

UVA LAW | Fundamental Questions for Our Democracy Regarding a Federal Right to Education

RISA GOLUBOFF: Hi, everyone. I'm so happy to see you all here, and I'm so glad that you're able to be with us here today. I am Risa Goluboff. I'm the Dean of the University of Virginia School of Law. And I am here to welcome you and make a couple of introductions as we start.

We are here today to talk about an incredibly important topic, whether the United States should recognize a federal right to education and what that right would look like if it were to do so. In *San Antonio Independent School District versus Rodriguez* in 1973, the Supreme Court rejected the idea of such a federal right. But as is so often the case, the courts was not the last word, and this has continued to be a discussion over the last several decades, and it's continued to spur a lot of conversation and a new book, which I'll come back to in a second.

And obviously, there have been incredible disparities in education across class, across race, across geography in the intervening time. And the COVID-19 pandemic has even highlighted those disparities even more. So this could not be a more timely or important book. I'm so glad that we get to celebrate it today and we get to discuss today where do we go from here and try to bridge these enormous disparities in educational opportunities. So I'm really glad that we're able to do This And so excited about the panel, the two panels that you're about to see here today.

One of the things about doing scholarship even when it's with a group is it can be a lonely undertaking. And we spend very long periods of time writing these things and editing them and putting them out into the world. And especially in this time of COVID, I think it's so important for us to come together and say, look at this book, and look at what it says, and look at how people are thinking about and all these contributors, and let's have a real conversation about it now that it's launched its life in the world.

And even in communities like ours at UVA that I think are really robust intellectual communities, we need to be very thoughtful about taking moments like this to celebrate the work of our faculty. So that's what we're doing today, and I'm really glad you're able to be here to join us for it.

I am doing just three introductions, and then I will hand this over to Kimberly to take the reins. So I have the immense honor of introducing the star of today's show, UVA law professor Kimberly Jenkins Robinson. And she has put together just an

esteemed set of panelists about whom she'll say more in a minute. And they are going to all be considering the important and challenging questions raised in her book, *A Federal Right to Education, Fundamental Questions for our Democracy*.

Kimberly is the Elizabeth D. and Richard A. Merrill professor of law here at UVA. She is also a professor of education at the UVA School of Education and Human Development and a professor of law Education and Public Policy at the Frank Batten School of Leadership and Public Policy here at UVA. She is a national expert on educational equity, equal educational opportunity, civil rights, and the federal role in education. She's also the author with Charles Ogletree of *The Enduring Legacy of Rodriguez, Creating New Pathways to Equal Educational Opportunity*. She's also served in the general counsel's office of the US Department of Education and is a Senior Fellow at the Learning Policy Institute.

Today's two panels will be moderated by two luminaries, luminaries in any field, but luminaries especially in the fields of law and education, Martha Minow from Harvard, and UVA President James Ryan. Martha Minow is the 300th anniversary university professor at Harvard Law School. She is also the former dean at Harvard Law School from 2009 to 2017, and she has taught there since 1981.

I think it's fair, I feel like the word expert means you can only be expert in a small number of things, but I think it's fair to say about Martha that she is an expert in many, many things. Human rights advocacy for members of racial and religious minorities and for women, children, and persons with disabilities, education, obviously, family law. She writes and teaches as well about digital communications, democracy, privatization, military justice, and ethnic and religious conflict. Among her many books, one that is most relevant for today is *In Brown's Wake, Legacies of America's Educational Landmark* from 2010.

Jim Ryan is the ninth president of the University of Virginia. He is also a member of the law school faculty and the faculty at the education school here at UVA. He is the former dean of the Harvard Graduate School of Education and the Charles William Elliott professor of education from 2013 to 2018.

He is an expert in law and education as well and especially on how law structures, educational opportunity, including topics such as school desegregation, school

finance, school choice, standards and testing, pre-K, and the intersection of special education and neuroscience. He is the author, among other books, of *Five Miles Away, A World Apart*. And he has also been a member of the law school faculty. He was for many years and a former colleague. So it's great to have him here today.

So before I hand things over to Kimberly, let me just thank, as always, all those here at UCLA who have made today possible, most especially Rebecca Klaff and also to the members of the events, the technology, the communications, and the dean's office teams, and especially to Kimberly for making this day happen and for making this day important. I'm so looking forward to hearing what everyone has to say about these really important topics at this really important time. Kimberly, to you.

**KIMBERLY
JENKINS
ROBINSON:**

Thanks very much, Risa. So I am so excited to be here and to have so many distinguished panelists join us. So I'm going to briefly introduce them, because our time together is relatively brief. But I just want to make sure the audience understands, all of you understand, the importance of this topic.

So as Dean Goluboff explained, we are in a moment where the Supreme Court has closed the courthouse door to a federal right to education. However, that litigation merely shifted into the states to address widespread disparities in educational opportunity and in outcomes for children. It's important to understand just how broad the scope of those are.

So for example, if you look at data from the Education Trust, what you'll see is that children who live in districts of concentrated poverty, when you adjust for their additional needs because they live in poverty, you see that they get about \$2,000 less per pupil. If you do not adjust for their needs, it's about 1,000 per pupil. But either way, huge disadvantages for those children who research is very clear that they need additional resources to compete on a level playing field with their peers.

Similarly, research from EdBuild finds that if you look at the funding for districts that have high concentrations of children of color, what you see is they get \$23 billion less than districts that do not have high concentrations of poverty. So these massive funding gaps result in impactful disparities in educational opportunity and achievement. And this book is meant to be a look at what do we do about that.

We've had more than four decades of state school funding litigation. And that

litigation has made important strides, but there is still a long way to go. And the question is, can we move in the direction of a federal rights education? Should we move in that direction? And if so, how might we do that and what should it guarantee?

So I'm very excited to have all of you here today and to introduce these very distinguished panelists. I am going to go ahead and introduce both panels at the outset so it flows smoothly into the second one when the first one is done.

So on the first, panel we have Kristine Bowman, who is the Associate Dean for Academic and Student Affairs at the College of Education, Michigan State University, and a professor of law at Michigan State University College of Law. We also have Peggy Cooper Davis, who is the John S. R. Shad professor of lawyering ethics as well as the director of the Experiential Learning Lab at New York University School of Law.

In addition, we are welcoming Jason Nance, who is a professor of law and Associate Dean for Academic and Faculty Affairs as well as the Associate Director for Education Law and Policy, the Center on Children and Families at the University of Florida, Levin College of Law. And then finally, we have Eloise Pasachoff, who is a professor of law and the Agnes N. Williams research professor as well as Associate Dean for Careers at Georgetown University Law Center.

For our second panel that will be moderated by Martha Minow, we have Derek Black who's professor of law as well as the Ernest F. Hollings Chair on Constitutional Law at the University of South Carolina School of Law. We also have Carmel Martin. She's senior policy advisor for the Biden for President Campaign working on domestic policy. We have Rachel Moran, who's distinguished professor of law, University of California Irvine School of Law. And we have Joshua Weishart, professor of law at the West Virginia University College of Law.

So as you can see from those many titles that we have a very distinguished panel, and I am thankful for all of you to join us. And I'm going to hand this over to Jim.

JAMES RYAN: Thank you, Kimberly, and congratulations on the publication of the book, and congratulations to your fellow contributors as well. Kimberly and I go back quite a ways. I have been a fan of her work for a very long time, and I am absolutely thrilled

that she is now at the University of Virginia. I'm also really delighted to see so many old friends on this panel. This is a welcome opportunity for me to visit my prior life. So I'm thrilled to be here and honored to be moderating the panel.

So the way it's going to work is straightforward. Each of the first four panelists will speak for eight minutes, and then we will open it up to questions. And they will speak in alphabetical order, starting with Professor Bowman, then going to Professor Davis, Professor Nance, and then lastly Professor Pasachoff. With that, I will turn it over to Professor Bowman. If you do have a question, feel free to type it into the question and answer box that you can see at the bottom of your screen. Thanks and thanks for being here.

**KRISTINE
BOWMAN:**

Good afternoon. I'm so delighted to be here with all of you today and appreciate all of Kimberly's work and leadership with this book. It's an honor, as always, to be in conversation with you and all of these wonderful fellow panelists and moderators who we have today.

So this panel starts out by asking why we might need a federal right to education, among other things. Now, this is important, because often when we start talking about a federal right to education, we ask what it could look like. And that is also a very important and interesting question.

But we miss a few things if we jump past this first step. Because if we're thinking about what a right to education could look like, it helps to have a really good understanding of what the problem is, so to speak. Otherwise, we have a solution that's misaligned with a problem or we have a solution in search of a problem.

So with that focus, the idea that I would like to talk about here is thinking a bit more about what that problem is, what the gap is that exists. Because oftentimes when we start thinking or talking about the idea of a federal right to education, one of the first responses is, well, the states have this covered, because every state has a constitutional right to education at the state level. And while that may be true, there's also the assumption that that right provides substantive protection of educational opportunity, and that part is not always the case.

Now, in the past several years, I've learned a great deal about Michigan, which has

been my home state now for over a decade. And in my chapter in this book, I really dig deep into what's going on in Michigan and think about it as a case study. It's a case study where we see at the state level weak or unenforceable education rights. We also see limited fiscal capacity. We have limited political will to have a different sort of approach. But it's not only the existence of all of these things independently.

