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EDUCATION IS A CIVIL RIGHT

LEGAL RATIONALE

INTRODUCTION

Any examination of education as a civil right or fundamental right must include the Supreme Court's decision in *San Antonio v. Rodriguez*^[1] in 1973. The Court held that education is not a fundamental right and that wealth is not suspect classification.^[2] In upholding the Texas school financing scheme, the Court only applied a low level, rational basis review. The defeat was so explicit that advocates largely abandoned the federal courts as a means to vindicate education as a fundamental or civil right.^[3] As devastating as *Rodriguez* was, since *Rodriguez* so many significant developments have occurred that, at worst, *Rodriguez* may now be irrelevant to furthering educational rights and, at best, *Rodriguez* may be susceptible to being overturned or distinguished in new litigation.

I. THE DEVELOPMENT OF EDUCATION AS A PUBLIC RIGHT

Rodriguez was decided very early in the evolution of our societal and legal notions of public education. As a general matter, public education is a modern phenomenon.^[4] Compulsory public education did not become widespread until the 20th century,^[5] and education did not even begin to be equally afforded until after *Brown v. Board of Education*^[6] in 1954. Only after *Brown* and subsequent desegregation did society begin to recognize that education was a public good that one could demand of the government. Even in *Brown* itself, the Court recognized that federal law only applied after the state of its own free will chose to provide education.^[7] Moreover, the school remained segregated, with essentially no change, for at least a decade following *Brown*.^[8] It took the Civil Rights Act of 1964 and the Court's unambiguous demands in *Green v. New Kent Co.*^[9] in 1968 for desegregation and equal opportunity in education initiate in substance.^[10] Coming just five years later, *Rodriguez* was decided when education as a civil right was still in its infancy and, for both racial and fiscal reasons, states were still reluctant to accept their responsibility to educate students, much less disadvantaged students.^[11]

Since *Rodriguez*, however, societal and legal notions of educational rights have changed considerably. Most important, at the time of *Rodriguez*, educational constitutional rights under state law

^[1] 411 U.S. 1 (1973).

^[2] *Id.*

^[3] See Derek W. Black & Gregory Malhoit, *The Power of Small Schools: Achieving Equal Educational Opportunity Through Academic Success and Democratic Citizenship*, 82 NEB. L. REV. 50 (2003) (discussing the first and second waves of education finance litigation).

^[4] See generally EDUCATIONAL POLICY AND THE LAW 1–3 (Mark G. Yudof, et al. eds., 4th ed. 2002) (discussing the evolution of Americans' attitudes toward public schooling).

^[5] *Id.*

^[6] 347 U.S. 483 (1954).

^[7] *Id.* at 493-94 (writing that where the state provides public education that "right . . . must be made available to all on equal terms.").

^[8] Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994).

^[9] 391 U.S. 430 (1968).

^[10] See Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027, 1034 (1992).

^[11] Both Alabama and Mississippi, for instance, made changes to their respective constitutions so as to reduce the importance of and financial support for education.

were entirely undeveloped. All fifty states have a constitutional clause that obligates the state to provide education to its citizens.^[12] Post-*Rodriguez* litigation in the states has established that these clauses guarantee a certain qualitative level of education,^[13] warrant application of equal protection to educational funding schemes,^[14] or create a fundamental right to education.^[15] Using these theories, plaintiffs have been victorious in the majority of states.^[16] Even when unsuccessful, plaintiffs often still established that they had a constitutional right to education. Their losses often were related to the remedy, which courts sometimes refused to order based on separation of powers or nonjusticiability concerns.^[17] Moreover, in several states, new litigation is underway to overturn these unfavorable decisions.^[18]

In addition to the developments in the state courts, Congress plays a much larger role in education now, having funded several additional statutory entitlements and created corresponding legal protections. Congress has directed these statutes toward specific subgroups of disadvantaged or at-risk students, including students with disabilities,^[19] students who speak English as a second language,^[20] homeless children,^[21] and low-income students.^[22] Congress appropriates supplemental funding for the education of these students and generally requires that they receive a Free Appropriate Public Education.^[23] In the process of expanding these student groups' educational rights, Congress has further solidified the societal and legal expectations regarding our educational obligations. It is no longer controversial that the state owes all children, whatever their need, access to meaningful educational opportunities.

