

## Transforming a Moral Right into a Legal Right: The Case of School Finance Litigation and the Right to Education

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Rights claims, in both theory and practice, convey a level of moral gravity that other types of public appeals do not possess. As Jeremy Waldron emphasizes, rights are weightier than need-based claims because they are not merely a list of demands for certain liberties or goods. More significantly, they invoke the moral status of claimants by expressing what citizens owe to each other, and thereby suggest a vision of society.<sup>1</sup> To honor or deny a right, therefore, is not simply to acknowledge or dispute an alleged need: more seriously, it is to pass judgment on the view of humanity and of political obligations implied by a right.<sup>2</sup> As Ronald Dworkin points out, political theories reflect different views of what constitutes a right, and how rights, goals, and duties are connected and ranked.<sup>3</sup> The scope and importance of rights varies across theories; nonetheless, to invoke a right is to make a moral claim that commands special consideration, or as Dworkin has put it, to play one's "political trump."<sup>4</sup>

This morally elevated rhetoric is not just the purview of law, limited to rights enumerated in constitutions. Rights rhetoric has become part of everyday political discussion to express social ideals that are far more expansive than legally protected rights, and education reform discourse is no exception. Parents, students, and policymakers increasingly invoke rights to give their calls for school reform moral urgency. We hear about "the right to learn," that "reading is the new civil right," and how "school choice is a right," for example. Yet despite the prevalence of rights rhetoric, a right to an equal or even just adequate education is a tenuous claim. As a simple legal matter, there is no federal right to education, and most state constitutions include only vague education entitlements. The uncertain status of education in the law underscores a fundamental incongruity in our conception of education: we treat education as a moral right and as a "great equalizer," but our concern about inequality in public education is often without a clear legal basis. Nonetheless, reformers have historically turned to courts for recourse against perceived state, district, and school negligence, resulting in arguably greater judicial involvement in education than in other policy arenas.<sup>5</sup> Given that the value we ascribe to educational opportunity typically exceeds its legal protection, how might courts help translate moral claims about educational opportunity into legal rights with policy traction? To explore the relationship between legal rights, educational opportunity, and the ideal of equal citizenship, I focus my analysis on two key decisions in school finance litigation that centrally consider a right to education, and that have deeply influenced the course of present-day litigation. The first case is *San Antonio Independent School District v. Rodriguez*, decided by the US Supreme Court in 1973; the second is *Rose v. Council for Better Education, Inc.*, decided by the Kentucky Supreme Court in 1989. I conclude by briefly suggesting how extra-

judicial activity can move the moral leverage of rights beyond courtrooms to advocacy in the public domain. This advocacy can then help mitigate the long-standing tension between counter-majoritarian rights and democratic processes, and can deflate concerns about judicial review.

THE *RODRIGUEZ* DECISION: POLARIZING OPTIONS TO DENY A RIGHT

In the landmark *Rodriguez* case, the Supreme Court denied the appellees' claims that Texas's school financing system is unconstitutional — a denial that ultimately turned on the Court's conception of a right to education.<sup>6</sup> The *Rodriguez* decision effectively ended school finance litigation at the federal level by denying that the Equal Protection Clause, which was reformers' only foothold to the Federal Constitution, could be used to advance educational equality. In rejecting the appellees' claim that education is a protected right, the Court relied on two central arguments: that the plaintiffs do not constitute a suspect class, and that education is not a fundamental interest of the state, thereby affirming Texas's financing system that allowed great inter-district inequality. I focus on the second aspect of the Court's analysis, that is, its consideration of whether education is a constitutionally protected interest.

The appellees argued that education is distinct from other public services because of its connection to political rights enumerated in the Constitution, namely the right to free speech and to vote. The central point here is that without a proper education — the appellees mentions the ability to read and to articulate thoughts intelligently and persuasively — voting and free expression rights are severely compromised (*EPL*, 784). This claim underscores that education is constitutive of political rights rather than instrumentally related to them, a difference that is critically important toward advancing a right to education. A right to basic income, for example, can be considered purely instrumental: its value lies in what it allows individuals to do, and the well-being that it provides could be achieved by other means such as food stamps, public housing, or employment opportunities. This is not how education stands in relation to First Amendment political rights. A meaningful right to free speech requires cognitive skills at a certain level that cannot be achieved by means other than education. Put simply, education is not one among several ways to empower individuals to use their political liberties: it is the primary way.