It's how they work together that creates a particular problem. Because these things function together in a way that undermines educational opportunity. And in a way, that means that children do not have an effective avenue for relief when their federal, or excuse me, when their basic right to education that we might be talking about today, they don't have an avenue for relief when they're not getting those very basic standards met.

And so the first part here is this idea that, well, maybe the right to education at a state level is not what we think it is. Again, 50 states have this language. 44 states have had litigation, school funding litigation, that really focuses on these provisions. And that's when a lot of variation starts. Because in some cases where the litigation occurs, there is a positive outcome for plaintiffs. But in other cases, the judiciary is not an option. The state courts say no, this isn't what we do.

And that's been the case in Michigan. We had some school finance litigation in the early 1970s. And actually, it's quite an interesting story. In December of 1972, our state Supreme Court said, all right, it looks like we have some substantive rights here. But you know what? Elections also occurred, and so as soon as a new majority was sworn in, it granted rehearing and ended up dismissing that case. Since then, the courts in Michigan have not been interested in thinking about systemic educational reform, and so the right to education in Michigan really is an access right more than anything else.

But you know what? Michigan is not unique. It's not the only state where the courts have said either because of justiciability issues or separation of power issues, we don't want to touch education reform. Florida, Illinois, Louisiana, Pennsylvania, Rhode Island, they're all in the same boat.

So first in Michigan, again, is this problem of judicial abdication. Second, we have the policy web. And in each state, there is a policy web where we have all of these

different laws that enact policies coming together and interacting with one another. And we often think mainly about the school funding statute. And that's an important part of the dynamic here, but it's not the only thing going on. Because again, we're going to start by thinking about the school finance system, how much money schools and students get per capita, how much equalization funding there is. But in Michigan and in other states, you can't stop or you can't stop there.

So what else do we have on the books in Michigan that impacts these things? Well, we have pretty permissive school choice laws, some of the most permissive in the country. And because our school finance system is fairly centralized, when a child leaves a district, that means that a fair amount of money follows that student. We have underfunded pensions. Certainly not the only state with that. We have underfunded pensions, and that underfunding is growing. Mandatory contributions that school districts must make have more than doubled in the recent decade.

And where does that money come from? It comes effectively, largely, out of the per capita allocation and so reduces the money that reaches the classroom. We also have capital improvements. In 15 states, the local school District has to fund those entirely. Michigan is one of those states. And so the districts that are best able to bear this are wealthy districts. The districts least able to bear this are districts like Detroit.

So we have these web of state policies, and they come together and they result in things that we call deferred maintenance. But what that really means is buildings where windows don't open in the summer, where textbooks are decades old, and where the heat might not work in the winter. Because of this, we have resulting significant educational inequalities. The fiscal crisis that we've seen in many Michigan school districts is the natural result of these policies interacting. And where fiscal crisis occurs, academic innovation does not.

So the last thing to mention here is that we have the state courts. And I mentioned previously that we had some school finance litigation in Michigan in the 1970s, but we also had one last run at the state courts recently. Many of you are familiar with the *Gary B versus Whitmer* case that was in the federal courts recently that focused on the federal right to literacy. Well, before that, the predecessor was *LM versus State*. It was largely the same claims in state court. But once again, the state court

said, we're not interested in engaging those issues. So we entered federal court, and a roller coaster of a case. Now, there's not any binding precedent, but we have certainly an outcome that moves the conversation forward.

So with that, I will conclude. And my last comment is that while state constitutional provisions might create a floor, it's an uneven floor, and parts of it are rotten. Both of these things are fundamentally unfair to children. And so to address this problem, we need some sort of federal floor. Thank you.

JAMES RYAN: Thank you, Professor Bowman. Now over to you, Professor Davis.

PEGGY COOPER Hello. I'm so glad that Professor Bowman mentioned *Gary B*. It's perhaps a useful

DAVIS: way to begin what I have to say. But first I want to say what a pleasure it is to be working in this different way with Kimberly and to congratulate her.

But *Gary B* was quite a moving thing for my students, because I teach a course that looks at the unenumerated rights that have not been recognized as fundamental in the United States but that are recognized generally as human rights. And of course, that includes the right to education. And so when the wonderful decision in *Gary B* came down, my students were thrilled, because I know they thought, we just are playing games here. None of this could ever really happen.

But it did. A court was persuaded that not only is there a right to education, which I imagine anybody would concede, but that that right is fundamental, such that you have to give very close and careful scrutiny to anything that interferes with that right.

And we're at an interesting and-- well, I'll leave it at interesting moment in our history. The character of the Supreme Court has changed so that right now it looks a bit more like the en banc panel that considered *Gary B* and decided not to let it stand as a precedent.

But I think there are stories about this country that have to live. And they have to live no matter who is sitting on what court. And that's what I've devoted much of my work to. I've devoted much of my work to what I call neglected stories. And I want to tell you what I mean by neglected stories by comparing the story that was told in *Brown v. Board of Education* about education in the United States and the story that

I would like to see told, the story that I think would lead us to acknowledge that education is a fundamental right, a right without which we cannot have a democratic republic.

Now, the story that the Brown court told was a story where there was a lot of private education. The court didn't talk very much about poor children who were not being educated in any formal way at all. And the court talked about the fact that education was prohibited at the time the 14th Amendment was being conceived in many states. And that to teach an African American person to read or write was at times in those states criminal, and there were severe punishments for slaves or enslaved people who attempted to learn to read or write and for those who attempted to teach them.

I want to tell a different story about education in the United States. And it's a story that begins with what I call caste based educational deprivation. And I'm talking here about the limited education opportunities that indentured servants had, and I'm talking about the shift to a system of slavery, in which, as I've just explained, being educated was something that could be punished and violently so.

Then, of course, I want to move to the Civil War and Reconstruction, and I want to argue that this was a time when the country revived ideas that were really implicit always in our founding documents, but trying to make them more meaningful and more real, such that people became citizens, all people became citizens, all people born or naturalized in the country, and entitled to certain privileges and immunities, to certain rights.

And of course, my argument is that one of those rights is education. The sense at that time that a right to education was central to the reconstructed government that was being created after the Civil War was ever present. And I want to revive that sense for all of you and hopefully for courts that will look at the fundamental rights question.

The anxiety that the country had felt over rule that was not localized, over rule that was distant, foreign, and monarchical had led to a devotion to local control that had been perverted into a defense of the local right to maintain a caste system. And so I'm arguing that the proper interpretation of the Reconstruction amendments is that

those amendments not only brought citizenship but brought with citizenship an entitlement to the capacity to participate as free and active citizens.

Now, this is a story that begins with rebellion. It begins with the rebellion of the slaves, enslaved people, that is, who learned to read and write and to take advantage of that capacity in order to liberate themselves at a much higher rate than has ever been understood. The official estimate is that 5% of people held in slavery before the Civil War had learned to read, but that must be low, because people were frightened to admit on pain of death sometimes that they had learned to read or taught others to read.

But what you saw once African American people began to go to Civil War battlefields was an incredible quest for education. You saw Black patients on the wards of Union wounded hospitals teaching one another to read. You saw freed people in liberated territory where, according to one report, there was a school of 40 or 50 students being taught by a person we only know as Rosanna, a colored girl.

A school of 89 students taught by a person we only know as Uncle Jack, a colored man. A school of 39 taught by Uncle Tom, a colored man. He was so infirm that he taught from his bed. And a school of 60 students taught by William McCutcheon, a colored man.

And of course, there were people better known, like Charlotte Forten, who volunteered from the North to teach in schools in the post Civil War period and who were conscious of their obligation to inspire freed people to appreciate the fullness of citizenship, which was in the process of being guaranteed to them.

We also saw Reconstruction governments before they were overwhelmed by terrorism establishing the right to education as a linchpin of democracy. And I don't want to take too much time, but I do want to say that the Reconstruction governments that survived for enough years did incredible work and showed incredible devotion to the creation of education system.

So if you look at South Carolina, a largely African American legislature, disparagingly referred to by some as the Carolina gorillas, sets up a universal system of education, makes that system mandatory. A Black delegate to that convention insisted that education be compulsory. He had served as a chaplain in

the Union Army. And during that service, he had encouraged education among Black troops, reporting that in the 26 US colored troops with which he served, 200 men were learning to read and 70 were learning to write.

Schooling was, he said, a matter of justice which is due to a people, and to compel it was no more anti-republican than to compel their military service. This gentleman was assassinated reportedly by Ku Klux Klan members just months after the South Carolina Constitutional Convention that enacted the provisions that would have made free and mandatory public education, a reality in South Carolina.

I want to close by saying that there were parallel sentiments in the United States Congress. There were people who understood that you could not have a republican form of government without an educated people. And that when you put all of this together and you begin to understand Reconstruction as a revolutionary time that was sadly interrupted but hopefully not ended by the period of redemption in the South.

Then you see that the need to understand education as a fundamental basic human right is something that this country has been far too slow to acknowledge and should acknowledge as soon as we can find courts that will not only hear the wonderful arguments that were made in *Gary B* but courts that will sustain the judgments of those who have heard those arguments and guarantee that children in Michigan and all across the country are not forced to endure education that fits them for nothing.

JAMES RYAN: Thank you very much, Professor Davis. We now turn it over to Professor Nance.

JASON NANCE: Thank you. Good afternoon, everyone. It's so good to be here today. I want to thank Kimberly for the opportunity to contribute to this book and participate in this discussion today. It's an exciting opportunity.