II. LEGAL THEORIES OF EDUCATION AS A FUNDAMENTAL OR CIVIL RIGHT

Given the developments in state courts, the expansion of the federal role in education, and the evolved societal expectations regarding education, *Rodriguez* and the question of whether education is fundamental or civil right warrant reexamination. Three different types of legal theories exist to support the educational rights of students: state-based constitutional claims, federal fundamental rights claims, and federal equal protection claims. The state based claims have proceeded in at least three distinct ways. Some courts have held that students are entitled to a qualitative level of education. One group of state courts has termed this type education as being a sound basic education, an adequate education or a minimally adequate education.^[24] Although the terms vary, the nature of this qualitative education is generally consistent across states, with the term meaning an education that includes the core components of the major subject areas of education, and also prepares a student for higher education, work, and citizenship.^[25] The next

^[12] See Allen W. Hubsch, *Education and Self-Government: The Right to Education under State Constitutional Law*, 18 J. L. & EDUC. 93, 96-97 (1989).

^[13] See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Leandro v. State*, 488 S.E.2d 249(1997).

^[14] See, e.g., *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996).

^[15] See, e.g., *Washakie County Sch. Dist. V. Herschler*, 606 P.2d 310, 333 (Wyo. 1980); *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1977). In fact, as of 1999, at least 15 states had declared education a fundamental right. See Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 270 (1999).

^[16] See <http://www.schoolfunding.info/litigation/equityandadequacytable.pdf>.

^[17] See, e.g., *McDaniel v. Thomas*, 285 S.E. 2d 156 (Ga. 1981); *Alabama Coalition for Equity v. Siegelman* (Ala. 2002).

^[18] See <http://www.schoolfunding.info/litigation/equityandadequacytable.pdf>.

^[19] *Individuals with Disabilities in Education Act*, 20 U.S.C. 1401, et. al.

^[20] *Equal Educational Opportunities Act*, 20 USC 1703(f) , *Bilingual Education Act*, 20 USCA 3221-3261 (subsequently repealed)

^[21] *McKinney-Vento Homeless Assistance Act*, 42 U.S.C. §§ 11431 et seq. (2002).

^[22] *No Child Left Behind Act* § 101, 115 Stat. at 1439-1620 (codified as amended in scattered sections of 20 U.S.C.) (addressing the need to improve academic achievement of low income students).

^[23] See, e.g., 20 U.S.C. 1414.

^[24] See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Leandro v. State*, 488 S.E.2d 249, 255 (1997); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003) (reinstating the trial court's holding that students were entitled to a sound basic education); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky.1989) (same as Leandro); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (1979) (same as Leandro); *Abbeville County School Dist. v. State*, 515 S.E.2d 535 (S.C. 1999).

^[25] See, e.g., *Rose*, 790 S.W.2d at 212.

groups of state courts have recognized education as a fundamental right, subjecting inequities or barriers to education to heightened scrutiny.^[26] The remaining courts have relied on state equal protection clauses or principles to find inequities in school funding unconstitutional.^[27]

The next two theories supporting educational rights arise under federal law. The first theory is that education is a fundamental right under the federal constitution and any abridgements of this right warrant strict scrutiny. Plaintiffs sued under this theory and lost in *Rodriguez*. The other closely related federal claim is that equal protection applies to state educational benefits. As the plaintiffs were unsuccessful on the fundamental rights claim in *Rodriguez*, the Court analyzed education under equal protection. However, under the Court's equal protection analysis at the time, a mere rational basis review applied if the law in question did not discriminate against a suspect class.^[28] Since *Rodriguez*, however, the Court has been willing to apply a level of scrutiny that is more searching than standard rational basis when the interest at stake was sufficiently important.^[29]

Among these theories, state based claims are the most viable. Plaintiffs have regularly been successful and secured various specific programmatic remedies, such as pre-kindergarten education,^[30] tutors for at-risk kids,^[31] and other services that are directed at improving the educational outcomes of low performing students.^[32] Likewise, this litigation has increased overall educational funding,^[33] raised teacher salaries,^[34] constructed new school facilities,^[35] and hired new staff. These theories could certainly be expanded or modified to make claims to additional remedies on behalf of uniquely situated students and districts, African American children in particular. The only drawback to state based claims is that they require a multi-state strategy, which inevitably result in varying levels of success. Moreover, legislative

^[26] See, e.g., *Serrano v. Priest*, 557 P.2d 929, 951 (Cal.1976); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979).

