

2017

Inequitable Schools Demand a Federal Remedy

Kimberly J. Robinson

University of Richmond, krobins2@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>



Part of the [Education Law Commons](#)

Recommended Citation

Kimberly Jenkins Robinson & Charles J. Ogletree, Jr., *Inequitable Schools Demand a Federal Remedy*, 17 *Educ. Next* 71 (2017).

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

RODRIGUEZ RECONSIDERED: Is There a Federal Constitutional Right to Education?

EDUCATION NEXT TALKS WITH CHARLES J. OGLETREE JR., KIMBERLY JENKINS ROBINSON, ALFRED A. LINDSETH, ROCCO E. TESTANI, AND LEE A. PEIFER

Does the U.S. Constitution guarantee a right to education? It does not, the Supreme Court declared in *San Antonio Independent School District v. Rodriguez*, a 1973 case alleging that disparities in spending levels among Texas school districts violated students' constitutional rights. In this issue's forum, Charles Ogletree, Harvard Law School professor, and Kimberly Robinson, professor at the University of Richmond School of Law, assert that the court should overturn the *Rodriguez* decision, thus opening the door to federal remedies to public-education inequality. On the other side, Alfred A. Lindseth, Rocco E. Testani, and Lee A. Peifer, attorneys at the law firm Eversheds Sutherland (US), contend that a reversal of *Rodriguez* would lead not to educational parity but to endless litigation.

INEQUITABLE SCHOOLS DEMAND A FEDERAL REMEDY

by CHARLES J. OGLETREE JR.
and KIMBERLY JENKINS ROBINSON



IT IS NOT OFTEN that the U.S. Supreme Court admits that one of its previous decisions, especially one that shaped the fabric of our nation, was fundamentally wrong. One such instance occurred in 1954, when the court famously declared, in *Brown v. Board of Education*, that the doctrine of “separate but equal” public schools for black children and white children was unconstitutional. In *Brown*, the court overturned, for public schools, its approval of this doctrine in *Plessy v. Ferguson* (1896) and (continued on page 72)

FEDERAL COURTS CAN'T SOLVE OUR EDUCATION ILLS

by ALFRED A. LINDSETH,
ROCCO E. TESTANI,
and LEE A. PEIFER



IN 1973, the U.S. Supreme Court held that the federal Constitution does not establish a fundamental right to education or to “equal” school funding. In so doing, the court rejected the argument that funding disparities across local school districts should be “strictly scrutinized” under the Fourteenth Amendment’s equal protection clause. That decision, in *San Antonio Independent School District v. Rodriguez*, has been good law for more than 40 years. Various commentators and (continued on page 73)

OGLETREE & ROBINSON

(CONTINUED FROM PAGE 71)

established that segregated schools violated the equal protection clause of the Fourteenth Amendment. The court also proclaimed that educational “opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

Less than two decades later, however, the court turned its back on protecting a right to equal educational opportunity. In *San Antonio Independent School District v. Rodriguez* (1973), the court held that the Constitution does not protect a right to education. This decision foreclosed a federal judicial remedy for disparities in funding that had relegated Mexican American children in the predominantly low-income Edgewood Independent School District of San Antonio, Texas, to an education that was inferior to that of students in the city’s affluent, mostly white Alamo Heights district. The two districts differed in their ability to raise property taxes because of significant disparities in property values in the two communities. Edgewood adopted the highest tax rate in the area but yielded the least funding for its schools, while Alamo Heights adopted a substantially lower tax rate that yielded considerably more per-pupil funding. Plaintiffs alleged, in part, that these funding disparities denied them their constitutional right to education. All children must be guaranteed that right, they argued, because education equips citizens to fully enjoy their free speech and voting rights.

