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A Proposal for Collaborative Enforcement of a Federal Right to Education

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What is Right for Children?
The Competing Paradigms of Religion and Human Rights

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Chapter 11

A Proposal for Collaborative Enforcement of a Federal Right to Education¹

Kimberly Jenkins Robinson

Our progress as a nation can be no swifter than our progress in education.
John F. Kennedy

In a nation that professes a strong belief in equal opportunity, many public schools in the United States fail to offer children a high-quality education. Low-income, minority, and urban schoolchildren typically attend markedly inferior schools relative to their more affluent and white counterparts (see Carter, Reddick, and Flores, 2004). Research demonstrates that higher teacher quality results in better student achievement but studies show that schools with higher numbers of poor and minority students employ less experienced and less qualified teachers (Ryan, 2004). More than 50 years and a host of educational reform efforts have passed since *Brown v. Board of Education* (1954), yet children in poor and disproportionately minority communities still receive vastly unequal educational opportunities (Hochschild and Scovronick, 2003; Ladd and Hansen, 1999).

Disparities in financial resources for schools and districts affect the quality of educational opportunity both within and between states. The burden of interstate disparities falls disproportionately on disadvantaged students who typically have greater educational needs (Liu, 2006). On average, urban districts report higher expenditures than suburban districts, but urban districts spend less money on regular education because they pay more for special education and repairs for older buildings and equipment (Hochschild and Scovronick, 2003; Petrovich, 2005).

Given the disparities in educational opportunities, it is not a surprise that the achievement of many low-income and minority students remains below their more affluent and non-minority peers. Black and Hispanic students complete high school at lower rates than white students, which is particularly troubling because high school plays a determinative role in how individuals will integrate into the workforce and the remainder of society. The achievement gap along racial lines persists even for students from the same socio-economic background (Rothstein, 2004). Students in urban districts often have lower test scores and higher dropout rates (Hochschild and Scovronick, 2003).

The public has not ignored our schools' inadequacies. In the 2000 presidential election, voters ranked education as their top priority. An overview of recent public

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opinion polls reveals that generally “the public ... remains very concerned about the performance of American public schools and supports federal leadership in education reform” (McGuinn, 2006, p. 192). Congress passed the No Child Left Behind Act of 2001 (NCLB) with bipartisan support, largely because lawmakers agreed that the problems plaguing the nation’s schools should be addressed at the federal level. NCLB requires schools and districts to disaggregate assessment scores by major income and minority groups. The law also holds schools and districts accountable for achievement of those groups by requiring corrective steps if any major subgroup does not achieve the established performance guidelines. However, the law has numerous shortcomings which do not allow it to address longstanding disparities in educational opportunity.

This chapter proposes an innovative approach for directing the expanding federal role in education. The proposed approach encourages states to address disparities in opportunity that prevent disadvantaged students from achieving their full potential and builds on the understanding reflected in the NCLB that the federal government will remain critical in public education reform. The proposal re-examines an avenue for federal involvement that the US Supreme Court considered in several cases and scholars have debated for more than 30 years: a federal right to education.

San Antonio Independent School District v. Rodriguez (1973) explicitly offered the Supreme Court the opportunity to recognize education as a fundamental constitutional right when poor, minority schoolchildren residing in districts with “a low property tax base” (*Rodriguez*, 1973, pp. 4–5) challenged the constitutionality of the Texas school financing system. The Court refused to recognize a federal right to education because the Constitution neither explicitly nor implicitly recognized education as a fundamental right. The Court indicated that it lacked the expertise to second-guess complex judgments about educational policies. The Court identified several reasons for deferring to the legislative judgment captured in the school finance scheme, including concerns about the appropriate distribution of power between the federal and state government.

Numerous scholars have disagreed with the Court’s ruling in *Rodriguez* and argued that the United States should recognize a federal right to education (see Chemerinsky, 2004; Sunstein, 2004). However, those arguments envision a court-defined and enforced reform effort. In contrast, this chapter contends that Congress should recognize a federal right to education through spending legislation that the federal and state governments collaboratively enforce. This reconceptualization of the enforcement of a federal right to education draws upon the enforcement mechanisms for a right to education in international human rights law.

This chapter proceeds in four parts. The first part briefly considers the major federal attempts to address inequities in educational opportunity and explains why current federal education legislation will not eliminate persistent disparities in educational opportunities. The first part also presents arguments for why federal action is necessary to address these disparities. The second part considers the human rights enforcement mechanisms for a right to education. The third part then proposes how these models could inform the development and enforcement

of a federal right to education in the United States. The fourth part explores some of the strengths and weaknesses of this chapter's proposed approach.

The Federal Vehicles for Addressing Educational Inequities for Disadvantaged Students and Why a New Federal Approach Is Needed

The efforts to address inferior educational opportunities for minority and low-income schoolchildren over the last half century focused on desegregating public schools, reducing inequities through school finance litigation, and providing additional federal funding to low-income children. While these approaches have resulted in important achievements in the efforts to improve education and to reduce disparities in educational opportunity, many disadvantaged schoolchildren continue to receive a substandard educational experience and substantial interstate and intrastate disparities persist. As this chapter proposes federal legislation to address these concerns, this part highlights the two principal federal approaches to disparities in educational opportunity: school desegregation and legislation to assist low-income children.

School Desegregation

Civil rights advocates initially believed that the 1954 victory in *Brown v. Board of Education (Brown I)* heralded an end to the separate and unequal educational opportunities for minority schoolchildren. In that decision, the Court held that states denied minority schoolchildren "equal educational opportunities" (*Brown I*, 1954, p. 493) when they provided separate schools for white schoolchildren. In striking down the segregated schools, the Court acknowledged the importance of education as the mechanism for exposing children to the building blocks of citizenship, introducing children to cultural norms, and developing the skills necessary to enter the workforce. In light of education's importance, the Court explained that "[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms" (*Brown I*, 1954, p. 493).

To guide lower courts in implementing this groundbreaking decision, the Court in *Brown v. Board of Education (1955) (Brown II)* ordered the states to admit minority schoolchildren to public schools on a non-discriminatory basis "with all deliberate speed" (*Brown II*, 1955, p. 301), a standard that the Court alleged represented an acknowledgment of the complexity of the changes that districts must implement. However, this language opened the door for districts opposed to the decision to move exceedingly slowly or not at all. Those who sought to implement *Brown I* and *Brown II* faced violent and sustained opposition. Many federal courts did little to respond to this violence and instead delayed resolving desegregation litigation or approved superficial changes.

In the face of this resistance, the Court slowly began issuing decisions that signaled it would not tolerate such opposition. Ultimately, though, the Court's decisions