^[27] See, e.g., *Edgewood Indep. School Dist. v. Kirby*, supra, 777 S.W.2d 391 (Tex. 1989); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997).

^[28] *San Antonio v. Rodriguez*, 411 U.S. 1, 29-45 (1973)..

^[29] See, e.g., *Plyer v. Doe*, *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). Although not directly applicable to fundamental rights analysis, the Court has also developed intermediate scrutiny as a middle tier in its class based equal protection analysis. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). See also *Rodriguez*, 411 U.S. at 70 (J. Marshall, dissenting) (arguing for a middle level of scrutiny).

^[30] See, e.g., *Abbott by Abbott v. Burke*, 710 A.2d 450, 464 (1998). See also *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 393 (N.C. 2004) (reviewing the trial court's order of pre-school education, but finding that such an order would only be appropriate after the state had itself first failed to respond to the finding of inadequacy).

^[31] See, e.g., *Hoke County Bd. of Educ. v. State of North Carolina; State Board of Education*, 2002 WL 34165636 (Trial Order) (N.C.Super. Apr 04, 2002) (NO. 95CVS1158) *overruled by Hoke County Bd. of Educ. v. State*, 579 S.E.2d 276 (N.C. Mar 18, 2003); *DeRolph v. State*, 712 N.E.2d 125 (Ohio 1999).

^[32] See generally EDUCATION IN THE POST-LAKE VIEW ERA: WHAT IS ARKANSAS DOING TO CLOSE THE ACHIEVEMENT GAP? (2008) available at <http://www.schoolfunding.info/states/ar/ARAdvocates-AchievementGap08.pdf> (discussing reforms after the state finance litigation).

^[33] See, e.g., Paul L. Trachtenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 919, 921 (1998) (identifying a \$246 million increase to the New Jersey education budget one year and a later opinion that would require another \$312); LITIGATION UPDATE: CONSTITUTION SATISFIED IN ARKANSAS, MIXED RULING IN ALASKA, SUIT DROPPED IN KENTUCKY, NEW HAMPSHIRE MEETS COURT DEADLINE available at http://www.schoolfunding.info/states/ar/lit_ar.php3 (noting a \$400 million increase in Arkansas's school budget); CINDY HEINE, KENTUCKY SCHOOL UPDATES: A PARENT/CITIZEN GUIDE FOR 2002-04 at 76 (2002) available at <http://www.prichardcommittee.org/pubs/updates.pdf> (tracking and increase in "overall state funding for education . . . from \$1.6 billion in 1989-90 prior to the court ruling to \$2.1 billion in 1991-92 and \$2.9 billion in 2001-02). See also Todd Silberman, *Schools' Spending Gap Grows*, NEWS & OBSERVER at B1(Raleigh, NC December 22, 2005) (reporting on the state's creation of a \$25 million fund to supplement the educational budges of low wealth school districts).

^[34] See, e.g., *Tennessee Small School Systems v. McWherter*, 91 S.W.3d 232 (Tenn. 2002); Heine, supra note, at 76 (calculating an increase in teacher salaries in Kentucky and a rise in national ranking).

^[35] See, e.g., Trachtenberg, supra note, at 921 (finding that the Supreme Court's decision would require anywhere from \$1.8 billion to \$2.8 billion in new funds for school facilities in New Jersey); *Pendleton Citizens for Community Schools v. Marockie*, 507 S.E.2d 673, 676 n2 (W.Va.,1998) (noting that the state's new facility construction fund was in response to previous school finance litigation).

resistance to the court decisions also often present obstacles in securing full and timely remedies.^[36] Notwithstanding these practical problems, state based claims have substantial precedent and need only be furthered.

