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Calli Leigh Burnett

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To Whom Should the Job of Solving Inequity in School Funding Schemes Fall?

Calli Leigh Burnett¹

On November 29, 2012, the appellate process ended for plaintiffs Paul Carr and Ron Newell with an unfavorable ruling.² The Supreme Court of Illinois affirmed the appellate court's judgment, holding that the lower court had rightly dismissed the case for lack of standing, as the plaintiffs' alleged injuries were "not the direct result of the enforcement of the education funding statute" or even "fairly traceable to defendants' actions in enacting the education funding statute."³ Carr and Newell had essentially challenged the constitutionality of Illinois' education funding scheme, arguing that it led to taxpayers in property-poor districts paying a median property tax rate that was twenty-three percent higher than the rate paid by similarly situated taxpayers in property-rich districts.⁴ While the ruling wasn't in their favor, *Carr* built on a legacy of state cases as well as federal cases, namely *San Antonio Independent School District v. Rodriguez*.⁵ These cases all creatively sought to challenge state education funding formulas with the ultimate goal of requiring states to establish more equitable funding models.⁶

One such attempt at a more equitable education-funding model is currently sitting in the Illinois State Senate.⁷ Originally introduced during the 2014 legislative session, the School Funding Reform Act has been reintroduced this session as Senate Bill 1 and has been gaining steam.⁸ Due largely to the

¹ Calli Leigh Burnett is a third year Juris Doctor/Masters of Education Policy Candidate at Loyola University Chicago, degree expected May 2015. Calli Leigh Burnett may be reached through email at cburnett2@luc.edu.

² Carr v. Koch, 981 N.E.2d 326, 336 (Ill. 2012).

³ *Id.*

⁴ *Id.* at 328-29.

⁵ See generally, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); see also *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see also Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1963 (2008) (arguing that this case allowed the court to "remove . . . wealth-based barriers to equal protection opportunities," and discussing the status of the United States in the years following the case).

⁶ Sutton, *supra* note 5 at 1971.

⁷ See *Illinois' Funding System is Broken*, FUNDING ILL.'S FUTURE, <http://fundingillfuture.org/about/> (last visited Apr. 25, 2015) (advocating for SB1, the School Funding Reform Act).

⁸ See *Illinois' Funding System is Broken*, *supra* note 7 ("[O]ver 200 organizations, schools districts and school leaders have come together to support giving all the state's children a fair chance at the education they'll need to be successful.").

fact that since 2009 Illinois has “lost \$1.4 billion (inflation-adjusted) from the education budget,” Illinois currently ranks 50th for the percentage of education funding covered by the state, and ranks 49th in funding equity, meaning that for every dollar spent on a student of average means only 77 cents is spent on a low income student.⁹ Senate Bill 1 aims at increasing the amount of education funding covered by the state and thus reducing how much schools rely on local property taxes for support,¹⁰ with the ultimate goal of more fairly funding schools throughout Illinois.¹¹

In order to better understand *Carr*, the School Funding Reform Act, and similar phenomenon in the area of education funding, this article will examine the Supreme Court ruling in *Rodriguez*, along with the judicial and legislative actions that have unfolded in the 42 years since the *Rodriguez* decision. While some view the *Rodriguez* ruling as the best possible outcome in that it returned the issue to state control, others view the ruling as a weakening of the constitutional remedies available to some of our nation’s most sensitive populations.¹² These opposite perspectives will serve as a frame for examining the education spending trends seen recently within states, specifically looking at Illinois.¹³ Lastly, this article will examine how states are moving forward in closing the equity gap within their educational funding systems.

What is the legacy of *San Antonio Independent School District v. Rodriguez*?

Nearly 20 years after the Supreme Court decided *Brown v. Board of Education*, another equal-protection case came before the court.¹⁴ A group of students and their parents from San Antonio, Texas filed a suit, challenging the state’s education funding formula, which they argued depended so heavily on local property taxes that there arose huge disparities between what tax payers paid in property tax in Edgewood, an inner city district, and Alamo Heights,

⁹ *Id.*

¹⁰ *School Funding Reform Act of 2015: SB1*, ILL. SEN. ANDY MANAR, http://senatorandymanar.com/images/2015/SB_1_Briefing_Document.pdf (Apr. 2015). (“The School Funding Reform Act of 2015 is a reintroduced version of last year’s Senate Bill 16, a proposal to replace Illinois’ dated General State Aid (GSA) formula with a new, need-based system.”)