In a 5–4 decision, the court disagreed. *Rodriguez* held that the Constitution does not explicitly or implicitly guarantee a right to education. The court denied that it had the authority or the ability to guarantee people “the most effective speech or the most informed electoral choice.” It said further that affirming a constitutional right to education would greatly disturb the balance of education federalism that embraced primary state and local control for education—an important means for encouraging innovation, experimentation, and competition between states. The court also claimed that it was not qualified to address difficult empirical questions such as whether money influenced educational quality. And since the plaintiffs had not alleged that they were denied the “basic minimal skills” required to enjoy the right to free speech and to vote, the court said it did not need to determine if the Constitution guaranteed a right to an education that provides such skills.

Parallels to *Plessy*

Rodriguez will one day be considered as erroneous as the court’s approval of the “separate but equal” doctrine in *Plessy v. Ferguson*, for three reasons.

First, just as the states refused to make good on the “equal” part of “separate but equal” after *Plessy*, for more than 40 years states have failed to provide equal access to the funding needed to achieve excellent schools for all children, largely because of a lack of federal accountability for equitable school funding. The *Rodriguez* court acknowledged the need for state tax reform related to school funding and for “innovative thinking as to public education, its methods, and its funding.” However, the court was unwilling to order states to engage in this reform. Instead, the court explained that any solutions to these challenges must be determined by state lawmakers and those who elect them. Although some states have undertaken school funding reform since *Rodriguez*, too many do not provide the funding systems that excellent and equitable schools demand.

Evidence abounds regarding the harmful nature of funding disparities. For example, the U.S. Department of Education’s Equity and Excellence Commission found in its 2013 report that “students, families and communities are burdened by the broken system of education funding in America.” State funding systems are not closely linked to desired educational outcomes: despite the fact that all states have adopted educational standards, the commission found that only a few states have developed funding systems that enable schools to teach all students the content of state standards.

Although scholars do not agree on what constitutes an appropriate minimum funding level, studies that attempt to determine such sums find that many states fund schools below those levels. Nor do states provide effective oversight of funding to ensure that it is used efficiently to meet student needs. Equality eluded generations of African Americans in part because of *Plessy*. Similarly, many schoolchildren today attend schools that lack sufficient and equitable funding in part because of *Rodriguez*, which foreclosed the federal judicial accountability that could require states to remedy their inequitable funding disparities.

Second, just as *Plessy* relegated African Americans to second-class status, *Rodriguez* relegates many students to second-class status. It is beyond dispute that, because disadvantaged children come to their classrooms with an (*continued on page 74*)



Just as the states refused to make good on the “equal” part of “separate but equal” after *Plessy v. Ferguson*, states have yet to provide equal access to the funding needed to achieve excellent schools for all children.

LINDSETH ET AL.
(CONTINUED FROM
PAGE 71)

two new lawsuits, however, argue that *Rodriguez* should be reconsidered. These advocates urge the courts to create a federal constitutional right to education. Although the word “education” appears nowhere in the federal Constitution, advocates for recognizing that such a right is implied typically argue that it would ensure “equal educational opportunity” and foster more effective participation in civil society. These advocates may be well-intentioned, but their arguments rest on shaky legal reasoning and would translate into bad policy.

First, as a matter of constitutional law, *Rodriguez* was correctly decided. With a nod to *Brown v. Board of Education*, the Supreme Court’s 1954 decision banning state-imposed racial segregation in schools, the *Rodriguez* court recognized “the vital role of education in a free society.” But the court also emphasized the restraint inherent in our federal constitutional scheme: “The importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause,” the court wrote in its opinion, and “education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.” And finally, the court noted, “it is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”

This analysis reflects the fact that the federal Constitution protects us from certain kinds of governmental action—such as state-imposed segregation, prohibitions on free speech, or invasions of personal privacy—but does not create expansive positive rights or guarantee governmental assistance. Federal courts typically refuse to create new substantive rights, and in a 1989 case, *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court “recognized that the [Constitution’s] Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests.” Declaring education to be an implicit fundamental right would raise difficult constitutional questions about essentials such as food, shelter, and health care—none

of which are mentioned in the federal Constitution.

