



Should access to a public education be a constitutional right for all children?

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lose to 40 years after the U.S. Supreme Court issued its landmark ruling in *San Antonio Independent School District v. Rodriguez*, the decision's implications are still a central topic of debate among educators, scholars, lawmakers and members of school communities across the U.S.

Low-income parents in a Texas school district, which was not as well funded as neighboring affluent districts, filed the lawsuit in 1968 alleging that this inequity violated the Equal Protection Clause of the Constitution's 14th Amendment. They argued the state's system — under which public schools rely on local property taxes as a source of revenue — meant poorer districts would inherently be disadvantaged. As a result, they said, the state's public education finance system violated the Equal Protection Clause and was unconstitutional.

The court thought otherwise. In a narrow 5-4 ruling, it found that the Texas education funding formula resembled those of some other states and did not systematically put poorer communities at a disadvantage. In coming to this conclusion, the court held the view that in the Constitution, there is no fundamental right to an education.

Since the 1972 ruling, the debate has remained very much alive, and almost all states have seen some kind of educational equity lawsuit. In 2016, Michigan schoolchildren argued in a federal lawsuit that a lack of state investment in Detroit schools obstructed their right to literacy — a pillar of education that some say is a federal right, but that others — including the district judge who dismissed the case — don't think is the case.

In addition, Rhode Island is currently facing a lawsuit filed by public school students and their parents who argue the students' 14th Amendment rights have been violated. Because the state does not include civics or citizenship education in its curriculum framework, the plaintiffs say students aren't prepared for citizenship or to exercise civic duties — tools they say are needed to exercise one's constitutional rights.

Four law experts recently debated during an event in Washington, D.C., whether there should be a federal right to free and equal public education. The panelists were:

- Derek Black, law professor at the University of South Carolina School of Law
- Earl Maltz, distinguished law professor at Rutgers University Law School
- Kimberly Robinson, visiting professor at the University of Virginia Law School and law professor at the University of Richmond School of Law

- Ilya Shapiro, director of the Cato Institute's Robert A. Levy Center for Constitutional Studies

During the debate, the scholars voiced their thoughts on the *Rodriguez* decision, whether a federal right to education should exist and how it might be enforced. Below are some of their comments.

EDITOR'S NOTE: The following responses have been edited for brevity and clarity.

The supporters

KIMBERLY ROBINSON: The court, in *Rodriguez*, relied on the laboratory of the states to address inequality and spending in educational opportunity. The court was clear that there needed to be greater equality in opportunity, and there needed to be school funding reform, but it said that the states should be the ones to address that. Almost 50 years later, we've had some improvement ... however, the laboratory of the states has largely been ineffective in ensuring that all children have equal access to an excellent education. The states have not provided for equitable funding.

So, we have a situation where the laboratory of the states has failed to address the needs of many communities, as well as our nation, and we need to have a federal remedy to address that. The federal government is the sole level of government that can address interstate disparities. The greatest disparities are between states, and only the federal government has the capacity, the ability and the interest to address those.

One of the goals of a federal right to education would be to ensure that we have citizens who are prepared to engage in democracy. But I think part of what the nation needs is a discussion [on] what each child should be entitled to, but then we have to make a national commitment to provide it. Right now, what we provide is the more privileged sections of our society get an excellent education, and everyone else gets the remnants of state and local budgets. And that is something that I think must change.

There are several avenues through which we could recognize a right [to education]. It could be enforced in the courts, [or] it could be something that was enacted in statute. But the point is that there are multiple ways to get there.

What a federal right to education could do is set a floor of educational opportunity below which states cannot go. It's not that it's a federal takeover ... but it is saying that you cannot continue to provide an inferior education to disadvantaged communities, to communities of color and to limited English proficiency students. And that's something that's consistent with the tenets of our democracy and is critical to the success of our economy.

DEREK BLACK: As we look for solutions to our opportunity gaps and our achievement gaps, a federal right to education should be one of those things on the table.

From the beginning, public education has been bound up in the very idea of our democracy. You can see this in our very first foundational ideas, and when those ideas were put to paper. You can see our national commitment to public education. Our nation has failed to reach the goals of education far too many times. [And] looking at 40 years of school funding data, no doubt about it: School funding matters in student outcomes.

Regardless of whether there's a federal constitutional right, Congress is complicit in its failure to spend to address our national interest, and it's been complicit for quite some time in that respect.

The opponents

ILYA SHAPIRO: How can there be a federal right to education when the Constitution doesn't give the federal government any power to regulate or legislate in this area? Article I, Section 8 enumerates all the powers Congress gets, plus the Necessary and Proper Clause, and education is simply not one of them.

When we talk about constitutional rights, in no way do we generally or normally think about positive rights; that is, the things that the government is supposed to give you, rather than the liberty and rights that the government protects. If we establish a federal right to education, what about things that seem even more important than education, [like] food, healthcare, shelter [and] clothing? So, it really opens up a Pandora's box.

The best solutions are provided for by federalism. Education policy generally ... has failed a large part of the American population. But bad policy does not somehow create new constitutional rights.

It could be that states need to change radically — I'd argue they should — how they maintain public education. I think a lot of educators are hamstrung by regulations, both from the state and especially from the unconstitutional federal Department of Education. You free them up — whether through charter schools [or] other innovations — and that's really what's going to release the better policy.

The reason why we have so much gridlock and toxicity in our current politics is because all major decisions and all major areas of policy are pushed up to Washington. And for a large, pluralistic society with different values and priorities, that's the exact wrong way to do it.

EARL MALTZ: You could look at the world and say that it's inequitable compared to what they spend in Mississippi to what they spend in [affluent] Montgomery County, Maryland. And one could imagine that ... maybe the federal government could give block grants to school districts that are underfunded.

But then the devil is in the details. The problem is once the federal government starts to have detailed rules about how the money's going to be spent, where the money's going to be spent, the conditions under which it's going to be spent, then we create problems, because schools are not able to adapt to local conditions.

Sometimes, different areas simply have different values. And you can talk in general terms about excellence, but there's a variety of different values, in addition to this concept of the laboratories of democracy. But there's also the idea that different places have different values, and they should have some say in how their education reflects those values.

What I fear about the federal right to education is what we have seen in a wide variety of areas — that we end up with micromanagement from Washington, and lots and lots of litigation that doesn't produce much good outcome.