¹¹ *Illinois’ Funding System is Broken*, *supra* note 7.

¹² Sutton, *supra* note 5 at 1971; Ian Millhiser, *What Happens to A Dream Deferred? : Cleansing the Taint of San Antonio Independent School District v. Rodriguez*, 55 *Duke L.J.* 405, 407 (2005)

¹³ Bruce D. Baker et al., *Is School Funding Fair?: A National Report Card*, EDUC. LAW CTR., 22 (accessed at Jan. 2014) http://www.schoolfundingfairness.org/National_Report_Card_2014.pdf

¹⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Sutton, *supra* note 5 at 1966.

the most affluent school district in San Antonio.¹⁵ Plaintiffs argued that the Texas system operated to disadvantage a suspect class, in this case wealth, and in the alternative that it impinged on a fundamental right – the right to education.¹⁶ To many, *Rodriguez* presented the Court with the means to continue what had begun with *Brown* because it “gave the Court an opportunity to remove, or at least ameliorate, wealth-based barriers to equal educational opportunities.”¹⁷ Ultimately, the Court did not seize this opportunity, and it found neither the suspect-classification of wealth nor the fundamental right to education analysis persuasive.¹⁸

As the Court reasoned away the right to education, many felt *Rodriguez* represented a failure of the Court system, which still hinders the development of equality in education funding schemes today.¹⁹ In the aftermath, others argue that *Rodriguez* allowed States to step up and remedy the problem on their own by adopting new funding reforms, though these reforms ultimately “did little to solve the equity problem – the lingering funding gap between the richest and poorest school districts – because none of these reforms meaningfully limited the amount of revenue wealthy school districts could raise.”²⁰ As a result what followed was a rise of state-court lawsuits between 1973 and 1989, each with claims premised under guarantees found in their States’ constitutions and each one targeting “the gap in funding between rich and poor school districts and the difficulties that property-poor districts faced in closing the gap.”²¹ While most of these claims were unsuccessful, plaintiffs’ successfully litigated cases still left the courts in a struggle to identify funding solutions that could remedy or close the gap between poor and rich districts without resigning to a system of imposing a baseline and cap on spending.²²

As a result, lawsuits have continued to fill state courts, now targeting “the methodology for determining a State’s guaranteed level of funding and the amount of that funding.”²³ The general aim of this new wave of lawsuits was:

¹⁵ Sutton, *supra* note 5 at 1966-67.

¹⁶ *Rodriguez*, 411 U.S. at 18-20.

¹⁷ Sutton, *supra* note 5 at 1963.

¹⁸ *Rodriguez*, 411 U.S. at 20.

¹⁹ See Millhiser, *supra* note 12 at 413 (“This [] has been borne out of numerous instances of states willing to address pressing educational needs only when held at knife-point by an active judiciary.”).

²⁰ Sutton, *supra* note 5 at 1973.

²¹ *Id.*

²² *Id.*

²³ *Id.*

[A] statewide funding guarantee accomplished little if the guaranteed amount was too low. . . . Invoking the education clauses that appear in all state constitutions – often to the effect that the State guarantees residents access to a “thorough and efficient system of common schools” – [plaintiffs] argued that the States must provide a minimum level of funding to offer an adequate education for all students.²⁴

Plaintiffs have been significantly more successful in this second wave of lawsuits following *Rodriguez*, to the point that in 2008 forty-five suits premised on state-constitutional guarantees challenged public school funding formulas and plaintiffs won twenty-eight of those challenges.²⁵ As a result, many states’ legislators were compelled to make changes on their own to make their funding systems more equitable.²⁶ Some argue that the outpouring of cases shows that while *Rodriguez* was a loss, it still led to a swirl of innovation throughout the country which has continued to this day, and shows that state-court challenges, not just federal cases, can lead to progressive change.²⁷ Still further, some argue that had *Rodriguez* applied strict scrutiny to education, the role of local control over curriculum, extracurricular activities, and all other elements of education policy would have been usurped by the judicial system.²⁸