More broadly, the federal government was designed to have limited, enumerated powers, as reflected in the Tenth Amendment: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Regardless of the incentives contained in federal laws like the Elementary and Secondary Education Act, the Supreme Court has repeatedly held that the federal government may encourage but may not simply “commandeer” state governments to implement or enforce federal policies.

These constitutional principles are especially important in the context of education. Historically, responsibility for designing and reforming systems of public education has rested with the states. Unlike the federal Constitution, all 50 state constitutions have provisions that explicitly address education. Many of these provisions speak merely in broad terms, but they still serve as points of reference for state and local governments charged with establishing and maintaining public schools. Legal challenges to a state’s legislative and executive policies on public education necessarily implicate separation-of-powers concerns about the courts’ abilities to answer political questions and resolve policy debates. But at least *state* courts have an education clause to begin their analysis of any right to education.

By contrast, given the lack of an education clause in the U.S. Constitution, federal courts attempting to define an implicit right to education would need to start from scratch. Without the benefit of any constitutional text

or interpretive history to lend meaning to the term “education,” federal courts would be fabricating a new substantive right out of whole cloth.

Misguided Efforts

Yet advocates of a federal right to education continue their efforts to overturn or reinterpret *Rodriguez*. Within the past year, plaintiffs in Connecticut and Michigan have filed new lawsuits imploring federal courts to recognize a federal constitutional right to education. The Connecticut plaintiffs, in *Martinez v. Malloy*, hope to expand school-choice (*continued on page 75*)



Historically,
responsibility for
designing and
reforming systems
of public education
has rested with
the states. Unlike
the federal
Constitution, all
50 state
constitutions have
provisions that
explicitly address
education.

OGLETREE & ROBINSON

(CONTINUED FROM PAGE 72)

when states provide *equal* per-pupil funding for all students, low-income children and communities remain disadvantaged. A recent Education Law Center report found that in 2013, 18 states provided essentially the same funding to districts with high and low concentrations of disadvantaged students. Only 16 states provided additional funding to districts with greater numbers of disadvantaged students, and 14 states provided *less* funding to such districts. In short, a sizable majority of states have failed to provide equitable funding. These funding inequities provide second-rate educational opportunities to many low-income children that adversely affect their life chances.

Third, just as *Plessy* resulted in depriving African Americans of access to the schools, jobs, ballots, and opportunities they needed to fully and equally participate in American life, the disparities that *Rodriguez* tolerates leave many students without the education they need to so participate. *Rodriguez* effectively foreclosed federal litigation as a mechanism for addressing inequitable disparities in school funding, and Congress has been unwilling to demand that states remedy such disparities. The individual and societal toll is clear: Those who attend inadequate schools are hampered in becoming fully engaged citizens. Workers who are less educated are less productive. Lower educational attainment increases criminal activity. In contrast, effective education significantly increases voting and civic engagement. Because education serves as the gateway to full participation and success in American society, *Rodriguez* contributes to many students being shut out.

Although the *Rodriguez* court trusted states to ensure equal educational opportunity, this trust has proven misplaced. Even when students and their families have been successful in school funding litigation based on state constitutions, many state lawmakers have resisted and evaded court mandates to provide equitable or adequate funding. Until we change this reality, students at all income levels will continue to perform poorly in comparison to their international peers.

Constitutional Claims

The Supreme Court could rely on a variety of constitutional protections in affirming a constitutional right to education. It

array of educational and personal challenges, they need additional resources to compete successfully with their more-affluent peers. Therefore, even

could find that the equal protection clause prohibits wide within-state disparities in educational opportunity that disadvantage some students because they live in a property-poor district, as Justice Thurgood Marshall argued in his *Rodriguez* dissent. Given the Constitution's protection of the right to vote, the equal protection clause also would support a federal right to an education that prepares students to be competent voters and civic participants—enabling them, for instance, to comprehend complex ballot initiatives and serve competently on a jury, as education law scholar and litigator Michael Rebell has contended. The court might also

invoke the citizenship clause, asserting that all children need an education sufficient to ensure equal citizenship, which entails political, civil, and social equality, as California Supreme Court Justice Goodwin Liu has argued.

