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Betsy Levin
Duke University

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COMMENTARY

EDUCATION AS A CONSTITUTIONAL ENTITLEMENT: A PROPOSED JUDICIAL STANDARD FOR DETERMINING HOW MUCH IS ENOUGH

BETSY LEVIN*

On the basis of a series of opinions issued by the Supreme Court, starting with *Dandridge v. Williams*¹ and culminating with *San Antonio Independent School District v. Rodriguez*,² it has been generally assumed that “welfare rights,” to use Professor Michelman’s term, are not entitled to special constitutional protection. In these opinions, the Supreme Court has said that welfare rights, including education, do not rise to the fundamental level that triggers the strict scrutiny test of equal protection. Moreover, poverty—if it causes only relatively less of the basic needs and services rather than their absolute deprivation—is not suspect and also cannot trigger strict scrutiny. Thus, to obtain special constitutional protection for “welfare rights,” the deprived class must be suspect. The closing-off of the “fundamental rights” route, leaving open only the suspect class route, has led to a number of problems, both legal and political. I will briefly outline some of the political and social consequences of not finding a constitutional entitlement to an education.

First, however, I will examine whether finding an entitlement to education would stretch the equal protection clause beyond its meaning. What is being sought? How do you characterize that right? The language of the equal protection clause and its traditional interpretation suggest that the guaranteed right is the right *not* to be treated differently than others by government, when the duty of the government is to remove government-placed barriers or not to install them in the first place. That the equal protection clause imposes an *affirmative* duty on

* Professor of Law, Duke University. A.B., 1956, Bryn Mawr College; LL.B., 1966, Yale University.

1. 397 U.S. 471 (1970). See also *Lindsey v. Normet*, 405 U.S. 56 (1972); *James v. Valtierra*, 402 U.S. 137 (1971).

2. 411 U.S. 1 (1973).

the government to remove a barrier, such as poverty, *not* necessarily of the government's making is not as obvious from a reading of the clause.

This latter interpretation has been characterized as a governmental duty to treat people differently. For example, does the Constitution entitle children who speak Chinese to special education programs because they cannot understand what goes on in the regular classroom where only English is spoken? If so, denial of equal protection of the law then arises because the government *failed* to classify them and treat them differently from all other schoolchildren.³ Does the equal protection clause require this kind of affirmative assistance? This inequality is different from the first-mentioned inequality, in which the government treats differently those that it should treat similarly. An example would be exclusion of Chinese children from the school *because* they are Chinese.

I also will suggest that if the assumption is that some welfare rights can be located in the Constitution, there remains the problem of whether judicially manageable standards exist to determine to what level the Constitution guarantees these rights; that is, whether the obligation is one of absolute equality or of some minimal level of education.

Finally, is there an alternative model for the entitlement to an education that courts could follow without doing violence to the equal protection clause? I shall suggest that the state school finance cases, by analogy, may provide a solution.⁴ If the Supreme Court's reluctance to find that education is a fundamental right entitled to special protection under the equal protection clause was due to its fear that no judicially manageable standards exist for determining the level of constitutionally guaranteed education, state courts have shown that courts can articulate a standard that does not oblige them to decide issues of educational policy.

First, let me review where the Supreme Court left education under the equal protection clause and indicate some of the political consequences of that decision. *San Antonio Independent School District v. Rodriguez*⁵ involved a challenge to the Texas school finance system

3. See *Lau v. Nichols*, 483 F.2d 791 (9th Cir. 1973), *rev'd on other grounds*, 414 U.S. 563 (1974).

4. For a more detailed treatment of this thesis, see Levin, *The Courts, Congress, and Educational Adequacy: The Equal Protection Predicament*, 39 MD. L. REV. — (1980).

5. 411 U.S. 1 (1973).

under which local districts, through authority delegated by the state legislature, raised funds for education by levying a tax on property located within the school district, with some subventions from the state. Because of significant differences in property wealth among school districts, the system resulted in large disparities in per pupil expenditures.