On the other hand, many feel that *Rodriguez* essentially left underprivileged Americans without a legitimate cause of action by which to petition the government.²⁹ In other words, “[i]f the right to seek redress is truly a fundamental constitutional right, then every American must be able to seek relief in *some* branch of government. Accordingly, if legislatures are structurally incapable of providing meaningful relief, then another branch must possess the power to act,” which in the case of *Rodriguez* would have been the judiciary.³⁰ In support of this perspective, many point to the *Rodriguez* dissent in which Justice Marshall drew attention to the futility of waiting for a legislative solution: “[T]his ‘lack of hope’ has been borne out by numerous instances of states willing to address pressing educational needs only when held at knife-point by

²⁴ *Id.* at 1973-74.

²⁵ Sutton, *supra* note 5 at 1974.

²⁶ See *id.* (“Plaintiffs have won twenty-eight of these challenges and in the process compelled legislatures to adopt a host of additional reforms, many of which increased funding and closed equity gaps.”)

²⁷ *Id.* at 1977-78.

²⁸ *Id.* at 1980.

²⁹ See Millhisser, *supra* note 12 at 408 (“[T]he Court since *Rodriguez* has denied underprivileged Americans their most basic right to seek redress.”).

³⁰ *Id.*

an active judiciary.”³¹ Critics also point to the plethora of state-constitution challenges as demonstrative of the “massive resistance that state legislatures are willing to exert when faced with a constitutional mandate to provide an adequate education.”³²

Relying on these two diverse interpretations surrounding the aftermath of *Rodriguez*, it is important to examine the data regarding reforms that various states have instituted to fund education equitably in the recent years.

Has State Funding of Education Become More Equitable?

In order to examine states’ proposed changes in education funding, it is necessary to rely on a data set collected and published by the Education Law Center (hereinafter referred to as “Report Card”).³³ The Education Law Center chose to focus on fairness due to two elements of the U.S. education system: decentralization and concentrated poverty.³⁴ Decentralization is the hallmark of the U.S. school system, as funds are distributed in varying methods between different states, districts, and schools. Each of the 50 states as well as the District of Columbia operates their own systems of districts, which are further segregated from one another.³⁵ On the other hand, increasing levels of child poverty is a phenomenon occurring in all states, though “these students are increasingly concentrated in schools with other poor children.”³⁶ Considering these two elements are so inherent within the American education system, it makes sense to consider funding data within the concept of “fairness.”³⁷

In the Report Card, “fair” school funding is defined as a “state finance system that ensures equal educational opportunity by providing a sufficient level of funding distributed to districts within the state to account for additional needs generated by student poverty.”³⁸ The Report Card is built on the principle that the level of state funding should increase for districts with larger percentages of students in poverty.³⁹ The Report Card evaluates states’ systems as “progressive” or “regressive.”⁴⁰ Under the Report Card’s definition, systems

³¹ *Id.* at 413.

³² Millhisser, *supra* note 12 at 414

³³ Baker et al., *supra* note 13.

³⁴ *Id.* at 2.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Baker et al., *supra* note 13 at 5.

³⁹ *See id.* (“[S]tate finance systems should provide more funding to districts serving larger shares of students in poverty.”).

⁴⁰ *Id.*

that allocate more funds to districts with higher numbers of students in poverty are labeled as “progressive.”⁴¹ Alternatively, the Report Card labels systems that allocate less to those districts as “regressive.”⁴² Finally, the Report Card labels systems that allocate relatively the same amount of funding across districts regardless of poverty levels as “flat.”⁴³ The Report Card relies on data collected between 2007-2011; though the impact of the Great Recession is clearly evident in the data, there is still much to learn from how States cope with strained income streams when planning and paying for public education.⁴⁴

