizing the tradition of local control of public schools).}
\textsuperscript{257} See supra notes 146–51, 154, 158–61 and accompanying text.
\textsuperscript{258} Cf. Starr, supra note 256, at 314 (noting that courts, as opposed to local legislatures, lack the resources necessary to effectively implement any system it designs to ensure adequate funding). 
\textsuperscript{259} See Kaeble, supra note 225, at 152.
\textsuperscript{261} See NAT’L CENTER FOR EDUC. STATISTICS, supra note 21, at 4 fig.1; Robinson, supra note 1, at 1744 (noting that federal funding accounts for only 7%–10% of education funding).
practice. Even if NCLB has imposed federal requirements in the area of education, no single expenditure receives more state and local support than public schools.263 There is a certain logic in having state litigation alleging resource deficiencies track state expenditures, the primary source of funding for education. Despite growing “federal involvement in education, the tradition of local-state governance has prevailed over efforts to equalize education resources across state lines through litigation or legislation.”264

The Supreme Court has been a chief defender of local control. The year following Rodriguez, the Court declared that “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools.”265 Ever since, the Court has reiterated the value of local control in decisions involving school desegregation,266 education funding,267 student assignment,268 and student speech.269 The Court has praised local control because it “affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages ‘experimentation, innovation, and a healthy competition for educational excellence.’”270 The prominence of community decisionmaking in schooling and the Supreme Court’s commitment to this policy weigh heavily against pursuit of a federal right to education.

V. CONCLUSION

A federal right to an education remains legally possible today, despite general perceptions that Rodriguez foreclosed such a right. By some measures, renewed federal litigation is the most viable it has been since Rodriguez was decided. In 1973, advocates and politicians were divided over federal involvement in education, legal precedent for a right to education was tenuous at best, and few remedies for school funding inadequacies were available. Thirty-five years later,

263. See supra note 261 and accompanying text.
266. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2826 (2007) (Breyer, J., dissenting) (noting that the Court has long acknowledged that local school boards are in the best position to determine how to meet their students’ needs); Freeman v. Pitts, 503 U.S. 467, 505 (1992) (Scalia, J., concurring) (citations omitted) (stating that federal supervision of local schools was intended to be only temporary in duration); Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991) (citations omitted) (recognizing that federal supervision of school should last only as long as needed to remedy past discrimination); Milliken, 418 U.S. at 741–42 (noting the importance of local control of schools because of the opportunity for community involvement and the ability to adapt to the particular needs of the students).
267. See Bennett v. New Jersey, 470 U.S. 632, 635 (1985) (acknowledging the importance of local control of education in the context of funding for low income areas); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49–51 (1973) (citations omitted) (noting the need for local control in policies designed to remedy interdistrict funding disparities).
elected officials largely support federal participation in education, numerous state decisions advance a right to education, and manageable standards for school funding reform abound. Growing frustration with a national regime that demands accountability without providing adequate resources also makes a federal right to education more politically feasible.

Though a federal right to education may be found in the Constitution, advocates should not return to the federal courts to try and achieve a quick fix to the country’s school funding problems. Recent Supreme Court decisions, such as ones that limit options for school integration, suggest a federal right to education will not be a welcome next step toward providing every student with a meaningful chance to learn. Reflecting on three decades of successful state school funding litigation and the federal judiciary’s recent reluctance to become involved in education, reformers should continue to use state courts to ensure that local community leaders provide the resources students need. The lure of avoiding piecemeal litigation should not distract advocates from what has been a successful state-level effort by courts, legislatures, and concerned citizens to improve the funding and management of our public schools.

### APPENDIX: STATE CONSTITUTION EDUCATION CLAUSES AND SCHOOL FINANCE LITIGATION

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