The court could emphasize that in a number of past decisions it has recognized “unenumerated” rights, that is, rights that are not explicitly included in the Constitution. For instance, before *Rodriguez*, the court recognized the right to interstate travel; the right of a parent to control a child's education; the right to marry a person of a different race; and a woman's right to terminate a pregnancy. Since *Rodriguez*, the court has continued to demonstrate a willingness to recognize and expand unenumerated rights—implying a right to consensual same-sex relationships; implying a parent's right to the care, custody, and control of their child; and extending the right to reproductive privacy to minors.

Most recently, the court held in *Obergefell v. Hodges* that same-sex couples enjoy a constitutionally protected right to marry within the Fourteenth Amendment's equal protection and due process clauses. These cases confirm the insights of leading constitutional law scholar Akhil Amar, who has stated that various implicit rights, though unenumerated, “are nonetheless full-fledged constitutional entitlements on any sensible reading of the document.”

Enforcing the Right

Once the court recognizes a federal constitutional right to education, families, advocates, and attorneys must begin the hard work of challenging state systems of education as unlawful under the U.S. Constitution. Federal courts should insist that states design their education systems to accomplish the *aims* of the right to education—be they ending inequitable disparities in educational opportunity, preparing students to be competent voters and civic participants, or ensuring that students are equal citizens. State-level (*continued on page 76*)



Education federalism has served as a consistent roadblock to federal efforts to remove barriers to equal educational opportunities for low-income and minority students.

LINDSETH ET AL.
 (CONTINUED FROM
 PAGE 73)

options and invoke a “fundamental right to a minimally adequate education.” The Michigan plaintiffs, in *Gary B. v. Snyder*, challenge alleged deficiencies in the Detroit public schools and contend that “literacy is a fundamental right.”

These attempts to revisit *Rodriguez* are misguided. For one thing, the Michigan plaintiffs rely on arguments that the Supreme Court has already rejected. Regardless of their contention that literacy is “uniquely significant to American civil life” because of its role in a “well-functioning democracy,” the *Rodriguez* court held that “the key to discovering whether education is ‘fundamental’ is not to be found in comparisons of the relative societal significance of education”; the question is “whether there is a right to education explicitly or implicitly guaranteed by the Constitution.”

Creating a federal right to education would also force federal courts to take on issues they are not well-equipped to address. School funding cases are complicated enough for state courts, even with state constitutional education clauses to interpret. Indeed, because of differing language in the various state constitutions, state courts have reached a variety of conclusions about their ability to adjudicate claims involving the “equity” or “adequacy” of public school systems. If federal courts undertook a similar journey unmoored from any constitutional text, “it would be difficult,” as the Supreme Court cautioned in *Rodriguez*, “to imagine a case having a greater potential impact on our federal system.”

The *Rodriguez* court further recognized that efforts to make education a federal right overlook “persistent and difficult questions of educational policy, another area in which [the federal courts’] lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.” And despite 40 years of intervening social-science research, the academic and policy debates described in *Rodriguez* continue today. Compare the *Rodriguez* court’s references to a questionable “correlation between educational expenditures and the quality of

education” with the following discussion by the Supreme Court of Texas in a 2016 adequacy decision:

Some amici curiae have filed Brandeis briefs citing recent studies going both ways on the issue of whether more spending means a better education. . . . Courts should not sit as a super-legislature. Nor should they assume the role of super-laboratory. They are not equipped to resolve intractable disagreements on fundamental questions in the social sciences. Arthur Miller may have referred to a trial as the crucible, but we doubt he saw it as the best place for reducing scientific truth when the scientific community itself has reached an impasse.



Arguments to equalize funding ignore the reality that in many places, schools with concentrations of poor or academically struggling students already receive at least as much funding per pupil as other schools. Should those targeted funding differences be held unconstitutional?