So the purpose of my chapter was to persuade readers of the need for a stronger federal response to address the profound inequalities that exist in our public education system. And these inequalities exist in many forms, but particularly with respect to race and poverty. I won't go into details of these inequalities, because so many of you are familiar with them, but they exist with respect to both inputs and outputs. Kimberly alluded to these in her introductory remarks.

And what I do in my chapters, I offer five rationales designed to help readers see that it's in our nation's best long term interest to consider a stronger federal response to address education inequalities. I also talked about some of the shortcomings related to current federal responses. And I don't think that any of these rationales are necessarily groundbreaking, but together I think that they provide an overall rationale for why our nation needs to bolster our efforts and consider a different approach to address these inequalities, which I hope might appeal to various constituencies.

And so the first rationale is an economic rationale. Historically, the US education system has helped create an educated workforce to sustain a high level of economic growth. But education inequalities threaten to stand in the way of continued growth and our ability to compete internationally. Our school age population has and will become increasingly more racially and ethnically diverse. And if we fail to educate and prepare a sizable portion of our youth to enter the workforce, we will lose a valuable economic growth opportunity. And of course, our workers with more education earn significantly more over their lifetimes, providing significantly more tax revenue to our country.

The second is a criminal justice rationale. And all these rationales in some ways link back to an economic rationale. There's a strong association between weak education and increased levels of involvement in the criminal justice system and the costs that crime impose on the federal government's society. Researchers have found that higher levels of education are associated with reduced criminal activity, and the estimated effects of education, quote, "cannot easily be explained away by unobserved characteristics of criminals or unobserved state policies that affect both crime and schooling." End quote.

There's also a connection between inadequate resources, student misbehavior, and increased student involvement in the criminal justice system. Educators working in schools with high concentrations of low income and minority students often teach large groups of students with acute needs, but many times they lack the experience and resources necessary to meet those needs. Instead they often resort to extreme forms of discipline, such as suspensions, expulsions, and referring students to law

enforcement to handle routine student behavior problems that should be more properly addressed in-house.

Obviously, the cost we spend on the criminal justice system are enormous, amounting to around \$270 billion a year. Clive Belfield and Henry Levin estimate that each high school graduate saves our nation an average of approximately \$70,000 in criminal justice expenses over the individual's lifetime, and each college graduate saves our nation an estimate of around \$175,000 in criminal justice expenses. Lance Lochner and Enrico Moretti estimate that even a 1% increase in graduation rates of all men between the ages of 20 and 60 years old would amount to an annual savings of around \$1.4 billion in costs from victims of crime in society at large or a 14% to 20% return on investment in our education system.

The third rationale is health. Individuals with higher education levels on average have better health and live longer. High school dropouts are more likely to die prematurely from cardiovascular disease, cancer, infections, injury, lung disease, and diabetes. They're also more likely to suffer from disabilities or illnesses. Better educated individuals are likely to obtain better jobs that provide better health insurance.

They can navigate the health system better. They're more likely to avoid risky behavior, eat more healthfully, exercise more, and engage in more health promoting social activities. Belfield and Levin also estimate that each high school graduate saves our nation on average \$50,300 in public health expenses over that person's lifetime.

The fourth rationale is a democratic rationale. A strong education system is essential to remain an effective democratic government. Education fosters a commitment to and a capacity for deliberating issues. Serving on a jury, exercising the right to vote, serving in a public office, and serving in the armed forces. Empirical studies confirm the positive relationship that exists between better educated citizens and political participation, including the increased likelihood to vote, donate to a political campaign, or belong to a civic organization. Of course, the growing wealth divide also determine who does and who does not wield political influence.

And the fifth rationale is a fairness rationale. That a child's access to a high quality education is determined by factors completely outside of that child's control, such as where the child lives or the income level of the child's parents, is strikingly inequitable and nonsensical. Furthermore, one should consider deeply the harmful messages that inequalities in education send to our children.

Katherine Layman, former Assistant Secretary for Civil Rights at the US Department of Education, observed that many minority and low incomes students' self perceptions today are strikingly similar to those held by students involved in the doll test more than 70 years ago. She illustrated this point by describing an experience she had when she was litigating the case about resource equity in schools. Her team hired several experts to conduct focus group discussions among minority students in high poverty schools to better understand the students' experiences.

Layman was devastated by what she witnessed as she watched and listened behind a one way looking glass. The experts displayed photos of well resourced schools and classrooms to these students and asked them to share their thoughts about what they saw. The students consistently responded with comments such as, oh, those schools must be for white kids. They wouldn't give those materials to us.

Students who participated in focus group conducted by Layman concluded that many of our minority students in high poverty schools are hearing our nation's message, quote, "loud and clear." That we don't believe in them, that we do not value their civic engagement, and there's no point in participating productively in their schools and communities. She concludes that this is exactly the wrong message that we should be sending our children. In fact, it is exactly contrary to our vision of what public education should stand for and the opportunities it should afford to all children. And I completely agree with her. Thank you.

JAMES RYAN: Thanks, Professor Nance. And now to Professor Pasachoff.

ELOISE PASACHOFF: Thanks, Jim. And thanks to everybody for being here for this wonderful event. I'm so pleased to join this amazing panel. But I think my role on this panel, as it is in the book more generally, is to be something of a name there. Because while I share the goal of an excellent and equitable education for all students and while I agree that the current state of American education does not yet provide this, I don't think that

a federal right to education is the way to pursue this goal. And I have three reasons for thinking this.

So the first reason is that everything we might want from a constitutional amendment we could already get from regular spending clause legislation. And that we don't have this is because of political limitations, not doctrinal limitations that an education amendment would cure. And these are the very same political limitations that would keep an education amendment from being ratified in the first place.

But even if it were to become part of the written Constitution, it wouldn't actually solve the problems we would want it to, because it wouldn't remove Congress's incentives to take federalism concerns seriously, given the host of other cooperative spending programs we rely on and that also benefit kids. Because it wouldn't resolve contested questions about what the substance of the right should look like, how strenuous it should be, and there are hugely different visions for this across America. And because it wouldn't remove budget constraints and capacity limitations across all levels of government.

OK, so that's my thinking about an amendment to the Constitution. What about judicial interpretation of the existing Constitution? So this brings me to my second point. Relying on courts to interpret the existing Constitution is no more likely to bring about the change that all of us on this panel would like to see. Even assuming that the court could get past federalism concerns or definitional hurdles about what the right should look like, any affirmative right to education would still require implementation by the very institutions that are struggling today. And I don't think that the current institutions are primarily lacking a command. I think they're lacking capacity.

I also think that for separation of power concerns, the Court is not likely to order any influx of federal dollars at the state level either. So think, for example, of how underfunded the right to counsel under *Gideon* is. And any right that the court were to declare would, I think, likely be weakened by courts over time, as happened with *Brown versus Board of Education*.

And people sometimes talk about the moral signaling effect of a declaration of a

constitutional right to education. I just don't think it's true that courts end substantive debates about morality when they declare constitutional rights, especially contested constitutional rights. So think about *Roe versus Wade*, just to take one example. If a court were to declare a federal constitutional right to education, I think people inclined to find the declaration of moral value would find it of moral value, and people not inclined to find it of moral value wouldn't. And I think this would ultimately weaken any right to education that the court might declare.

So my last reason for thinking that pursuing a federal constitutional right to education is not worth the candle has to do with broader downsides. So let's imagine that the movement succeeds in securing the right. For the reasons I've just said, I don't think it's likely to bring about real change on the ground. And I worry that that could then lead to disillusionment with government more generally in a way that I think would be destructive to our national politics.

Let's now imagine a counterfactual, which I actually think is more likely, that the movement doesn't succeed in securing the right. It may well have burned bridges and missed opportunities to reach agreement on other kinds of more readily achievable change. I also especially worry about any kind of constitutional convention that in principle might ratify an education amendment in light of deep divides in our country and my concern that reopening the constitution would cause more harm in other areas than good. So that's my third reason for not wanting to pursue a constitutional right to education.

But none of this is to say that we should sit down and accept the current status of American education. I just think that instead of what I take to be second order arguments about what the Constitution does say or should say about education, we should instead be focusing on first order debates about the substantive merits of specific education policies and practices and budgets at all levels of government, and we should be educating our students to make those kinds of arguments and do that kind of work outside the court. Basically, we should keep doing what we are doing, even in the absence of a constitutional right to education. I know it's a hard path and it's a frustrating path, but I think it's the path with the most promise of success.

JAMES RYAN: Great. Thanks, Professor Pasachoff. We're going to turn to the question and answer portion. And I think Kimberly has granted us permission to go a little bit over three, but not too much. I will kick this off with a question that picks up where Eloise left off, which is to those of you on the panel who do support a federal right to education, what reason should we have to expect that federal courts would be more effective at expanding educational opportunities or closing gaps than state courts have been?

KRISTINE BOWMAN: So I can begin the conversation here. And I think when we talk about something as theoretically big as a right to education, it's often helpful to try and have some concreteness to that discussion. And one way that I like to think about making it more concrete is to think about what sort of level we're talking about. And when I think about a right to education, I'm thinking of something that really fills in the gaps and gets and provides opportunities, ensures opportunities for children in some of our most challenged school districts around the country.

I'm not thinking about my school district where my kid goes to public school that is well resourced and pretty well-run and has an opportunity to provide a really good education. I think there are a lot of districts that for various reasons are not able to. And so from my perspective, really thinking about where do we need to be thinking - where are the huge gaps? Where are situations like identified in the *Gary B versus Snyder* case where we had students that had single digit literacy rates?