In contrast, *Rodriguez* present a substantial barrier for fundamental rights claims under federal law, but the practical benefit of a federal strategy is the obvious fact that its rationale would extend to all jurisdictions. Similarly, federal equal protection claims challenging inequities in education have not fared much better with the Court in *Rodriguez* applying only the most cursory examination. Nevertheless, more recent Supreme Court precedent, coupled with the state court decisions, provide a strong basis for the Court to now reach a different conclusion under its equal protection analysis.

First, since *Rodriguez*, the states' recognition of educational as a constitutionally guaranteed right is a compelling basis for the Court to apply a level of scrutiny higher than mere rational basis. Second, even placing these state cases aside, the Court has applied a stricter version of rational basis review to education in cases subsequent to *Rodriguez*. The following section deconstructs *Rodriguez*'s rationale to demonstrate why the time is now appropriate to revisit education as a fundamental or civil right under federal law.

III. REVISITING AND DECONSTRUCTING RODRIGUEZ'S PREMISES

At least four of the major premises or rationales for the Court's holding in *Rodriguez* have been proven false in subsequent years. First, the Court conceptualized education as mere economic state legislation. Second, the Court assumed adjudicating education as a protected right would require it to make qualitative judgments. Third, the Court believed that educational authority rested with local districts and that the state's decision to further such a system was well intentioned and defensible. Fourth, the Court believed that federalism principles required it to refrain from scrutinizing education. These rationales no longer can find support in the laws or facts.

A. The Educational Interest at Stake

The current state of education is inapposite to the Court's characterizations in *Rodriguez*. In addition to finding that education was not a fundamental right, the Court treated education as a low-level interest that placed no obligations on the state.^[37] In effect, the Court treated education as being equivalent to a state sponsored bus-voucher that the state might freely offer or withhold.

At the time of *Rodriguez*, the Court may have been correct to treat education as being no different than any other public benefit that a state provides. But since then, state courts, and legislatures, have established that education is far different. In all fifty states, education is a constitutional right.^[38] That right is further defined, specified and regulated by extensive statutory schemes in every state.^[39] Most important, over half of the state supreme courts have ruled that the constitutional right to education gives plaintiffs a cause of action to force the state to provide appropriate resources and/or tax structures.^[40] Thus, education is not on the level of a bus voucher, housing, health care, food stamps, police protection, or any other state benefit.

^[36] See, e.g., *DeRolph v. State*, 780 N.E.2d 529, 530-37 (Ohio 2002). See also Susan H. Bitensky, *Theoretical Foundations for a Rights to Education under the U.S. Constitution: A Beginning of the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 552 (1992) (stating that in spite of educational reform, the problem has "persisted with an unnerving intractability"); Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984-95*, 26 LAW & SOC. INQUIRY 631, 670-71 (2001) (questioning the effectiveness of the remedies and identifying only moderate gains in educational outcomes); Jonathan R. Werner, *No Knight in Shining Armor: Why Courts Alone, Absent Public Engagement, Could Not Achieve Successful Public School Finance Reform in West Virginia*, 35 COLUM. J.L. & SOC. PROBS. 61, 62 (2002) (finding that West Virginia has yet to succeed in its reform efforts); Julie Zwibelman, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 532, 537-40 (2001) (stating courts are often reluctant to impose stiff remedies in these cases, using New York, Ohio, and Tennessee as examples).

^[37] *San Antonio v. Rodriguez*, 411 U.S. 1, 35 (1973) (categorizing education as merely part of the state's "social and economic legislation" and refusing to distinguish it from "other services and benefits provided by the State.")

^[38] See Allen W. Hubsch, *Education and Self-Government: The Right to Education under State Constitutional Law*, 18 J. L. & EDUC. 93, 96-97 (1989).

^[39] See, e.g., *Leandro v. State*, 488 S.E.2d 249 (1997); N.C. Gen. Stat. 115C-1 through 115c-583.

^[40] See *infra* note 39.

Education is an express state constitutional right and one that the legislature is bound to deliver, often above all else.

This understanding of education was not available to inform the Court's rationale in *Rodriguez*. Whether this understanding would lead the Court to find that education is a federal fundamental right is uncertain, but for the Court to treat education as a common or unimportant right would be unjustifiable today. State courts have simply ruled out this rationale.