Plaintiffs sought to persuade the Court that the state's school financing legislation discriminated on the basis of wealth, a "suspect" classification, or alternatively, that education was a fundamental right. Either would trigger the "strict scrutiny" equal protection standard of judicial review. The Supreme Court, however, found that the Texas system of financing schools did not discriminate against any class of persons considered "suspect" because the case dealt with property-poor school *districts*, not persons. Moreover, the wealth discrimination complained of in *Rodriguez* did not absolutely deprive any student of an education, but merely produced *relative* differences among school districts in the quality of education. The Court also declared that education was not a fundamental right because it was neither explicitly nor implicitly guaranteed by the Constitution and thus relative differences in education, unless wholly arbitrary, would be permitted.

This failure to find that the state government has some *affirmative* duty to provide education to all equally has not deterred attempts to find ways to expand educational services. Since the Court clearly said that there is no affirmative duty in the Constitution to equalize differences in educational expenditures that result from differences in property wealth—because education is not a fundamental right and children who live in property-poor districts are not a suspect class—the model followed at the political level created new categories of protected classes. Thus, Congress and some states, influenced by what the Supreme Court said, have attempted to identify new categories of "discrete and insular minorities,"⁶ in which "the political insularity of the disadvantaged group might call for special scrutiny."⁷ Some lower federal and state courts have followed this route as well.⁸ The alternative

6. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

7. Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 455 (1978).

8. *See, e.g.*, *Frederick L. v. Thomas*, 408 F. Supp. 832, 836 (E.D. Pa. 1976) (dictum); *Fialkowski v. Shapp*, 405 F. Supp. 946, 949 (E.D. Pa. 1975) (dictum); *In re G.H.*, 218 N.W.2d 441, 447 (N.D. 1974) (handicapped entitled to equal educational opportunity). *Contra*, *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 762 (E.D.N.Y. 1973).

political-legal route would have focused on a guarantee of an adequate education for all children rather than on singling out special classes.

The protected classes include women,⁹ the physically and mentally handicapped,¹⁰ the linguistically handicapped,¹¹ the economically disadvantaged,¹² Indians,¹³ migrant workers' children,¹⁴ and so on. Congress, in its statutory mandates, and some courts, in interpreting the equal protection clause, are saying not only that school authorities must protect these classes from being treated unequally through the denial of equal access to educational facilities, books, or teachers, but also that school authorities are *required* to treat these groups unequally; that is, *additional* resources and special services are to be allocated to these groups above and beyond the resources and programs provided the average child.¹⁵

This approach—identifying new groups as “discrete and insular minorities”—brings with it several problems.¹⁶ First, who determines which group is entitled to treatment as a “discrete and insular minority” and by what criteria? Second, who determines what is an “appropriate” education for these various categories and on what basis? For example, should a learning-disabled child be “mainstreamed” with supporting services or placed in special classes?¹⁷ Third, guaranteeing a certain level of educational services for an increasing number of protected classes at the expense of the middle class has helped to create a

9. Education Amendments of 1972, §§ 901-907 (Title IX), 20 U.S.C. §§ 1681-1686 (1972).

10. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1970) (amended 1978); Education for All Handicapped Children Act of 1975, §§ 602-66, 20 U.S.C. § 1401-1461 (1970).

11. Bilingual Education Act, §§ 701-751, 20 U.S.C. §§ 3221-3261 (Supp. 1978).

12. Elementary and Secondary Education Amendments of 1978, §§ 101-198 (Title I), 20 U.S.C. §§ 2701-2854 (Supp. 1978) (formerly 20 U.S.C. § 241a).

13. Elementary and Secondary Education Amendments of 1978, § 722 (Title VII), 20 U.S.C. § 3232 (Supp. 1978) (“Indian Children in School”). *See also* 20 U.S.C. § 2711(d) (Supp. 1978).

14. Elementary and Secondary Education Amendments of 1978, § 101, 20 U.S.C. § 2761 (Supp. 1978) (formerly 20 U.S.C. § 241e(c)).

15. *See, e.g.*, Elementary and Secondary Education Amendments of 1978, §§ 101-198, 20 U.S.C. §§ 2701-2854 (Supp. 1978); Education for All Handicapped Children Act of 1975, §§ 602-66, 20 U.S.C. §§ 1401-1461 (1970).