Where are those type of things happening around the country and where are there, as we lawyers think of it sometimes, where are there the most egregious facts? Because when I think about a federal right to education, I'm not thinking of it for the schools that are doing OK and the kids that are doing OK. I'm thinking of it for the districts and the children that are really at that far end of the spectrum.

And so to answer your question directly, Jim, what makes me optimistic that courts would be effective in doing this and more effective than state courts? Certainly, part of it is hope and knowing that in some states that these kids in these districts do not have other options, and I want there to be an avenue for relief somewhere. But additionally, it's also thinking about ways that federal courts can think differently about these issues.

And especially if we're really targeting a smaller group of districts and a smaller group of students, to think about what type of relief might be necessary. Because if we're not thinking about what applies across the whole state, if we're thinking in a more focused way, I'm hopeful that a more focused remedy would be available and effective.

PEGGY COOPER I'd just like to thank you for that and to add one thing. This state federal dichotomy,

DAVIS: this state versus federal mindset, I think is unfortunate. And so I look forward to hearing from Kimberly, because I think she has written very effectively about the value of a cooperative system. And I would love to pull away from the old system in which there was a Confederate story of states' rights and there was a competing story of national rights to move to a cooperative story.

JASON NANCE: I'll just add one thing. I'm also looking forward to Kimberly's answer on this. I think she's going to provide a very effective response. But just in addition to what's being said, I think to some extent as well, it also may provide some political cover. And so if there is a movement to continue to address some of these inequalities that we have discussed and there is now a federal right that can provide some who effectively could not do so before the political will and perhaps the resources to be able to do things differently.

JAMES RYAN: So Eloise, I'll go back to you. If I understand Kristy right, she's arguing in a sense for at the very least a right to a minimally adequate education. And it's been a while since I've been able to read case law. But if I remember correctly, the court has actually left that question open. And so if that were the strategy, do you still have objections to it?

ELOISE
PASACHOFF: So I just don't think we should put-- it's less that I have objections to it and just more than I think our expectations should be extremely small. So if such a case were to be successful, and you're right, the court has left that open, I think it would be such a low floor, that to go back to Kristy's metaphor, I mean, it might be one little patch.

But my basic concerns about over time judicial weakening, about the need for implementation by the very same institutions that are struggling today, I just don't think it would have that great an effect on the ground. And so one of the questions is sort of like a cost benefit strategic movement focused one. Is that really where

you want to put all of the energy or a significant amount of the energy if what we're talking about is kind of not raising the bar all that much?

And to go back to Professor Davis's point, I'm deeply in favor of the cooperative federalism regime that I think is much more just a statutory one. It's just much more a spending clause one. It's much more let's kind of build the right programs out. And we don't necessarily need to frame it as a right. It's more of a program. It's like the Affordable Care Act was not about a right to health care except for at some very sort of highfalutin level. It's a deeply complex regulatory program, and that's what I think we need in education, not just the statement that there shall be a right.

JAMES RYAN: All right. Thanks to all of you. So now I will turn to questions from the audience. And again, if you do have a question, feel free to type it into the Q&A box. We'll see how many we can get through in the next nine minutes or so.

The first one is, if the US were to recognize a federal right to education, could we adequately ensure that no child is left without access to the right? Which I gather is a question about uneven enforcement.

ELOISE PASACHOFF: I could do a naysayer thing, but I don't think that's necessarily what the panelists wants to hear. I'll do my one second intervention, and then I'll turn it over to a more positive view. But for example, I think with the Individuals With Disabilities Education Act, that's a great example of a place where there's a right that's so unevenly put in place. And so again, it's the existence of programs like the IDEA that make me deeply skeptical that any kind of statements about what a right would look like would be effectively effectuated evenly. But anyway, I will pull back and let somebody have a more positive view.

PEGGY COOPER DAVIS: I'll attempt to be a little more positive. This is very much a story about culture and a story about how we think about the country and acknowledging that every child has a right to be educated to become a citizen, participant, in this democracy, in this republic. It's a cultural move.

And I agree with you that courts don't change the culture, but they affect it, federal courts as well as state courts. There will be problems of collaboration. There will be problems of acceptance. But to go against the international trend that says education is a basic human right seems to me a wrong direction for our culture.

JAMES RYAN: Kristy or Jason, do you have anything you'd like to add? Thanks, Peggy.

JASON NANCE: I'll just chime in for just a second. I mean, I think that's a very difficult question. How do we adequately assure that no children are left without an access to a right? Well, there's a couple of things that come to mind. I mean, first of all, I think it's difficult to do. We have to decide exactly how that right is going to be defined first. One of the problems that we've had in the state courts, I think, is to really to understand what that remedy is going to look like.

And so I think from a basic standpoint, from a minimum standpoint, we might be able to do this. But if we start discussing, for example, to maximize a child's potential, to guarantee that child a certain level of resources, a certain or particular outcome, I think that's going to be extremely difficult for courts to enforce.

KRISTINE BOWMAN: I'll chime in to wind up our panel discussion of this question. And I think honestly the answer is no. We cannot ever assure that no child will be left behind if we're talking about something like even a minimally adequate education at the federal level. We just can't. There are too many variables. It's too complicated. And I think we should work very hard toward providing that-- toward providing an adequate education to every child while also trying to minimize the number of children who might fall through the cracks.

Because some of these things are going to be ad hoc problems, but some of them are also going to be systemic problems. And I think what we're all focused on here today is this question of ultimately whether this is the right sort of system change to pursue. And so we have questions about doctrine, whether it makes sense, but we also have questions like those that Eloise raises, which are really pragmatic.

Saying, hey even if you could win, I don't think it would be worth it. And I don't think this would work out how you think it will. And so no, we can't guarantee you that. And I think we all still need to be moving forward as best we can to try and guarantee that result, even though we know it's not possible.

JAMES RYAN: All right, the next question, which we touched on a little bit, but let me ask it. Is the right that we're talking about a right to equal education or equal outcomes? Or a right to education substantively? In other words, what does the right look? Kristine

said it could be a minimally adequate education. I'm curious what others think. Peggy or Jason?

PEGGY COOPER Well, if you say my name, I'll just have to talk. I was trying not to. What the right would look like is it's such an excruciatingly hard question. Is it minimally adequate, and what on Earth is minimally adequate?

And when you begin to think about what the right would look like, you have to begin to have some anxiety that-- or anxiety that stems from the fact that control of education systems has so often led to programs of indoctrination and control of thinking. So I think many of us are in the very difficult and awkward position of wanting to be assured that a floor is guaranteed, but wanting always to safeguard against the kind of standardization and the kind of indoctrination that would stifle individual development.

So my sense is that if we can get past the horrible situations like the one that we saw in *Gary B* where children are in rooms with no heat with 10 year old books with rats running around the classroom, then we can turn our attention, and we must turn our attention, to making sure that we are developing a system that helps people to think independently rather than a system that tells people how to think.

JASON NANCE: I'll just add a couple of thoughts. So Jim, I think to me, I think it needs to be a combination of the two. So I would be looking at both inputs and outputs. I don't think that you can really separate those. I think that each school district, each child, I think should have a minimum set of resources that they should be guaranteed to in order to be successful. What that is, I mean, that could depend on a lot of factors, and that could depend on what experts believe. But I think that that's a very important component. But I don't think that you can separate that from outcomes as well. And so I think that should be considered as well.

And I would say that this is sort of what Peggy was talking about in some ways. There could be, if you look at this as a spectrum, it may be obvious in many cases in which we'll say this is not an adequate level. I think it's a lot harder, I think, in the middle, in which perhaps that you have decent achievement levels, but you have low funding levels. I think that's going to be a much harder question.

But I think for me right now, I'm less concerned about that middle group, and I'm a

lot more concerned about that lower group, because we see so many obvious places in which they are receiving-- they're not receiving an adequate education. So for me, that's my primary goal is how can we help those students get up to a better level.

JAMES RYAN: Plenty more questions. And in some ways, I feel like we're just getting warmed up, but I don't want to interfere with the next panel. And I know the next panel is going to take up in more detail this question about what the right would look like. So I'm going to stop right there and say thanks to all of you. Thank you Professors Davis, Bowman, Nance, and Pasachoff. Kimberly, thanks for having me. I'm going to have to duck off. And I will turn it over to the more than capable hands of my friend and former colleague, Martha Minow. Thanks again to all of you. Dean Goluboff, thanks for hosting. Take care, everyone.

KIMBERLY JENKINS ROBINSON: Thanks very much, Jim, for being a part of it. All right, so we are going to turn to our next panel. And we are going to focus on how the United States could both recognize and define a federal right to education. Martha Minow will be moderating the panel, and we will each have eight minutes.

MARTHA MINOW: Well, thank you, Kimberly, and thank you not only for creating this terrific event but also for the enormous work that went into producing a book that is a feast of ideas and debate and a resource for time to come. I think that you showed great prescience, because the topic has only grown more relevant.

The *Gary B* case has already been discussed. There is much to study, even with the vacated opinion, to see how the settlement is going to work out there. And now we have the *A.C.* case from Rhode Island. And although the federal district court dismissed the case, it's about as full throated an argument for a federal right as I've ever seen but a doubt about the power of the federal courts.