The majority opinion at first seems to concede this much. When the Court condones the Texas school financing system, it does so because it found that the system did not fail to provide students with the "basic minimal skills" necessary for effective political participation, which implies agreement that some amount of education is required to make other rights meaningful (*EPL*, 785). This acknowledgment opens the door to a minimal right to education, and subsequent cases have cited *Rodriguez* to this effect (*EPL*, 796). Yet the Court then seems to retreat from its initial acceptance of the unique link between education and political rights. When considered against other basic welfare goods, the Court suggests, education might turn out to be only instrumentally useful to political rights, and may not even be the most instrumental good. The Court hypothesizes that perhaps those who are politically deprived are not the most ill-educated, but rather the starving and

homeless — a bald assertion that seems to rest on a conflation of correlation and causation (*EPL*, 785).

Where the Court went most wrong, I believe, is in the false dichotomy it creates to consider its options for redressing funding inequalities in Texas. The appellees linked education to political rights to claim that the state has a responsibility to provide an adequate education despite the fact that such a right is not enumerated in the federal Constitution. However, nowhere did the appellees assert that the state's responsibility is to enable citizens to make *maximum* use of their political rights via education. Yet the Court uncharitably misconstrues the appellees' adequacy claim into this superlative form, and thus forces its judicial options into two stark extremes: to find that the state is responsible for providing an education that enables *the most* effective free speech or electoral choices, or to find that *any* state effort at providing education is sufficient. Given the obvious problems with the former standard, the Court picks the latter. This choice forecloses any substantive discussion of what counts as a satisfactory minimum, and ignores the myriad possibilities between these extremes.

The state's responsibility to provide education is clearly not the all-or-nothing proposition that the *Rodriguez* decision misconstrues it to be. The Court's sanction of the status quo is a woefully inadequate standard for public education that accepts any state effort as sufficient, and so condones second-generation discrimination against students in property-poor districts. As anemic as this conception of a right to education is, it is not clear that the opposite extreme with its maximizing standard is any more desirable. As Amy Gutmann and Dennis Thompson underscore, when we are considering how to distribute basic opportunity goods such as education, healthcare, and housing, an egalitarian principle that seeks to maximize each individual's well-being is not necessarily best. From a practical standpoint, there is a real trade-off between social goods that has to be acknowledged: as they put it, "if government tried to fund education to normalize the life chances of all citizens, this would probably leave inadequate funds for health care."<sup>7</sup> Moreover, they rightfully argue that, just as we would question individuals who use their personal resources to maximize one aspect of their well-being to the exclusion of all else, so too would we question a society that dedicates all of its resources to one of its citizens' many needs. It is reasonable for citizens to expect public resources to fund an array of services and goods, both essential and non-essential.<sup>8</sup>

Where things get tricky, of course, is in determining what counts as a satisfactory minimum for basic welfare goods given that we cannot maximize everything. Recent litigation has shown the necessity of engaging in serious, reflective debate about what minimum is satisfactory, and to be aware of when minimalism is twisted into outright inadequacy. In New York, for example, an expert witness defending the state's system argued that, because newspaper articles and jury instructions are usually written at an 8th grade reading level, an eight grade education is sufficient toward promoting competent civic participation.<sup>9</sup> It is these sorts of challenges that are the crux of the debate, and that require careful exploration of the gray area between accepting any education system as sufficient, and requiring the state to

maximize students' abilities. This hard work is what the *Rodriguez* court entirely dodged.

Justice Marshall's dissent properly points out the majority's mistake in forcing the Court's options into this false dichotomy that misconstrued the appellees' claim. He writes: "With due respect, the issue is neither provision of the most *effective* speech nor of the most *informed* vote" (*EPL*, 792). Nor, he suggests, must students experience complete deprivation of education for the state's system to be unacceptable. Somewhere between a miserly standard that accepts *any* public education and a maximizing standard is an entire range of possibilities open for debate and experimentation.

#### THE *ROSE* DECISION: AFFIRMING A RIGHT FROM THE MIDDLE GROUND

After the *Rodriguez* decision shut down litigation at the federal level, the school finance reform movement looked to state courts to compel reform under state constitutional provisions for education. This shift to state courts marked the beginning of the "second wave" of school finance litigation, which tried to leverage equal protection clauses in state constitutions to promote equality of educational opportunity.<sup>10</sup> This round of cases was largely unsuccessful, prompting a shift to the "third wave" of litigation that remained focused on state constitutions, but aimed to secure an adequate level of education for all students rather than to achieve equality across districts.<sup>11</sup> *Rose v. Council for Better Education* (1989) is the landmark case at the start of this adequacy movement.<sup>12</sup> This round of litigation has had greater success and seems more politically viable since it does not center on what opponents might call a Robin Hood redistributive scheme.<sup>13</sup> It instead aims to raise the floor rather than lower the ceiling of educational opportunity.