16. *See note 4 supra.*

17. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1970) (requires mainstreaming to the maximum extent appropriate to the needs of the handicapped child) (amended 1978); Education for All Handicapped Children Act of 1975, § 612, 20 U.S.C. § 1412(5)(B) (1975). *See also* Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va. 1976); LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973); Mills v. Board of Educ., 348 F. Supp. 886 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

backlash from the white middle class. Those who are not members of a “disadvantaged minority,” even if they are harmed by a school system’s failure to respond to their educational needs, have little hope for recourse from the courts because the most permissive standard of equal protection review will apply. All they can do is try to bring pressure on legislatures to cut back the resources that the protected classes receive for private schools. The pressure on Congress for tuition tax credits or the recent flurry of Proposition 13-type movements in several states are examples of this backlash. Thus, minorities are set against nonminorities in the competition for resources. Fourth, minorities also battle against other minorities in the competition for resources, as typified by the *Adams v. Califano*¹⁸ litigation. Although it began as a suit to compel HEW to require Title VI compliance by school districts, the Women’s Equity Action League (WEAL) intervened to insure that HEW did not give Title VI enforcement priority over Title IX enforcement. Groups representing Hispanics and the handicapped also intervened in that litigation. Finally, this proliferation of “specially protected” classes and the sense of competition for resources may increase, rather than decrease, our distance from a classless and colorblind society in which we treat people as individuals. Thus, even though the “discrete and insular minority” approach is often justified, it is not the happiest of approaches.

On the assumption that the Court was wrong and that Professor Michelman is correct about the Constitution protecting the so-called welfare rights, are not there still problems in defining the constitutional right to equality of basic subsistence needs such as food or housing and basic services such as health or education?

Professor Michelman wants to locate these “welfare” rights—expanding on Professor Ely’s constitutional interpretivist approach¹⁹—in the open-ended guaranties of the fourteenth amendment and, perhaps, in the ninth amendment under a theory of representation-reinforcement. In other words, if various basic needs and services will insure participation in the political processes, including the benefits of those processes, then the government must correct their maldistribution.

What level of goods and services will reinforce representation or participation? How much is enough? Professor Michelman has given us

18. 430 F. Supp. 118 (D.D.C. 1977).

19. See Ely, *supra* note 7.

some cogent arguments why the government has an affirmative duty to treat some people (primarily indigents) differently. He has attempted to show how some interests—housing, clothing, food—are grounded in the Constitution because they relate to effective participation in the system and how others might not. Indeed, in his view education might be *less* crucial to effective political participation than food or shelter. He has not indicated, however, how we determine what the duty of the government is—whether the government must provide everyone with an *opportunity* to obtain some level of goods or services by increasing access to the political-economic process or by making cash or in-kind payments. Or is the duty to insure equal *outcomes*; that is, no one may have a better education or a better house than another. In our society, except in a very few areas, there is little absolute deprivation. Differences are *relative*. Where can the courts draw the line? How much of *X* is necessary to enable one to participate effectively in the political process if we say that the entitlement is not to the same amount of *X* that everyone else has?

Thus, whether welfare rights—and, for my purposes, the right to an education—are characterized as fundamental or as representation-reinforcing, we have the problem of determining the level of the constitutional guarantee. Is a poor person entitled to the same housing as others, a one-acre lot house, or a minimal level shelter—*i.e.*, something with a roof and outdoor plumbing? Must education be absolutely equal or are children merely entitled to a basic level of education, and if so, what guidelines are there for determining what is basic?

Is there an alternative approach to determining what a constitutional entitlement to an education might be that avoids this difficulty? In the absence of absolute deprivation of minimal basic skills, which the Court in *Rodriguez* indicated might be a fundamental right,²⁰ was there a standard by which the Court could ascertain whether the government satisfied or violated an individual's right to equal access to an education? If we turn to the school finance litigation strategies under *state* constitutions, we may find a model that courts could adapt to the federal equal protection clause without doing violence to the clause.

The *Rodriguez* case, as presented to the Supreme Court, followed the model used in *Serrano v. Priest*.²¹ *Serrano* articulated a simple fiscal

20. 411 U.S. 1, 36-37 (1973).