And we're going to talk here about if there is a federal right, how would it be recognized? Would it be judicial? Would it be legislative? What are the elements? How do we imagine the current composition of the federal courts in dealing with this question and the federal Supreme Court? What methods of originalism or otherwise would affect an articulation? And how do the implementation lessons from prior educational reforms, legislative or judicial, set us on a path of assessing

what's ahead?

Is there some lesson from COVID, I would put to the panel as a planting a seed, and also maybe some lessons from special education in particular. So with no further ado, we will proceed here alphabetically. And I am so very, very happy to be able to turn to our panel. So the very first speaker.

DEREK BLACK: Thank you. This is Derek Black. Thanks to Kimberly and everyone. It is good to see everyone. And Jim said earlier this is his former life. I feel like being together is a former life for all of us. So it's nice to see everyone.

So my chapter was a bit of a survey of scholarship and the different ways that folks have thought about implying a constitutional right to education. What I want to do is continue the conversation a little bit from the prior panel and then dive into a couple of policy points that I think are directly relevant to us at this very moment in time.

So first I'll say I fall somewhere in between Peggy and Eloise. And I guess the big question is why? Why would you? I think leaning towards Peggy, and I've been fortunate enough to work with her and learn a lot from her in recent years. And in fact, I should give credit now that much of the work that I've done over the last four years is really born out of a conference that she does each year for her students that helped me think further about this. So I'll publicly thank you, Peggy, for that opportunity and what it's meant for me.

But on the one hand, I think the history supporting the right to public education is far more powerful than anyone has sought to care to think about in a while. And I've spent quite a good deal of time dealing with the issues that Peggy is raising as well as others. And I'll get at that in just a moment. So that makes me tend towards Peggy's points, that there really is something there to be unearthed.

On the other hand, as much as I might believe in that history and what it means to me, I am a realist, much like Eloise, and believe that it doesn't mean much to a lot of other folks. And so that's just the way I see it. And by folks, I mean the federal judiciary. And so I worry about spending a lot of resources and effort on something that is going to potentially backfire. But let me take up each sides of those arguments and then hopefully come to a middle ground for myself.

So the first on that history. I mean, a few of us, I think Jason has a PhD in education and surely had his education history courses. But most of us lawyers don't come from that background. And if you ask any PhD in history about the Northwest Ordinance, they could tell you lots of stuff about the history of it. And it's always perpetually cited in that history. And even in federal courts it is cited, but it's really cited in a very thin way that I think is too thin.

So in my newest book, I focus in on the fact that the Northwest Ordinance itself precedes the United States Constitution. The Northwest Ordinance is the land deal that makes the US Constitution possible. At that moment in time, Pennsylvania, Virginia, and Connecticut, and I don't know why Connecticut, given their geographic location, but those states claim that they own everything that's not in a colony.

And so for the nation to move forward, they have to agree on how these lands are going to be divided up. They cede that over to Congress in the Northwest Ordinance at the very moment that the Constitution is being written in Philadelphia. Many of the same people who were part of the Continental Congress are also part of the Constitutional Convention.

So point number one is that we cannot separate the Northwest Ordinance from the Constitution itself. It appears in the front matter and the United States code reprinted across the country. It is a foundational document. And that document carves up every square inch in the remainder of the United States into little squares and says that each square will be a town and at the center of each town will be one lot for schools and surrounding lots to generate resources for that. So there's no getting around the fact that the very growth of our nation has education built into its structure. And that's an important thing to remember.

The other part of the history which I find far more fascinating, which Peggy was getting into, is both the post-war and I would say the pre-war period. In writing my most recent book, I was shocked with what I learned quite often. This picture behind me on the wall right here is a school building built in Buford County, South Carolina. It is the first school built for African Americans in the South, and it was built before the Civil War was over. Before the Civil War. For many of the reasons that Peggy mentioned, that freedom and education were intertwined from the very first.

Also been reminding folks, focus we spent a lot of time talking about 1619, rightfully in the last year. Well, Fort Monroe, which is the location where African Americans first land in America, is also the first location where African Americans escaped slavery during the Civil War.

They flee to Fort Monroe, and the reports of all the officers there attest that they were amazed that the first thing that they wanted to do was read, to learn to read. And then there's pictures, I don't have it handy by me, of an African American woman teaching under the old tree, which is actually an old tree on Hampton University's campus there in Virginia. And so this history is much deeper, I, think than most people know about.

I also got Lincoln here on the other side. I didn't mean to. That seems kind of imposing. But in any event, during the middle of the war in Louisiana, when Louisiana is taken and Lincoln writes a letter to the commanding general down there and says, look, when they rewrite their Constitution, they can do a lot of things, but the education has to be provided for. And the General issues a famous field order in '21 or '23 in which he during the war takes control of the lands, divides them up into zones, and a tax system to finance public education in Louisiana before the war is over.

So again, this is certainly this idea of education and turning from the old ways to a greater promise of America is there. And then as I've also written about, the terms of readmission to the Union required southern states to rewrite their Constitution. Education was an implicit part of that and definitely part of the conversation. In fact, when Congress grew worried that states were going backwards on that, they conditioned the readmission of the last three Confederate states saying that they should never deprive any citizen in those states of their rights just vested in their state constitutions.

And guess what? The Fifth Circuit, no bastion of liberal thinking, is at this moment has told the Southern Poverty Law Center that Mississippi's terms of readmission to the Union are at least judicial. We have to find out the facts as to whether Mississippi has actually gone backwards, but I think we can probably answer that without digging too far. And then after the war, Congress insists that education clauses be in

the state constitutions. And in fact, rejects the state of New Mexico when they don't have one.

And so all of this is important. I think, in part, Peggy you mentioned earlier this dichotomy between the states and the federal government. I think part of this story is that the states and the federal government have done this together. The federal government has set up structures. It has made demands, and states and carried them out. As I say in my book, it would be hard for me to imagine that somehow another 50 different states accidentally ended up in the same place on the question of the constitutional right to education. It exists that way because the federal government had demanded it.

Does that mean we should go file lawsuits? Well, I think maybe four years ago I was more willing to entertain that idea. At this point, I think it's important to change the narrative. Again, giving a lot of credit to Peggy's work on this. The narrative is important. We have operated under a false narrative since the end of Jim Crow. And in fact, I think much of this history is buried because of Jim Crow. And so I think re-articulating the role that public education has played in the nation is an incredibly important thing in terms of shaping that narrative so that we look at the legislative agenda differently.

So let me move to the legislative side of it and maybe more in the direction of things that Eloise was thinking about. And towards that, I would say that notwithstanding how much of that history that I just described plugs into a substantive due process and republican guarantee government or equal protection framework. It also is the basis upon which Congress has passed legislation. The Northwest Ordinance was legislation. The readmission of Mississippi, Texas, Virginia, et cetera, that was legislation. At this moment, Congress has the opportunity once again to pass legislation in this area caring for this long story of education.

And I've been doing a bit of work on what that legislation would look like for the last few years and was able to persuade the Warren campaign, as short lived as it ended up being, to include pieces of that and their funding proposal. And the short story is that if we think about how to make education a right through legislation, we have the ability to do it at this moment in time by tripling or quadrupling the federal investment in Title I dollar.

The flaw, I believe, or maybe a missing link in Joe Biden's proposal right now, is it just simply talks about increasing those inputs. The difference between his proposal and what is discussed in Senator Warren's is the conditions that attach to that money. And so one of the things that I was crystal clear in trying to press on them is the idea that, yes, we need this money, but if we are not going to condition it in very specific ways, states will backfill in many respects, and they won't necessarily correct inequality or segregation.

At the same time, I think it would be foolish to suggest that there's any amount of money that we could offer to a state that tomorrow would make them transform their ways immediately. And towards that end, I suggest Title IX and its framework for moving toward more equity is actually a perfect one. When you look at athletics, for all the ways that we may malign Title IX for its failures, it's had a three step clause. One of the important ones was are you making progress? So long as you were showing progress, closing the inequality gap between males and females, you would be deemed as being in compliance. If you actually had already closed them, then that would be compliance as well.

But I think what we need to do with this federal money is to ultimately say, states currently have a measurable funding gap between their high poverty and their low poverty school districts. And we could in exchange for tripling their Title I funds say that, you know what, you figure it out. We will stick federalism. You figure out how you're going to do this, but what we want to see is each year you pick the number. I mean, us as legislators. 2% to 5% reduction in that gap. So that instead of a 30% gap, it becomes a 28% or 25%. In 10 years, we could close the funding gap.

And so if we achieve that, then the question is, what about race? I don't think that simply closing funding gaps is going to get us anywhere close to where we need to be. And I think I have two comments to that. I think the wide inequality in funding is a major contributor to segregation, and I think you need look no further than Gardendale, Alabama and the secession district down there. You read those debates, a lot of that is about them saying, Alabama is not taking care of public education for our children, for this white community.

And so we just want to secede so we can just keep all of our money together. Now,

I'm not claiming that they would have been all in for integration if the schools, all had their amount of funding. But in a severely under-resourced system, we incentivize people of all races to run for the hills of silos where there is more opportunity. So I do believe, number one, that making substantial progress on closing funding gaps takes away an incentive for segregation. And then I think we can also--

MARTHA Derek, we're going to have to wrap up here.

MINOW:

DEREK BLACK: Sorry, sorry. And then finally, I would just say that the final point is that there is also the ability at that point to ask that no additional new segregation occur. So report the data every year. When you make a student assignment change, is it increasing or decreasing segregation? And ultimately, we can begin to get a better handle on that as well. My apologies for running long.