The Report Card relies on four measures to determine the fairness of education funding occurring in each State, (1) funding level, (2) funding distribution, (3) effort, and (4) coverage.⁴⁵ Looking specifically at Illinois, in the area of funding level Illinois ranked sixteenth overall because between 2007-2011 the amount Illinois spent per child in general increased by \$2541.⁴⁶ On the measure of funding distribution, Illinois was found to be regressive, as under the current funding system a district with thirty percent poverty is expected to receive more than five percent less than a district with no poverty.⁴⁷ On the third element, effort, which essentially considers the state’s effort to fund its public schools based on the percentage of the state’s Gross Domestic Product allocated to education, Illinois earned a grade of a B for investing 3.8% of its GDP on education.⁴⁸ Lastly, on the measure of coverage, which examines “the extent to which school-aged children attend public schools and the degree to which there is economic disparity between those within and outside of the public education system,” Illinois ranked thirty-fifth with a one hundred and sixty-three percent disparity.⁴⁹

Considering all four measures, this left Illinois ranked as thirty-fifth overall on the Report Card.⁵⁰ Overall the Report Card found that, like Illinois, the

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See id.* at 5, 30. (“Not only did most states see a declining financial base from which to fund schools, most states have actually reduced the share that is spent on education. Funding levels are stagnant or down, and many states have shifted toward more regressive, or less progressive, distribution of funds to districts.”).

⁴⁵ *Id.* at 6-7.

⁴⁶ Baker et al., *supra* note 13 at 12.

⁴⁷ *Id.* at 14.

⁴⁸ *Id.* at 25-26.

⁴⁹ *Id.* at 28-29.

⁵⁰ *Id.* at 31.

majority of States' funding systems were characterized by regressive or flat distribution patterns, meaning districts with higher numbers of students in poverty received no additional funding, and sometimes less, than their high-income counterparts.⁵¹ This data would seem to support the latter understanding of *Rodriguez* that minus a Court order, states will fail to adopt more equitable funding measures on their own accord. However, it is important to note that many states had improved between 2007- 2011, which may be an indication that they are headed in a more equitable funding direction.⁵² Similarly, the Illinois legislature could soon vote into law the School Funding Reform Act on its own accord.⁵³ This along with the data of the some 27 states that improved in funding since 2007 may support the former argument that while *Rodriguez* was a loss, it succeeded in bringing the debate over funding disparities front and center, so states could craft their own remedies. The Report Card illustrates this is an opportunity many states have seized, though there is still much room for improvement.⁵⁴

What is next in remedying the equity problem in education funding?

While the Supreme Court declined to take control in finding a solution to the equality gap present in states' education funding schemes forty-two years ago in *Rodriguez*,⁵⁵ today the federal government might be more inclined to get involved. For example, the federal government acted in 2009 through the American Recovery and Reinvestment Act to allocate \$100 billion in stimulus funds to public schools in order to stay teacher layoffs and cuts to educational materials and programs.⁵⁶ This increased federal involvement in education doesn't just involve funding, with measures like No Child Left Behind and the Race to the Top; in addition, the federal government appears to be stepping more assertively into the education policy arena.⁵⁷ At the same time, we have seen broader movements of collaboration across states to create initiatives such as Common Core, another indicator that we may be seeing a convergence of

⁵¹ See *id.* at 30. (tracing current trends in state education funding schemes.).

⁵² See *id.* (charting how states performed according to the four fairness indicators.).

⁵³ See S.B. 0001, 98th Gen. Assemb. Reg. Sess. (Ill. 2015), available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1&GAID=12&DocTypeID=SB&SessionID=85&GA=98> (for status of the bill and legislative history.).

⁵⁴ Baker et al., *supra* note 13 at 4.

⁵⁵ Sutton, *supra* note 5 at 1971.

⁵⁶ Baker et al., *supra* note 13 at 1.

⁵⁷ *Id.* at 43.

education policy in the United States.⁵⁸ If so, it is important to consider whether such a centralization of education policy will lead to better schools or simply similar schools?⁵⁹ In this case Justices, legislators, and policy experts have all lamented the complexities involved in finding a remedy for the equity gaps created by school funding schemes, which leads me to suggest the old adage: two heads are better than one.

⁵⁸ See Ill. Learning Standards, Ill. State Bd. of Educ. (Ill. 2015), *available at* <http://www.isbe.net/ils/> (for history and overview of how Illinois has instituted a uniform curriculum in its public schools.).

⁵⁹ Sutton, *supra* note 5 at 1984.