B. Qualitative Educational Judgments

The Court reasoned that it could not adjudicate the case in favor of plaintiffs because it would require it to make qualitative judgments that were unspecified in the law and which the Court was unqualified to make.^[41] In effect, the Court believed that it would be called upon to make pedagogical and policy decisions. This was not necessarily a reason to reject the merits of plaintiffs claim, but at the time, the Court was arguably correct in its notion that qualitative questions were raised by the plaintiffs claim.

Regardless, adjudicating a case in favor of plaintiffs under either equal protection or fundamental rights no longer would require this type of judgment by the federal courts because the state courts have often already made the qualitative judgments themselves.^[42] In those states that have held that students are entitled to a sound basic, high quality, or minimally adequate education, the states have determined the required qualitative level of education and set standards by which to measure it.^[43] States resolving these issues under equal protection and fundamental rights analysis have also often determined that there is some set level of funding or resources necessary to comply with the law.^[44] Moreover, all states have developed extensive statutes that set benchmarks for the type of education to be delivered to their students.^[45] The federal courts would not be forced to make independent qualitative judgments, but rather simply asked to rely on what the states themselves have already said.

C. Local Control and Legislative Purposes

The Court overestimated the state's effort in providing education and its discretion in doing so, while at the same time underestimating its responsibility. Consequently, the Court believed it must afford the state almost unbridled discretion in the way it supports and manages education,^[46] and that the state's intent in these efforts is relevant to whether it is providing a constitutional education.^[47] The Texas legislature's preference had been for local control, and the Court accepted local control as an appropriate and natural part of school systems. Thus, the state could sit idly by in the face of variances and inadequacy.^[48]

The state constitutions and decisions since *Rodriguez* demonstrate that although the state may delegate responsibility and authority for providing education to local school districts, the ultimate responsibility rests with one entity: the state.^[49] The state has final responsibility for creating an educational system and ensuring that it delivers opportunities consistent with its constitution. In so far as the state creates a system that shares power with local school districts and those school districts fail to deliver a constitutionally mandated education. Fault is placed within the state for failing to remedy the situation or creating a system that permitted the failure to occur in the first instance.^[50] Thus, lauding the state for contributing significant amounts of funds to failing school districts, which the Court did,^[51] misses the point. The state is responsible for the failure and is obligated to provide resources and leadership necessary to meet

^[41] *Rodriguez*, 411 U.S. at 23-24, 36-37.

^[42] *See, e.g.*, *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Leandro v. State*, 488 S.E.2d 249, 255 (1997); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (1979); *Abbeville County School Dist. v. State*, 515 S.E.2d 535 (S.C. 1999).

^[43] *See infra* note 42.

^[44] *See, e.g.*, *Edgewood v. Kirby*, 777 S.W.2d 391, 393-97 (Tex. 1989); *Serrano v. Priest*, 557 P.2d 929 (Ca. 1976).

^[45] *See, e.g.*, N.C. Gen. Stat. 115c-81; Va. Stat. Ann. 22.1-253.13:1.

^[46] *Rodriguez*, 411 U.S. at 40-44, 49-50.

^[47] *Id.* at 26 (looking to the program's intended design); *id.* at 38-39 (taking into account "what Texas is endeavoring to do with respect to education" and deferring to it).

^[48] *Id.* at 43-44, 49-50.

^[49] *See, e.g.*, *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Rose v. Council for Better Educ.*, 790 S.W. 2d 186 (Ky. 1989)

^[50] *See infra* note 49.

^[51] *Rodriguez*, 411 U.S. at -.

constitutional requirements. Moreover, in such a system, the state's intent is irrelevant. The only relevant question is whether its actions produce educational opportunities on par with constitutional requirements.^[52]

D. Federalism

The Court was wary of interceding because it believed that doing so would broach serious problems in regard to federalism.^[53] The Court's concerns about federalism largely disappear for the same reason they disappear in regard to the qualitative judgments: the state has already exercised those powers reserved to it by adopting education as a fundamental right, for instance, and setting up a funding structure. The federal courts would only require the state apply its own standards regarding education consistent with equal protection. That taxes and tax schemes that are implicated are of no import.