MARTHA Well, it's all very important. So thanks so much, Derek, and we turn to Carmel.

MINOW:

CARMEL
MARTIN: Thanks so much, Martha, and thanks, Kimberly, for inviting me today, but also for including me and my co-authors in the book. It was a real honor to work with all of you legal giants on this issue.

In terms of the chapter that my co-authors and I put together, we did not tackle-- at the time i was working at the Center for American Progress and worked on the chapter with some colleagues there. We were a bunch of policy wonks, so we left the legal analysis to the professional lawyers. I'm only a recovering lawyer.

And we focused more with a policy lens, that if policymakers at the federal level or other levels of government tried to tackle effectuating equal right to education, what could that look like? Using as a background information, we took stock of previously litigated school finance and school equity cases at the state level. So we tried to see what we could learn from looking at that existing case law to create some guiding principles for policymakers in that regard.

We did make the case in our chapter that policymakers should embrace a federal right to education, laying out as our rationale what some of the other panelists have

already said that it is critical not just to our economic and national security interests as a nation, but to our ability to be a well functioning democracy. So in that regard, we picked up on a lot of the legal arguments in making our policy argument in that regard.

And some of the things from, again, looking at the case law, some of the takeaways that we highlighted in the paper were, first of all, there is a growing body of evidence that money does matter. It particularly matters for low income students. And probably for most people on this call, that seems like, of course. That's not really that important a finding.

But actually when I was during school desegregation and school finance cases in the late '90s, which tells you how old I am, that was not a given. And in terms of the political debates on school funding, it's incredibly important to appreciate that there is very high quality research that has been released in relatively recent years that actually brings home that point that money, dollars, do matter, particularly for low income students and students of color.

The second finding for us, again, something that's probably obvious to everybody is that despite many decades of school finance reform litigation in many, many states, although progress has been made in some places, disparities continue. And those disparities break down along income. But as Kimberly pointed out in her opening statement, there's this very powerful study that was put out by EdBuild last year, I think it was last year, that demonstrated that even putting income aside, there are just staggering, to the tune of \$20 billion, disparities in spending between predominantly the schools that are predominately students of color and students that are predominantly white. So those disparities are extremely disturbing.

And those disparities, also some of the greatest disparities exists between states. So state litigation is just an ineffective tool in tackling those disparities. Because some of the biggest disparities in spending exist state to state, not within states. We've actually made some progress within states, in part because of state litigation. But there's still really quite staggering differentials between states, even taking into consideration cost of living differences, which I think really doubles down on the need for the federal government to be involved in this.

And then the third big take-- the next big takeaway that we have looking at the existing case law goes to President Ryan's question about whether this should be a substantive right. And one of the things that was noteworthy to us is that basically, if you look at the 40 years of school finance litigation, generally speaking, litigators either tried to argue based on equity in dollars. Their theory of the case was that poor children should at least get the same amount of money that non poor children were getting. Or they were based on adequacy. So trying to get to that substantive right that we were talking about with the last panel.

And sort of our big takeaway there was that there was a lot of unintended consequences, regardless of which avenue you took in that regard. For some of the cases that focused on equity in dollars, you look at places like California. And I would argue it made the situation worse for everybody, because California passed a state wide proposition that capped education funding.

So as a result, California went from one of the highest spending states in education to one of the lowest. Now, of course, under Governor Brown, they've tried to correct that, but they're still not doing that well on that front. And that really stemmed from this idea that we have to get to equity as opposed to get kids what they actually need to have a high quality education.

Similarly, some of the cases that looked at adequacy, that wasn't a great tool either, because it gave courts the ability to define adequacy at a very extremely low level and say, everybody met it. That said, it does seem like in the states that have had ongoing school finance litigation where they have focused on the adequacy, they do seem to have made more progress.

In terms of when the question is, what do these kids need to succeed, you look at places like New Jersey, and again New Jersey is not a panacea. It's not like the kids in New Jersey or are getting everything that they need. But you see courts providing-- the court providing to the students, again, a substantive relief. They got more money. Not equal money, more money, because the court determined for it to be adequate they actually needed certain reforms to be in place.

So coming out of all that, our recommendations to policymakers moving forward basically were, first and foremost, that we really did need to think about this in a

much more substantive way. There's lots of research that tells us what the core components of a high quality education are. And unfortunately, across our country, low income and students of color have less access to those core educational services. And the ones we highlighted were early childhood education, access to high quality effective teachers, and access to a rigorous core curriculum.

And as someone who was a desegregation lawyer, I can tell you that one of the things that was more disturbing to me as I deposed witnesses in places like Yonkers, New York was not the funding inequity but the inequity in expectations for students. So I think that's one reason we do have to go past just dollars and think about making sure that just because a student is Black doesn't mean they shouldn't have access to the same advanced coursework as a white student or low income or high income student.

So we push in our paper for looking beneath the hood under the dollars and looking at equity in core educational services and make the point that equity does not mean equal. It means sufficient resources to give those students a high quality education. We also argued that we should not throw an outcomes based approach out the window.

Obviously, there were unintended consequences with No Child Left Behind that was much more focused on test scores and students low income, other at risk students getting to certain educational benchmarks from a testing perspective. There were lots of bad things that flowed from that. But that said, we argue that you still need to combine, have transparency around outcomes based on desegregated student groups in order to ensure that the resources that are flowing to those groups are actually making a difference. Illinois is a state that's created a dashboard that combines those two things. California is also doing the same.

And then the last point that we made was that we need to increase funding on the federal level for education, but we also need to think about a holistic view towards child development. So again, early childhood education is very important, but so are programs like Medicaid and SNAP. Children need to be healthy and well-fed as well as supported by high quality educational programs if they're going to be successful. So those were our big points. With that, I'll turn it back over to Martha. Thank you.

**MARTHA
MINOW:**

Thank you, and thanks for the superb chapter and very important work that it reflects. We turn to Rachel.

**RACHEL
MORAN:**

Well, first of all, I also wanted to thank the University of Virginia for inviting me to this conference and to Professor Robertson both for that invitation but also including me in this terrific book project. We really have enjoyed it.

So what I wanted to do today was to talk a little bit about my book chapter and the key points, but then I thought I would bring it up to date by talking a little bit about the pandemic and the school closures and the litigation over those closures that already has begun. So let me start with the chapter.

We've already heard about *Brown versus Board of Education*, which clearly recognized education as singularly important in the kind of government benefits that are conferred. And it recognized that singular importance because education is what prepares students for their adult responsibilities in the marketplace and the civic square. And embedded in Brown's acknowledgment of education as so critical to people's flourishing, there was a presumptive norm of equality. Brown seemed to suggest that part of that right to education was equal educational opportunity.

But just about 20 years later, the court told us in a case already mentioned, *San Antonio Independent School District versus Rodriguez*, that in fact there was not a norm of equal educational opportunity embedded in the Constitution. At most, there might be a right to be free of an absolute deprivation of education. In other words, being consigned to the stigma of permanent illiteracy.

Now, what I think these cases reveal are some inherent tensions in the notion of a right to education, tensions that Brown itself did not fully recognize, because Brown seemed to suggest that work and citizenship went hand in hand when it came to education's role. And it's certainly true that to an extent, education does serve both ends. But I do think we've often considered citizenship to be fundamentally an egalitarian concept. We even speak of equal citizenship, and Brown itself rejected second class citizenship. And in our recent experience, we were saying every vote counts. And of course implicitly, we all understood equally.

Now work, on the other hand, is a very hierarchical construct. We have a highly

stratified marketplace, and we anticipate that schools will prepare children for very distinctive occupational lives. And I think that those tensions, in turn, are reflected in the way that states after the setback in Rodriguez enumerated the right to education under their own constitutions. And so we've heard about equality movements, which typically developed immediately after Rodriguez, where the court seemed to be embracing the idea of equal educational opportunity for full citizenship.

But later, we saw adequacy, which is a base level of competency, but allows for a lot of stratification above that minimum. And it's probably no accident that the rise of adequacy came about at the time of the accountability movement, because that accountability testing framework was heavily pushed by the business community.

Now, I wanted to turn to the metrics that we heard a little bit about already. But if you look at right to education lawsuits, however denominated, the parties are typically going to look at both inputs and outputs. And we heard about those inputs. Curriculum, teacher qualifications, quality of the facilities, and per capita student funding. Now, we look at inputs because we're looking at opportunity. And typically, the courts won't guarantee a particular result. But that doesn't mean that outputs are irrelevant, because we use those outputs to corroborate the claim that these disparities in inputs are denying students a right to education.

Now, in my chapter, I look a little bit at those metrics. And if you look at lawsuits, they very often focus on average levels of achievement based on standardized tests, especially those accountability measures I just mentioned. But that's not the only way to think about a right to education. Some researchers have looked at another metric, what they call the excellence gap.

And that looks at the highest performing students, for example, in schools marked by disadvantage and schools marked by advantage and how their different performances look. And it's interesting, because researchers found that even as the achievement gap based on average scores was closing, the excellence gap was widening.

Now, in my chapter, I propose yet another metric based on what I call the opportunity to compete. Now, that metric actually says that embedded in the right

to education, whether denominated adequacy or equity, is some idea that a student will be sufficiently prepared to have a meaningful opportunity to compete with peers. So what I suggest is that in order to determine whether that opportunity is real, we look at the distribution of achievement across schools to determine whether or not there's any meaningful overlap. Do the highest performing students at disadvantaged schools look anything like even the lowest performing students at advantaged schools? If they do not, if there is no meaningful overlap, these students inhabit separate educational worlds.