The plaintiff's group, the Council for Better Education in Kentucky, did not have much to work with by way of the state's constitutional provision for education. The Kentucky Constitution tersely states only that Kentucky must "provide an efficient system of common schools throughout the state" (*EPL*, 819). Constitutional provisions aside, outsiders would not have looked to Kentucky as the vanguard of education reform given the state's notoriously under-performing system. As Peter Schrag puts it, "Nobody ever said that as Kentucky goes, so goes the Nation."<sup>14</sup> Yet from the state's thin constitutional promise of "an efficient" public education system, the Kentucky Supreme Court engaged in debate about the connection between education and equal citizenship, and the state's responsibility to provide the former to protect the latter. Whereas the *Rodriguez* court never considered what the substantive content of an adequate education might entail, the Kentucky Supreme Court took this issue as its central task. Citing the *Brown* decision's statement that "education is perhaps the most important function of state and local governments," the Kentucky Court not only declared the state's entire funding system unconstitutional, but additionally defined what an adequate education should include (*EPL*, 819).

To this end, the Kentucky Court articulates seven capacities that education must foster to meet constitutional muster — capacities that demonstrate the Court's view

that education is inextricably linked to the exercise of political rights rather than merely instrumentally related to them. Whereas the *Rodriguez* decision equivocates on the uniqueness of education's relation to political rights compared to other social goods, the Kentucky Court unconditionally asserts the distinct importance of education: "No tax proceeds have a more important position or purpose than those for education in the grand scheme of our government" (*EPL*, 819). The understanding of education as constitutive of political rights is reflected in the Court's description of the capacities it believes education should foster. Many of the capacities that the Court names are clearly tied to the exercise of such rights and enable informed civic participation, including knowledge of economic, social, and political systems to enable students to make informed choices; and understanding of government processes to enable students to understand issues that affect their community, state, and nation (*EPL*, 820).

This acknowledgment of the distinct role of education toward preparation for equal, competent citizenship is not, however, the most remarkable aspect of the *Rose* decision despite the *Rodriguez* court's failure on this basic point. The Kentucky Court affirms an even more robust right to education that considers individual well-being apart from the exercise of political rights. The Court goes beyond capacities that recognize education qua political education to articulate aspects of a liberal education that benefits individuals independent of their role as citizens. Such capacities include knowledge of one's mental and physical wellness; arts education to enable students to appreciate their cultural and historical background; and training to enable students to choose and pursue life work intelligently (*EPL*, 820). The knowledge suggested by these capacities fosters the values of self-understanding, dignity, and group identity — values that are celebrated by liberal and multicultural theorists such as John Rawls and Will Kymlicka.<sup>15</sup> Although these capacities certainly have bearing on one's role as a citizen, they are not centrally concerned with preparing individuals' to exercise political rights, demonstrating the court's broader perspective of what a right to education properly entails.

Such a capacious view of education, however, need not be dismissed as unrealistically aspirational. The *Rose* decision is careful to avoid the unfeasible maximizing standard that the *Rodriguez* decision rejected as beyond the judiciary's purview. The Kentucky Supreme Court's finding of a right to education — though robust — is repeatedly tempered by the language of adequacy. Each of the seven capacities the Court named is carefully disclaimed so that the state is not required to provide the best or most equitable education to maximize the stated goals, but rather just an education that is "sufficient." Whereas the *Rodriguez* decision polarized the options for judicial redress into two extremes, the *Rose* decision properly seizes the middle ground to affirm a right that does not make a fetish of education that would preclude funding other valued goods and services. Despite the *Rose* decision's realistic approach, however, the right that it endorses is not immune to the challenges of implementation. Making a right "actionable" once it is on the books raises a whole new host of problems that underscore the limits of rights as levers for reform, to which I next turn.

## WHAT GOOD IS A RIGHT?

The nature of moral, political, and legal rights and the protection they offer to individuals is an expansive topic warranting treatment beyond what I can provide here. I briefly take up a narrow part of this issue to focus on the strengths and limitations of legal rights toward promoting education reform. Education falls under what political theorists classify as “second generation rights”: it is an individualistic entitlement like first generation liberty rights, but requires redistribution of resources to be realized.<sup>16</sup> And it is this redistribution requirement, according to critics, that limits — if not blocks altogether — the utility of rights toward realizing social change. Rights are not self-actualizing: the declaration of a right by a court does not suddenly even out resource and power imbalances between citizens. A court finding in favor of a right to education does not itself lead to more textbooks, better trained teachers, and cleaner and safer schools. Political processes have to be set into motion for a right on the books to be implemented: legislators have to pass supportive law; local actors have to comply with new policies; enforcement mechanisms have to be created; and citizens have to know their rights and the avenues for recourse should violations occur.