The *Rodriguez* court anticipated this problem when it held that federal judges should “refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.” *Rodriguez* thus belongs to a long line of federal cases emphasizing the value of state and local control over public education. Even in the desegregation context—where state actions are subject to strict scrutiny under the Fourteenth Amendment—the Supreme Court held in *Freeman v. Pitts* that “returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system.”

Hence, the lack of supporting constitutional text, principles of federalism, and the doctrine of *stare decisis* (which lends stability to the law by encouraging courts to stand by their prior decisions) all militate against the creation of a federal constitutional

right to education or to supposedly equal school funding. Plaintiffs who are unable to achieve their policy goals through state and local political processes should not be allowed to impose their preferences by federal judicial fiat.

Unanswered Questions

But even if *Rodriguez* had been wrongly decided, defining a federal right to education in a way (*continued on page 77*)

OGLETREE & ROBINSON

(CONTINUED FROM PAGE 74)

funding litigation has often revealed that education systems are based upon the bargains struck by politicians that are divorced from a rigorous analysis of the aims of education and the best means to achieve them. In designing remedies, the federal courts could draw critical lessons from successful state cases such as *Abbott v. Burke* (New Jersey) and *Campaign for Fiscal Equity v. State of New York*. Both cases provide examples of state courts that have insisted that states design funding systems to accomplish specified aims.

Cases alleging a federal constitutional right to education need not center on the illegality of funding disparities. Such cases can cause courts to lose their focus on the underlying disparities in educational opportunity that prevent children from becoming engaged citizens and productive members of society. When cases do implicate funding disparities, the federal courts can build upon the consensus that has emerged from the overwhelming majority of state courts that have concluded, after a review of the relevant social science research, that money does matter for the quality of educational opportunity. Recent research by C. Kirabo Jackson and colleagues confirms that spending increases can improve both educational and adult outcomes for low-income children (see “Boosting Educational Attainment and Adult Earnings,” *research*, Fall 2015). Therefore, although the *Rodriguez* court noted that it was unable to address complex policy questions such as this, the Supreme Court would not be stymied by this question in future cases.

When enforcing a constitutional right to education, federal courts should establish clear guidance about what that right requires, while also allowing for flexibility in how states implement it. State funding and governance mechanisms vary. Therefore, federal courts should eschew simple one-size-fits-all remedies such as mandating equal per-pupil funding. States should be able to continue to serve as laboratories of experimentation and innovation that decide how best to provide the right to education. However, these laboratories should operate within federal limits that protect the national interest in a well-educated populace. This approach would provide federal accountability while retaining the beneficial aspects of state and local control.

Ultimately, what we are calling for is a long-overdue restructuring of education federalism to establish an effective partnership of

the federal, state, and local governments to advance equal access to an excellent education. Education federalism has served as a consistent roadblock to federal efforts to remove barriers to equal educational opportunities for low-income and minority students. The oft-praised benefits of state and local control—experimentation, innovation, and competition for excellence—have failed to eliminate the substandard schools that many children attend. Instead, trumpeting the importance of state and local control

has too often served as a vehicle for those privileged by the current education system to maintain their advantage and avoid accountability for effectively educating all children.

Education federalism has already undergone a tremendous evolution since the *Brown* decision and its progeny and passage of the Elementary and Secondary Education Act of 1965 (ESEA). Successive reauthorizations of ESEA have revealed the need for federal accountability to incentivize states and localities to enact K–12 education reforms. Even the Every Student Succeeds Act, the law’s 2015 iteration, which reduces the federal role in school accountability, still insists that state and local governments focus attention on the lowest-performing schools. This demonstrates Congress’s continuing concern that states and localities often do not intervene in ways that can break long-standing cycles of low graduation rates and lagging achievement.

Undoubtedly, the litigation we envision will impose costs on the federal, state, and local governments. Yet the United States already bears costs from our broken education system, including

higher crime rates, additional expenses for health-care and public-assistance programs, and lost tax revenue as well as the untold costs of telling generations of children in chronically under-resourced, low-performing schools: “You don’t matter!” As states receive the message that they must provide equal access to an excellent education, the litigation costs will subside while the benefits to our nation will continue to accrue and multiply for generations.