Now I wanted to turn to the pandemic and apply this framework so you can see how it works with some recent events that we're currently living through. So clearly the pandemic affected inputs. And the biggest disparity in inputs that got the most attention was the digital divide, where students in schools marked by disadvantage and fewer resources often were less able to get a device or internet access. There were other disparities too between rural and urban and smaller and larger districts. But clearly that affected inputs. Could you actually get the instruction that was delivered?

There were also other significant differences in inputs. Some schools experienced substantial delay before they were able to deliver any instruction after school closures. There are also marked differences in the hours of instruction offered. And we are seeing significant differences in instructional quality so that schools serving more advantaged students are covering new material. Schools serving less advantaged students are reviewing material already studied. Schools have also differed in their ability to monitor attendance, and there are very marked differences in students' ability to get one on one time with their teachers.

In addition, the schools that served the most disadvantaged students faced other logistical challenges. For example, in schools with high levels of free and reduced price lunch eligibility, they had to figure out how to get meals to students so they would be able to concentrate on learning. And in schools serving English language learners, they not only had to move to a remote teaching platform but figure out how to do it when students didn't speak English or didn't have substantial fluency.

Now, the other thing that we know is that the pandemic is going to affect outputs. Now, so far these are projections, but I found a report by McKinsey. It depends on

the schools reopening in January of next year, an assumption that seems increasingly unlikely to happen. But what you can see here is all students are experiencing substantial learning losses as a result of the closures. Nearly seven months, according to this projection. But other students, students marked by racial difference or socioeconomic disadvantage for example, are suffering much larger losses. And a low income student is losing over a year's worth of learning as a result of these closures.

So clearly litigation is going to follow these closures. There's already been a lawsuit filed against Los Angeles Unified School District. But what I wanted to do was just briefly walk you through the three frameworks.

MARTHA

We're going to need to wrap up now, I'm sorry.

MINOW:

RACHEL

This is the next to last slide, so I'm just about done. In the first instance, it would be an absolute deprivation of education under a federal framework. And the argument there will be over how much the closures count against the full year of study that students had whether the losses are enough to consign them to permanent illiteracy.

MORAN:

Under inadequacy of the education, under my approach of an opportunity to learn, what you'll want to look at is whether there was once meaningful overlap. But the learning losses that pulled the distributions apart. And under an unequal approach, the last approach, it would be whether there had been overlap, but it's diminishing as a result of the closures.

And to let me just say as my final word that all of this, I think, reminds me of Hannah Arendt's comment in the same year as Brown was decided, that education is the point at which we decide whether we love the world enough to assume responsibility for it. And I would add whether we love our children enough to equip them with the tools not only to compete but to engage in the vigorous exchange that renews our society and makes new possibilities available. Thank you.

MARTHA

Thank you so much. And now we turn to our amazing editor and convener, Kimberly.

MINOW:

**KIMBERLY
JENKINS
ROBINSON:**

Thanks so much, Martha. So I have to make sure we have enough time to get to Q&A, so I'm going to just make a few points about a federal rights education that could be recognized by Congress. So I'm going to talk about two topics. One is why should we think about a congressional right to education rather than going through the federal courts? And then how might we accomplish this?

So there's several reasons to think about recognizing a federal right through legislation rather than through the courts. And in some ways, the first panel touched on this as well. So I want to just spell out some of those benefits.

So first you want to think about the fact that merely defining a right doesn't move you that far along to actually enforcing the right and ensuring children receive the content of that right. And so the advantage of a congressional right to education is that Congress could simultaneously provide the resources and support for enforcement of that right. So protection of that right and enforcement at the same time.

In contrast to what you see in state litigation, which tends to be a declaration of a right either at a very broad level. Or even when you get the more detailed right in places like Kentucky, you don't have the legislative support that's going to say, OK, how we're going to get this done? Congress, however, has the ability to do both, define the right and to provide the resources and increase the capacity of the state to engage in impactful education reform.

Second, as my work has often detailed, to have a federal right to education, you're going to have to shift the structure of education federalism. It's going to be a shift to increase federal authority over education in a way that is different from the current place in which the federal government is very much sidelined in education. And so what's important about that is with the court, the Supreme Court has repeatedly said we are reluctant to change and interfere in education federalism that stands now.

But look what happens if you get a federal congressional right. You have we the people saying no, the states have had more than four decades since Rodriguez to address these issues of inequality, and still many children are left behind in our education system. Many poor children, many minority children, English language

learners, children with disabilities. And so we need this federal intervention to require there to be a greater focus on both adequacy and equity. So with that expression of the will of the people, then you get support for this shift in education federalism that must also happen.

In addition, you also have the support of understanding what role the Department of Education could play in supporting that right. Congress could very clearly express that. And so we have a definition of a right in Congress to be a place that would clearly articulate what is needed, and how to get there. In addition, you would avoid some of the downsides of litigation.

So litigation is very much driven, even in the successful litigation in *Gary B.* It's driven by the dismal facts of education in Detroit and the parties that are litigants there. Here when Congress looks across our land and says we have an education crisis, we do not have the education system that we need to support democracy, they can address that in a comprehensive and systemic way, and they aren't limited in the same way that litigation is limited to the parties.

So then how could we accomplish that? So there are several things I explained in the book about how we could accomplish that, so I'm just going to make three brief points and then I'm going to turn it over to Josh.

So the first thing to think about is we should definitely do some experimentation about a federal right to education. There is significant divergence among scholars even, as [INAUDIBLE] states, about how to define a federal right to education. And I do think that we could do some experimentation in federal legislation before actually enacting such a right to see how might this definition of a right play out. One of the speakers we don't have for this is Linda Darling-Hammond. She wrote an excellent chapter about the key education resources that students need, that they should receive under a federal right to education.

So if you take that approach along with approach supported by Carmel and her colleagues presented about school funding, if you look at the various proposals in Rachel Moran's chapter about a right to compete, you can see how there's competing visions of what a right to education should include.

And that was one of the purposes of the book, to recognize that for so long, people

said, oh, we should overturn Rodriguez. It's like, well, let's talk about that. What would that really look like? We need to dig deeper into that. So I think that it's important for us to get it right when we do have a federal right to education. And part of what can be done is experimentation in the laboratories of democracy.

And then second, I also do think that we need more of a collaborative approach to enforcement rather than focused on litigation. Litigation is very expensive and time consuming. And this is one of the concerns that the court expressed. It said, look, if we approve this right, there's going to be litigation immediately against all 50 states. Well, that could cut both ways. The court said, well, that's a reason not to recognize the right.

It could also have been viewed by the court as that's an indication that there's a problem the states are not addressing. Instead they said, well then, we should let the states try to fix it. But we've had over four decades. We have not fixed it. And so it's important to understand that the goal is not litigation. It's not the equal employment for education lawyers act. It's all about getting resources to kids. If we can have the federal and state governments come together to collaborate to do that, that would be a benefit to the nation.

And then finally, how do we get there? How do we get there in this deeply polarized moment? We just had this deeply-- we had an important victory for President-elect Biden, but we had a very large percentage of the country to vote for President Trump. And how do we get to the politics that would support a federal right to education?

And I really think we need it in our country a movement that demands a right to a high quality education for all children. I think we are seeing some indication of that. I think we're going to see more movement toward that because of the closures that happened during the pandemic that Rachel mentioned. But I think we need more people. And this is where the students in the audience can get involved. We need more people to say, look, our education system is broken, and we have to demand more from our lawmakers for what is provided to each and every child. So with that, I will wrap up and look forward to the Q&A.

MARTHA

Fantastic. Josh?

MINOW:

JOSHUA

WEISHART:

Thank, you and thank you Kimberly for letting me be part of this book project. So I'll pick up where you left off. In his victory speech, President-elect Biden said that America's defining attribute is that we are a nation of possibility. Of course, that's not the lived experience of all Americans, perhaps not even most. But when we have fulfilled that possibility, we have only done so in the contested space of what is Possible.

We are still negotiating that space in education after more than a half century of legal challenges to segregated and underfunded public schools. And those challenges, I think, reveal to us that the right to education is supposed to protect children's liberty and equality interests. And so as we are today imagining the possibility of a federal right to education, we should do so in that contested space of what is possible. I'm sympathetic to Eloise's points about that.

So too often, we are told that equality and liberty are incompatible. Well, that depends upon how those principles are defined. But I don't think we can inscribe a federal right to education on a blank slate to resolve all potential tensions between those two principles. We aren't in the original position. We aren't behind a veil of ignorance. We have more than 50 years of jurisprudence defining educational equality and liberty in the state courts. And I think we would be wise to consult those.

My chapter in the book suggests that there are two critical lessons for us to absorb from the state precedent. First, state courts have been most successful when they have imagined the possibility of equality and liberty within the parameters of what is possible. They've turned away from the extremes of equality and liberty, moderated those principles to account for certain pragmatic concerns about what is feasible politically and socially.

But the second lesson is that courts have been less successful when they have overcorrected for these pragmatic concerns in a way that obstructs their vision of equality and liberty. And this has played out again and again when courts are tasked with fashioning an enforceable remedy. Even the most active and forceful courts have struggled to do so. And I think there might be a way for the federal right to

education to avoid that problem.