The federal courts would not be exercising judgment over a state's tax scheme per se, but over whether the state is meeting its own self imposed requirements regarding education. Once a state exercises its discretion to provide education as a constitutional right, it has an obligation to provide that right to all on an equal basis. If it fails to do so, it is no defense that providing an equitable constitutional education will require changes in its tax structure. Of course, a finding that the state is failing to meet these educational requirements might require funding and tax changes, but these changes would not broach problems of federalism or discretion.^[54] Again, equal protection merely demands the state meet its own standards in regard to all students. How the state structures its funding schemes is largely of no accord to the federal courts so long as the state delivers equal educational opportunities. Thus, the states still retain broad discretion in that respect. The only limitation on their discretion is in regard to delivering their self imposed education.

IV. POTENTIAL OUTCOMES UNDER FEDERAL LAW

Important legal developments have also occurred in the federal courts since *Rodriguez* that would affect the outcome of educational claims. First, the Court in *Rodriguez* suggested that the case may have been different had the state failed to deliver a minimally adequate education,^[55] leaving open the question of whether there might be a fundamental right to a minimally adequate education. The Court made this again in *Papasan v. Allain*,^[56] suggesting that there may be such a right.^[57]

The Court has been more comfortable with the notion of a fundamental right to a minimally adequate education because such an education would have presumably obviated the Court from delving into the qualitative aspects of education which it concerns. The Court was particularly concerned with its ability to identify an objective floor rather than make relative qualitative judgments.^[58] Identifying a floor would make it possible for the Court to easily find that there is an absolute deprivation of education and, thus, remove the basis upon which it had distinguished education from other rights the Court had protected.^[59] A minimally adequate education, at least in so far as the Court seemed to understand it, was such a basic type of education that it could be an objective floor sufficient to justify a remedy.

Based on our evolving standards of education, a minimally adequate education today would be higher than it was at the time of *Rodriguez*. The Court could easily combine its minimally adequate concept with the subsequent state cases that have raised the floor of what is adequate, minimally adequate, or required.

^[52] See *infra* note 49.

^[53] *Rodriguez*, 411 U.S. at 44, 50 (assuming that a decision in the plaintiffs' favor would force the court to invalidate the education structures of many states); *id.* at 39 (protecting those "rights reserved to the States").

^[54] In fact, the court in *Robinson v. Cahill IV*, 358 A.2d 457 (N.J. 1976), did not order the state to change its tax scheme, but it did order the schools to be shut down until they were operated consistent with the constitution. The legislature then responded with tax changes of its own and instituted the state's first income tax. EDUCATIONAL POLICY AND THE LAW, *supra* note 4, at 818.

^[55] *Rodriguez*, 411 U.S. at 37.

^[56] 478 U.S. 265.

^[57] *Id.* at 285.

^[58] *Rodriguez*, 411 U.S. at 19-20.

^[59] See *id.* at 19-23 (reasoning that education was distinguished from criminal appeals, voting, and other benefits where the Court had found wealth discrimination because those cases involved an absolute deprivation).

The Court could rely on these state cases to define the substance of a minimally adequate education and, therefore, identify the objective floor that apparently motivates it. Relying on the state's qualitative predetermined floor, the Court would then simply measure educational opportunities against it. In fact, the Court could, without overturning *Rodriguez*, hold that there is a fundamental right to a minimally adequate education and define that right in the same way as state courts. This would allow the Court to remain facially consistent with its precedent, while in practice bringing its jurisprudence in line with state courts and modern concepts of education.

Second, the Court, although not stating it explicitly, has decided cases in which it subjects some non-fundamental rights to scrutiny that is higher than traditional rational basis even though no protected class is discriminated against. Most notably, in *Plyler v. Doe*,^[60] the Court reiterated that education was not a fundamental right and found that no suspect classification was involved.^[61] Thus, rational basis review applied to the law that deprived undocumented immigrants of education.^[62] Under the type of rational basis applied in *Rodriguez*, the statute would have survived.^[63] But in *Plyler*, the rational basis review was far more searching than in *Rodriguez*. In its review, the Court second guessed the wisdom of the state's laws in several respects, ultimately finding that the law lacked a rational basis.^[64] The Court has repeated this heightened rational basis scrutiny in other cases as well.