21. 5 Cal. 3d 548, 487 P.2d 1241, 96 Cal. Rptr. 601, *cert. denied*, 432 U.S. 907 (1971).

neutrality theory that the level of spending for a child's education may not be a function of property wealth other than the wealth of the state as a whole.²² Thus, despite the arguments based on fundamental rights and suspect classes, *Rodriguez* was framed as a taxpayer equity suit rather than an equal education suit. The focus was on equalization of fiscal capacity—equalizing the property tax base.

A number of state courts have rejected this approach, focusing instead on assuring an adequate education to all children.²³ The leading case is *Robinson v. Cahill*,²⁴ in which the New Jersey Supreme Court overturned that state's school finance scheme on the ground that it violated the state's constitutional command to the legislature to provide a "thorough and efficient system of free public schools."²⁵ In construing this state constitutional provision, the court stated that "the constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market,"²⁶ suggesting an outcomes or basic-achievement level standard.

The New Jersey court then held that there was no relationship between the educational needs of school districts and their tax bases, "unless we were to suppose the unlikely proposition that the lowest level of dollar performance happens to coincide with the constitutional mandate and that all efforts beyond the lowest level are attributable to local decisions to do more than the State was obliged to do."²⁷

Nevertheless, because equal educational opportunity is the provision of an educational floor or basic level of adequacy, local leeway beyond that level would be allowed. "[N]or do we say that if the State assumes the cost of providing the constitutionally mandated education, it may not authorize local government to go further"²⁸

Seattle School District v. Washington,²⁹ another school finance case, also suggested a mandatory basic level of education standard, although the language focused solely on inputs rather than pupil outcomes. In

22. *Id.* at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

23. For a detailed analysis of these cases, see Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099.

24. 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973).

25. N.J. CONST. art. VIII, § 4, ¶ 1.

26. 62 N.J. 473, 515, 303 A.2d 273, 295 (1973).

27. *Id.* at 516, 303 A.2d at 295.

28. *Id.* at 520, 303 A.2d at 298.

29. 90 Wash. 2d 476, 585 P.2d 71 (1978).

that case, the trial court held that the state's "paramount duty" was to guarantee sufficient funds to support a "basic education" without relying on voted local levies. But once the state fulfills its duty of supplying every district with a basic education, expenditure disparities resulting from local choice constitutionally may exist, even if they are a direct consequence of district wealth.³⁰

The Washington state supreme court affirmed, noting that the constitutional duty went beyond the "basic minimal skills" of "mere reading, writing and arithmetic." The Washington court, echoing the terms of the New Jersey court in *Robinson*, held that the constitutional duty "also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as the marketplace of ideas."³¹

The trial court used several approaches to determine whether the state had, absent a legislative definition of a basic program, met its constitutional duty to make "ample provision for the education of all children residing within its borders."³² One approach was to "cost out" the current requirements imposed on school districts by state statutes and the regulations of the State Board of Education and to measure that amount against the amount of state funds received by the Seattle school district. Another approach determined the costs associated with operating those programs necessary for the Seattle district to obtain or maintain state accreditation. Applying these standards, the funding level for education under *existing* law was insufficient in plaintiff-district.

This brief look at some of the state school finance cases suggests that courts can articulate a principle of a right to an adequate education without requiring the state to provide the same level of education to *all* children in the state or having to "legislate" the kind of education to which a child is entitled. The legislature is left to define that education which is basic.

One could argue that these courts have articulated an empty principle if the states can define what is basic, for that could mean no kindergartens, no foreign languages,³³ or even no reading or arithmetic.

30. Civ. No. 53950 (Wash., Thurston County Super. Ct. Jan. 14, 1977).

31. 90 Wash. 2d at 517, 585 P.2d at 94.

32. WASH. CONST. art. 9, § 1.

33. The Washington state legislature recently adopted a definition of "basic education" in an

However, there are two limiting principles. One is the absolute minimal education that the *Rodriguez* Court hinted might be a constitutional right—"the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."³⁴ Some city districts today are graduating significant numbers of functional illiterates. A New York state trial court in *Board of Education v. Nyquist*³⁵ found that large concentrations of students in the urban districts in New York were absolutely deprived of an education by the state-aid statute. The court thus held that the statute violated the federal equal protection clause under *Rodriguez*³⁶ as well as the state constitution.³⁷

The other limiting principle is the requirement in several state cases that the necessary skills to compete in *today's* labor market must be provided. *Minimal* basic skills are clearly not enough in today's technological society. Thus, these courts must mean that the entitlement is to more than ditch-digging skills, but less than brain surgeon skills.