Given structural inequalities, critics argue, rights are therefore unequally useful to citizens. Although on paper they are “formally neutral,” they are not evenly realized by individuals due to unequal access to resources and power in the implementation process.<sup>17</sup> As sociologist of law Laura Nielsen notes, empirical research shows that individuals in ongoing relationships are less likely to exercise rights with respect to those relationships, a trend often due to fears about job loss or other repercussions.<sup>18</sup> The exercise of rights (and legal mobilization to establish rights) may also be thwarted by the sociological reality that victims may become accustomed to what outsiders view as deprivation. This fact is, as Stuart Scheingold notes, “the despair of reformers who can work much more effectively in an atmosphere of indignation.”<sup>19</sup> This point is particularly salient with respect to school reform: the dilapidated condition of public schools — particularly in predominantly minority, urban areas — has almost become a cultural fact rather than a cause for outrage.

Moreover, because rights are achieved and institutionalized through law, their realization is subject to general criticism about the judiciary as a social reformer. Setting aside structural inequalities outside courtrooms that complicate the implementation of rights, skeptics argue more broadly that change via courts occurs so incrementally that legal rights are, at best, overdue band-aids on gaping wounds. As Gerald Rosenberg emphasizes, court-ordered reform is painfully slow from the perspective of the oppressed: courts must wait for an issue to enter the legal system, and follow-up after a case has been decided is difficult because it can take years for a court to hear about instances of non-compliance.<sup>20</sup> But even before the slow judicial process can begin, individuals have to translate their outrage into a legal claim — again a process more easily undertaken by individuals with greater resources and power.<sup>21</sup> Since legal mobilization is not widespread, critics worry that legal advocacy saps energy from broader popular mobilization, thereby dampening

the potential for sweeping social movements.<sup>22</sup> Time spent in the courtroom in the name of reform might be better spent in the streets, such critics claim. In sum, we may pin too many hopes for reform to courts.

Yet court issued rights are far from indefensible, and their support need not rest on naiveté. Scheingold's replacement of the "myth of rights" with a "politics of rights" offers a realistic view of what rights can do: rather than relying on the "myth" perspective that assumes a direct linkage between litigation, rights, and reform, a politically savvy view treats rights as a means toward reform.<sup>23</sup> From this perspective, rights are a "contingent resource" rather than ends onto themselves: "The politics of rights, therefore, involves the manipulation of rights rather than their realization."<sup>24</sup> And it is this process of manipulating rights to make them work on behalf of victims, some theorists argue, that becomes morally uplifting and dignifying. Rights enable individuals to feel entitled to better social conditions and are empowering: as Michael McCann argues, "the symbolic manifestations of law as both a source of moral right and threat of potential outside intervention, invest rights discourse with its most fundamental social power."<sup>25</sup>

The case for rights is strengthened further by considering the deficiencies of the alternatives. From a theoretical perspective, Waldron convincingly argues against the critique that rights advocacy diverts attention from recognition of need, showing that the rhetoric of need is not a better alternative.<sup>26</sup> He notes that calls for reforms that center on needs have historically done little for racial minorities; moreover, a rhetoric of need implies dependency and weakness, whereas rights rhetoric is uplifting and dignifying: "The language of rights refers us to the full moral status of the claimants in a way that the language of needs, taken on its own, does not."<sup>27</sup> From an institutional perspective, there is no obvious alternative to courts to grant rights: relying on congress, the media, or political protestors opens up myriad new problems that likely match if not exceed the imperfections of courts. Court-issued rights, for all the reasons noted above, cannot redistribute resources to promote equality, but they can promote cognitive shifts that become an impetus for other individuals and institutions to do their part. And as Joel Feinberg puts it, a world with this possibility is not perfect, but is nonetheless an improvement upon his fictitious "Nowheresville" that is devoid of rights: "The activity of claiming... makes for self-respect and respect for others, gives a sense of the norms of personal dignity, and distinguishes this otherwise morally flawed world from the even worse world of Nowheresville."<sup>28</sup> Legal rights are necessary but not sufficient. I will conclude by briefly acknowledging a possible supplement to litigation that may help realize the ideals behind a right to education.