The Court's increased willingness to exercise a rigorous rational basis review, combined with the recognition of education as a constitutional and/or fundamental right in state courts, suggests that infringements on education will not be given the same deference afforded in *Rodriguez*. A strong argument exists that strict scrutiny should now apply since the right is a constitutional or fundamental one under state law. However, even if the Court did not apply strict scrutiny, it would apply a heightened rational basis review that would force states to make reasoned defenses of their systems. The defenses from *Rodriguez*—that the state was fostering local control and was already exercising significant fiscal effort—may not even survive a basic rational basis review any longer, much less a heightened one. Since the responsibility of delivering constitutional educational opportunities has been held to rest solely with the state, a state could not longer argue that fostering local control at the expense of meeting the state's constitutional responsibilities was a legitimate goal or that its methods were rationally related to it.

In summary, the developments since *Rodriguez* indicate that no matter what theory is pursued or what support one asserts for education rights, the arguments on behalf of improving the educational opportunities for students are far stronger than they were in 1973. Now, established rights abound in state courts and, in federal courts, most of the traditional notions supporting a hands-off approach to education have proven antiquated. Moreover, the Supreme Court's own precedent has developed standards and raised questions that dictate that if another education case came before the Court it would have to recognize a fundamental right to some level of education and/or require the states to live up to the qualitative standards that they themselves have put in place.

V. RELEVANCE FOR AFRICAN AMERICAN STUDENTS

For purposes of this memorandum, the question now is whether these developments have any particular relevance to African American children. The theories discussed above have been used to secure general overall improvements to education. To the extent they have been directed at subgroups, those subgroups have been the relatively general categories of "at-risk" or low performing students.^[65] Otherwise, the remedies have been directed toward districts as a whole, such as rural, urban, or low-wealth

^[60] 457 U.S. 202 (1982).

^[61] *Id.* at 221, 223.

^[62] *Id.* at 224-30.

^[63] *See id.* at 248-53 (Burger, dissenting).

^[64] *Id.* at 227 (rejecting the state's assertion that denying an education to illegal immigrants would conserve limited state resources).

^[65] *See, e.g.,* State v. Campbell County School Dist., 19 P.3d 518 (Wyo. 2001); Hoke County Bd. of Educ. v. State, 599 S.E.2d 365 (N.C. 2004).

districts.^[66] Often, however, these districts have disproportionate percentages of at-risk or low performing students and, thus, there is an overlap between the district focused and student focused remedies.

To date, however, no state (or federal) based claims have proceeded on behalf of African American students as a distinct group. Litigation on behalf of Newark, New Jersey and New York City, for instance, has primarily benefited African American and other minority students, but the theory in those cases has not been that the students were entitled to a specific remedy based on their race. Rather, the districts that were most disadvantaged in those states just so happened to be disproportionately minority. They received a remedy based on their disadvantaged fiscal and need situation, not race. Consequently, the remedies do not take racial concerns into account, but rather general educational improvement.

A claim based on or that takes race into account, however, may be possible. Most state based educational claims proceed on theories predicated on student need. The plaintiffs assert that at-risk students, for instance, need a specific program or resources to obtain a sound basic education and that the state is not providing them.^[67] If they demonstrate this, then a court can order the state to provide the resources. Similarly, plaintiffs might assert that there is some barrier that is preventing them from achieving at a level that allows them to obtain a sound basic education. For instance, many low income children start kindergarten already a year to two years behind their peers in terms of preparedness. Historically, school systems have said that this problem resulted from external factors that were beyond the control and responsibility of schools. Nevertheless, some states have recognized that if the state has a responsibility to deliver a sound basic education, then it is the state's responsibility to remove the barriers individual students face to receiving the education. Thus, a court could order a state to institute pre-kindergarten school for at-risk children.^[68]

This type of rationale could be extended to African American students if data and research could identify specific barriers to their academic achievement, which states are capable of removing. For instance, in many school districts, African American children are disciplined at two and three times the rate of white children.^[69] The result is that African Americans spend large amounts of time outside the classroom.^[70] This missed instruction has an obvious detrimental effect on their achievement. If research could demonstrate that the cause of the disproportionate discipline was cultural incompetence by teachers or that the disproportionate discipline could be reduced by different classroom management techniques,^[71] then one could argue that the state was obligated to provide teachers training or create alternative learning environments because it is necessary for African American students to obtain a sound basic education. This is not to conclude that discipline is the barrier for African American students, but merely to provide an example.