Of course, this is only a model that courts could have followed in applying the federal equal protection clause. There are clearly differences—at least superficially—between the constitutional claim made in *Rodriguez* and those made under state constitutions. Education is not mentioned in the federal Constitution, but was explicitly mandated by the state constitutions construed in the cases under consideration. In addition, the constitutional claim is raised under the duty to provide an education, although in some of these cases it is also raised under the state's equal protection clause.³⁸ Nevertheless, the state court approach demonstrates that courts can articulate a standard without having to decide issues of educational policy or without requiring absolute equality.

What the state courts seem to be suggesting is that a state must be concerned with the educational needs of its children—indeed, by pro-

attempt to comply with the trial court's order in *Seattle School District*. The Basic Education Act of 1977 excludes foreign languages from the definition of basic education, leaving it to district discretion—meaning locally raised funds. 1977 Wash. Laws, ch. 359, § 3.

34. 411 U.S. 1, 37 (1973).

35. 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

36. *Id.* at 530-32, 408 N.Y.S.2d at 641-42.

37. *Id.* at 532-34, 408 N.Y.S.2d at 642-43.

38. *See, e.g.,* Lujan v. Colorado State Bd. of Educ., Civ. No. C-73688 (Colo., Denver County Dist. Ct. December 12, 1977); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); Board of Educ. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).

viding publicly supported, *compulsory* schooling, it already has expressed this concern. A state, moreover, cannot meet its concerns by a system that relies heavily on the haphazard location of property wealth and the whims of local voters within political subdivisions that are often not coterminous with any other political boundary.

In other words, the standard for determining whether the constitutional duty to provide education equitably is still somewhat of a negative standard in the sense that the original fiscal neutrality principle proposed by the *Rodriguez* plaintiffs was negative, but state courts have modified the standard as follows: educational opportunities may not be a function of local school district fiscal capacity (reflecting municipal and educational overburdens as well as property wealth) and the whims and preferences of local school district voters. The level of education offered cannot depend on a municipality's willingness to approve local tax levies. This standard is accompanied by an affirmative "education need" standard, which differs from the simple fiscal neutrality principle in that the state guarantees an educational floor, but permits localities to choose the level of program they desire to provide beyond the basic state-provided program.

If courts applied this standard to the federal equal protection clause, they would not need to determine how much education was adequate. Courts would not have to "fashion a constitutional command that a designated minimum of . . . [educational] services . . . be distributed to the poor [districts]."³⁹ The courts would merely command the state to devise a system that funds that level of education which the state already has indicated it considers basic rather than having what is an "adequate" education program determined by the amount of property wealth a district zoned in or out in prior years.

Finally, the courts would be deciding not that education "is a fundamental interest and recreation is not,"⁴⁰ but that because the *state* has declared the fundamental importance of education, making it compulsory and public, it must ensure a *basic* level of education for all. Had the Supreme Court taken this approach in *Rodriguez*, it could not be accused of acting as a "national school board."⁴¹ Moreover, as the states themselves often declare in their own constitutions, education is

39. Winter, *Poverty, Economic Equality, and The Equal Protection Clause*, 1972 SUP. CT. REV. 41, 92.

40. *Id.* at 93.

41. *Id.* at 96.

the key to democratic values. In Ely's language, it is "representation-reinforcing." States have not so declared recreation, or even housing or health.

Education is a publicly provided governmental service for rich and poor alike, purchased not with *personal* wealth—in contrast to the primary reliance on the market for housing, food, and health care—but with district wealth, the state determining the boundaries of that wealth.⁴² And myth though it may be, education is seen as the key to social mobility, to breaking the poverty cycle, and to obtaining access to adequate food, shelter, and other subsistence needs. Thus, courts can justifiably entitle education to special constitutional protection either because it is a "fundamental right" or because it is "representation-reinforcing." And, as I have attempted to show, there are judicially manageable standards for determining the extent of the government's affirmative constitutional duty without requiring it to insure absolute equality of educational services.

42. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 48 (1969).