Recognition of a federal constitutional right to education will provide us with a clear path to excellent and equitable schools. Just as the court declared an end to separate but equal in *Brown v. Board of Education*, the court must also declare an end to a third-world education for some and a world-class education for others by overturning *Rodriguez*. Our national commitment to equal opportunity and a just society demands no less. ■



Federal courts should eschew simple one-size-fits-all remedies such as mandating equal per-pupil funding, allowing states to be able to continue to serve as laboratories of experimentation and innovation that decide how best to provide the right to education.

LINDSETH ET AL.
(CONTINUED FROM
PAGE 75)

that guarantees “equal educational opportunity” would be no easy task and would raise more questions than it answered.

For example, should equality be gauged by the financial resources made available to public schools? How far would states have to go to equalize these educational inputs? Would providing greater base funding suffice, or would states have to go further to prohibit additional “unequal” spending by local school districts? Would the federal government have its own affirmative duty to provide additional federal funds—which currently make up less than 10 percent of all nationwide funding for K–12 education? And would Congress need to equalize spending across states?

Arguments to equalize funding ignore the reality that in many places, schools with concentrations of poor or academically struggling students already receive *at least* as much funding per pupil as other schools. Even the Education Law Center, an advocacy organization that supports plaintiffs seeking “fair” (that is, more) public-education funding, recently reported that two-thirds of the states provide equal or “progressive” funding for high-poverty school districts. Particularly in large urban districts, funding levels for disadvantaged or struggling students are often *more* than equal. Should those targeted funding differences be held unconstitutional? Or would “equal educational opportunity” require even *more* unequal spending, as Professors Ogletree and Robinson argue in their companion essay?

If equalized funding is not the answer, should states instead be forced to equalize student outcomes? Setting aside practical and policy questions about how to accomplish that goal, serious questions about the proper “aims of education” cited by Ogletree and Robinson remain unsettled. Which outcomes should be measured, and how “equal” must they be? Should courts consider test scores, classroom grades, or graduation rates? If the stubborn achievement gaps that exist in every state could prove a violation of federal equal-protection rights, would federal courts have to monitor *every* state’s education policies and spending decisions?

Asking federal courts to wade into these thickets is a mistake. State officials and courts have already grappled with many of these issues, and creating a federal right to education would destabilize policies and decisions that have shaped local school systems for generations. On this point, the *Rodriguez* court observed that the school-funding systems in Texas and “virtually every other state [would] not pass muster” under strict federal judicial scrutiny. “Nor indeed,” the court

explained, “in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense.”

Proponents of a federal right to education presume that federal judges would succeed where local policymakers have supposedly failed. But the federal judiciary lacks the capacity and expertise to solve entrenched problems like the achievement gap from the bench. Federal judges are not school superintendents, education experts, or central planners. What evidence shows that federal courts would produce *better* results than the state and local governments that have been designing and experimenting with education policy for years? And what benchmarks would allow the federal courts to decide when they had achieved the amorphous goal of “equal educational opportunity”? Numerous racial-desegregation cases, in which the goal of integration to remedy intentional discrimination is relatively clear, have lasted for decades. Adding constitutional equity and adequacy claims to the federal dockets, in the service of an

implicit right to education, could lead to an era of federal judicial supervision with no end in sight.

It may well be the case that additional funds devoted to particular policies could improve certain facets of American public education. But the *Rodriguez* court correctly held that because “the Constitution does not provide judicial remedies for every social and economic ill,” broad educational goals are “not values to be implemented by judicial intrusion into otherwise legitimate state activities.” Given the substantial risks (and uncertain rewards) of federal judicial intervention, any acknowledgment of constitutional rights to education should be left to the states. ■



Proponents
of a federal right
to education
presume that
federal judges
would succeed where
local policymakers
have failed.
But the federal
judiciary lacks
the capacity
and expertise to
solve entrenched
problems like the
achievement gap
from the bench.