The key here is to identify the barrier/s to African American achievement and shift the responsibility to the state to remove the barriers. Such strategies have been successfully implemented in analogous situations in the past. A few drawbacks, however, to such a strategy on behalf of African American students exist. First, one must be careful in identifying barriers specific to African American students. The

^[66] See, e.g., *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003) (on behalf of New York City Schools); *Abbott v. Burke*, 575 A.2d 359 (1990) (on behalf of urban districts that suffered from municipal overburden).

^[67] See, e.g., *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998).

^[68] *Id.*

^[69] Patrick Pauken and Philip T.K. Daniel, *Race Discrimination and Disability Discrimination in School Discipline: a Legal and Statistical Analysis*, 139 EDUC. LAW REP. 759, 766-68 (2000) (discussing results of various studies indicating systematic overrepresentation of suspended and expelled African-American students as compared to white students on the basis of enrollment figures); Russell Skiba, *When Is Disproportionality Discrimination? The Overrepresentation of Black Students in School Suspension* in *ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS* 179-80 (William Ayers, Bernardine Dohrn, and Rick Ayers, eds., 2001).

^[70] See, e.g., M. KAREGA RAUSCH & RUSSELL SKIBA, *DISPROPORTIONALITY IN SCHOOL DISCIPLINE AMONG MINORITY STUDENTS IN INDIANA: DESCRIPTION AND ANALYSIS* (2004); AUGUSTINA REYES, *DISCIPLINE, ACHIEVEMENT, AND RACE: IS ZERO TOLERANCE THE ANSWER?* (2006).

^[71] See, e.g., PATRICIA L. GUERRA & SARAH W. NELSON, *CULTURAL PROFICIENCY* (2007), PEDRO A. NOGUERA, *SCHOOLS, PRISONS, AND SOCIAL IMPLICATIONS OF PUNISHMENT: RETHINKING DISCIPLINARY PRACTICES* (2003); CHARLES L. THOMPSON & SAM D. O'QUINN, III, *ELIMINATING THE BLACK-WHITE ACHIEVEMENT GAP: A SUMMARY OF RESEARCH* (2001).

argument would not want to suggest that there is something wrong with African Americans as a group or that they are different, meaning abnormal, than other students. Second, remedies and programs specifically for African American students might raise serious political concerns. One could imagine the pitting of whites against blacks if the state was perceived to go out of its way to provide an education to African Americans. Similarly, some would most likely charge that the remedy was a form of affirmative action and possibly file suit alleging race discrimination.^[72] These problems, however, are largely practical and have no effect on the legal viability of educational claims on behalf of African American students.

CONCLUSION

Rodriguez has served as a barrier to furthering education as a fundamental right for decades. However, the time for avoiding an educational agenda based on *Rodriguez* has come to an end. *Rodriguez*'s relevance has been greatly diminished in recent years. Advocates have achieved consistent and widespread success with state based educational claims. Through these cases, plaintiffs have achieved much of what was sought in *Rodriguez*. The only limitation to these state cases is the variability among them and the need to pursue multi-state individual strategies. However, these cases may ironically also be the basis for returning to federal court. These cases have also undermined most of *Rodriguez*'s rationale. Were plaintiffs to return to federal court, they most likely would be able to achieve success in several areas where *Rodriguez* failed. The import of these developments for African American students is the ability to assert claims and make race specific demands for remedies that are designed to allow African American students to achieve at levels similar to their peers. Borrowing from theories asserted on behalf of at-risk students, advocates could argue for remedies such as culturally competent classroom instruction and racially proportional discipline practices.

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^[72] See, e.g., *Parents Involved in Community Schools v. Seattle*, 127 S.Ct. 2738 (2007); *Comfort v. Lynn Sch. Cmty.*, 418 F.3d 1 (1st Cir. 2005).