But first let me go back to the first lesson, reconceptualizing equality and liberty. We often quote the line from Brown that educational opportunity is a right which must be made available to all on equal terms. But the state court experience with that right, with the right to education, has shown that strict equality of opportunity is neither achievable nor is it desirable. It's not achievable because the state can't possibly neutralize all the natural and social disadvantages and advantages that render chances for educational success unequal. For some children, the needs would be virtually insatiable.

But even if we could marshal enough resources, chances for educational success would still remain unequal given the prevalence of influence of family life. And equalizing resources. That's also not desirable, because some children have greater needs. So treating all children equally by giving them all the same would only perpetuate disadvantage. Some children require more, not equal resources, just to approximate the opportunities held by others.

And that's where I think several state courts have settled, at least in principle. Not on guaranteeing equal chances for educational success, but on a needs based equity, which holds that the neediest students require more to mitigate their disadvantages. And to me, this is still equality, not because it treats all children equally, but because it treats differently situated children as equals according to and accounting for their needs.

Liberty has also been reconceptualized. We are predisposed to thinking of liberty very negatively as a freedom from state interference. But the view emerging from state court precedent is that the right to education protects liberty in a positive sense of freedom to become. And that's evident, I think, in the adequacy decisions where the quality of the education matters in terms of what is constitutionally mandated in terms of the outcomes. And most notably, education is adequate if it imparts in children the freedom to become equal citizens, to attain productive employment, contribute to society.

So what happens if we are able to bring disadvantaged children up to this adequate level while more advantaged children continue to sail high above it and thus

continue to reap all the positional benefits? Well, traditionally equality would say do more. Adequacy would say do nothing. And I think each overshoots the target. As I've already explained, we can only go so far when it comes to equality. We can't guarantee equal chances for success. But that's not an excuse to do nothing. I think we do owe disadvantaged children a meaningful chance.

And we can do all sorts of things to bring that about. Integration, fair school funding, equitably distributed quality teachers. But there are still these positional advantages held by those above the adequacy threshold, making it unrealistic for disadvantaged children to achieve mobility, then that undermines adequacy itself, which is to produce, again, citizens capable of participating in democracy on an equal footing and competing for selective opportunities, as Professor Moran was saying.

So bottom line, I think that it can't be either equality or adequacy. A federal right to education should guarantee adequately equal and equally adequate educational opportunities to both mitigate disadvantage and diminish positional advantage to strike some measure of fairness. And it's not going to be easy to hit that mark. Again, the second lesson is that state courts have missed it more times than not, and they've failed to give any remedial guidance about how to synchronize those demands.

And here's where I think a federal equal protection and substantive due process doctrines could help. Now, before you roll your eyes, notice I did say both equal protection and due process. Either one without the other, I think, will set up the federal right to education for failure. So equal protection is fraught, as we all know. Chief among the problems is that it prevents courts only to enforce existing standards, not to impose new standards of adequacy inequities. And that's a problem, because we're concerned chiefly, I think, with interstate inequities.

Substantive due process is a mess. But the main difficulty for us is that it would translate a federal right to education into a non-comparative right. And thus it would not permit this needs based equity comparison that we would need. It would just say if you get an adequate level, you're done. That's problematic.

But joined together, I think, equal protection, substantive due process could offset

the limitations. So substantive due process would exert leverage and the demand for an adequacy threshold, a baseline from which we can judge-- make need based equity judgments. Equal protection, I think, pivots that analysis squarely on the disparities in requiring us to meet the needs of students and intercede when disparities become objectionable. I think that implicates a substantive due process, again, because that might mean that we have to adjust that adequacy threshold to diminish positional advantages.

So now, all that might sound like I'm falling outside the space of what is possible. But in fact, the Sixth Circuit in the *Gary B* decision observed in the footnote that the convergence of equal protection and substantive due process post *Obergefell* is a distinct possibility in supplying an additional justification for a fundamental right to education. I hope I didn't go over my time. Thank you.

**MARTHA
MINOW:**

Perfect, Josh. Thanks so much. I'm going to ask the panelists one question and see how many can give a couple of seconds of response. Carmel's point about the lessons from state education cases underscores the key ingredients such as access to quality teachers and teachers who have high expectations. So from your perspective, what is the best way to get that to every student? Access to high quality teachers. How do we do that, and how do we do that consistent with union rules and other kinds of concerns?

**CARMEL
MARTIN:**

Martha, is that a question for me?

**MARTHA
MINOW:**

Sure, please. It's a question for everybody.

**CARMEL
MARTIN:**

Yeah. So at [INAUDIBLE] we also put out a paper on the need to invest in and dramatically elevate the teaching profession. So we've laid out a lot of pieces to how to get at that. But big picture is we need to pay teachers across the country more. But in particular where there's a hard to staff schools, we need to consider providing additional funding for teacher salaries and then making sure that those teachers have the other resources that they need to be successful.

Not here representing the campaign, but just want to say Joe Biden's proposal with respect to tripling Title I funding, I would urge everybody, it's still up on our website,

it did actually, contrary to what one of the earlier speakers said, it did seek to leverage that funding to core reforms, including paying teachers more in these hard to staff schools and did contemplate that state and local actors would contribute funding to match the federal funding. So that's part of the picture of getting high quality teachers in these schools but also, just as importantly, we have to give those teachers resources that they need so they can be successful.

MARTHA MINOW: Thank you. Anyone else want to address this, including the tricky question how do we assess who's a good teacher? Is it by reference to student test scores or teaching credentials or what?

KIMBERLY JENKINS ROBINSON: Yeah, so I'm going to take the first question. So I think part of what we really need is increasing the national understanding of what the cost of our current system is. We have so many people are focused on getting what's best for their child and there's too often not a concern for other people's children. And I think part of the reason our education system is broken is because of that focus. And so I think we need to have a knowledge campaign of here are the educational opportunity and achievement gaps.

As we become and increasingly a nation with just higher and higher percentages of children in poverty and children of color, we're going to have to educate them or we're going to pay for it on the back end, not just in democracy, but in health, the economy, which Jason indicated. So I think that a critical part of getting reform and the push for reform is people understanding the cost of the broken system we have.

MARTHA MINOW: Great. Any other takers on the teacher front? Do we get there by litigation, by legislation, by a knowledge campaign, by using the internet? How do we do this?

RACHEL MORAN: Well, I would just add that I think leadership at the schools is important. I think there's been a lot of studies showing that, because that is how school cultures are formed. So clearly issues of training are important, but then having a culture of teaching at your institution which respects you as a professional, which continues to invest in you.

And in terms of metrics of what makes an effective teacher, I think, of course, we care about your academic progress and the value added by the teaching. But I also think we care that you have good attendance, that people feel included in the

classroom, that students are enthusiastic about learning.

There was recently a documentary about the shift to online learning, and there was a student who had had a teacher who really took an interest in him, and she passed away during the pandemic. And he was crying, because she was his connection to the school. She was how he felt emotionally as well as academically attached to the learning process. So I think the metric of what makes for a good teacher is very complex.

MARTHA

MINOW:

Very good. I see another. There are some great questions here. For those who do think that courts ought to be the ones articulating these elements, is there an avenue in reimagining Plyler or is it the combination of Obergefell equal protection and liberty? Josh, maybe you want to take that one.

JOSHUA

WEISHART:

Yeah. Although I will say, I mean, I'm not optimistic that the current court is going to pick up that argument and run with it. I mean, that was Kennedy's argument. But then again, the Sixth Circuit panel did note that, as I said before. So I think there's that possibility. But I think you have to have a court that's firmly convinced that a right to education is fundamental, first and foremost, before you get into how to enforce it with the aid of substantive due process and equal protection. And I think that's the biggest hurdle is getting the recognition in the first place.

MARTHA

MINOW:

Derek, a word?

DEREK BLACK:

I was just actually going to return to what Carmel and Rachel are saying, because I think we really have an enormous crisis that's about to hit us really hard, which is we are at a national teacher shortage for the last two years, and the pandemic has caused a lot of our older teachers to retire early. They're not coming back. And so ultimately, the problem with teachers sorting, it's a 0 sum game. And if this was the size of teachers before the pandemic, this is the size now. So unless we expand that pipeline back out, as Carmel was saying, there's really not much we can do.

MARTHA

MINOW:

Thank you for that. Well, for the closing words, we turn to Kimberly. I want to give my thanks to the University of Virginia and everybody who participated in this great symposium.

**KIMBERLY
JENKINS
ROBINSON:**

So thank you, Martha, for a great panel. Thanks to all the panelists, both in the first and the second panel. And I just want to close with this one comment, which is that we have in education system that is made by human beings. And as former President Kennedy said, we not only have a system-- the problems that we have are human problems, but we can fix them.

And I think it's important to remember that as we think about these issues and seek to understand them that a federal right to education is not a panacea. The goal with this, and any other legislation and court decision and others, it should be all hands on deck. Every method possible of closing our opportunity and achievement gaps that are harming our nation should be used.

And so this is just one of a part of a larger conversation about education reform and the need to address the gaps that are harming every interest that we have as a country. And so I encourage the audience to get engaged in that conversation and get engaged in that reform and demand that we move our nation forward to close educational opportunity gaps.

So with that thank, you so much to UVA Law for support, for Risa, for Jim and Martha for doing a great job, and to all the panelists. And thank you very much to the audience as well. I'm sorry that we did not get to all the questions, but I look forward to future conversations about this important topic. Thank you.