#### CONCLUSION: A CASE FOR EXTRA-JUDICIAL, DELIBERATIVE ADVOCACY

As legal advocate Michael Rebell suggests, public engagement beyond courtrooms is critical toward advancing the cause of school reform litigation.<sup>29</sup> Legal reform need not be a top-down process; to be truly democratic, argues Rebell, individuals must also be involved from the bottom up. Giving citizens forums in which to discuss perceived needs and potential negligence not only heightens awareness of entitlements. It can also provide important information to guide courts

and legislators when they address inequalities and violations of rights — guidance that is particularly helpful in education cases, given the intricacies of education policy and the courts' distance from schools. As Rebell notes, if there is already a clear public mandate for change voiced through civic engagement, the judiciary and legislature are more likely to promote reform: "The significant potential for successful civic dialogue on the difficult issues involved in fiscal equity and adequacy reform is indicated by the fact that judicial orders have encountered the least political opposition and brought about the most thorough change in states where broad-based citizen involvement preceded or dominated legislative action."<sup>30</sup>

Kentucky's *Rose* decision is a case in point: in addition to concerned citizens, the business community also sought reform and the Court's decision gave the Kentucky legislature license to redistribute state resources.<sup>31</sup> The Campaign for Fiscal Equity (CFE) in New York is another case in point. Under Rebell's direction, CFE held public forums to solicit input from citizens regarding the needs of their schools. This information was then part of a larger study to determine how much money New York State must spend to provide its students with an adequate education.<sup>32</sup> The court-appointed panel found that New York schools need over five billion more dollars per year in addition to nine billion dollars for capital improvements — figures that are practically what plaintiffs requested.<sup>33</sup> Whether and to what extent the momentum generated from CFE's public engagement campaign contributed to the panel's conclusion may be difficult to gauge — but it's unlikely to have hurt their case. Coupling litigation with civic activism of this sort not only creates a political environment that allows courts and legislators to promote reform via rights. It also provides opportunities for public deliberation about what sort of right to education citizens want — deliberation that mitigates fears that courts are anti-majoritarian bodies, and that the rights that they issue constrain rather than enable democratic processes. Broader public engagement about a right to education then ultimately helps makes rights better understood, and vigilantly protected.

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1. Jeremy Waldron, "Rights and Needs: The Myth of Disjunction," in *Legal Rights*, eds. Austin Sarat and Thomas R. Kearns (Ann Arbor, Mich.: University of Michigan Press, 1996), 87–109.

2. *Ibid.*, 87–109.

3. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), 171–173.

4. *Ibid.*, xi.

5. David Kirp and Donald Jensen, eds., *School Days, Rule Days* (Philadelphia: Falmer Press, 1986).

6. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); decision reprinted in *Educational Policy and the Law*, 4th ed., eds. Mark G. Yudof et al. (Belmont, Calif.: Thomson Learning, 2002), 781–94. This work will be cited as *EPL* in the text for all subsequent references.

7. Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1996), 214–215.

8. *Ibid.*, 215.

9. *Campaign for Fiscal Equity, Inc. et al v. The State of New York, et al.* (2000).



10. William Koski, "Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation," *Santa Clara Law Review* 43, no. 4 (2003): 1189.
11. *Ibid.*, 1192.
12. *Rose v. Council for Better Education, Inc.* (1989); decision reprinted in *Educational Policy and the Law*, eds. Yudof et al., 819–822.
13. Koski, "Of Fuzzy Standards and Institutional Constraints," 1233.
14. Peter Schrag, *Final Test* (New York: New Press, 2003), 61.
15. See especially John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971); and Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995).
16. Laura Beth Nielsen, "The Work of Rights and the Work Rights Do: A Critical Empirical Approach," in *The Blackwell Companion to Law and Society*, ed. Austin Sarat (Malden, Mass.: Blackwell Publishing, 2004), 65.
17. Nielsen, "The Work of Rights," 66.
18. *Ibid.*, 67.
19. Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven: Yale University Press, 1974), 132.
20. Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991), 17.
21. William L.F. Felstiner, Richard L. Abel, and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming," *Law and Society Review* 15, no. 3–4 (1980–81): 633.
22. Rosenberg, *The Hollow Hope*; Scheingold, *The Politics of Rights*.
23. Scheingold, *The Politics of Rights*, 7.
24. *Ibid.*, 148.
25. Michael McCann, "Law and Social Movements," in Sarat, ed., *The Blackwell Companion to Law and Society*, 514.
26. Waldron, "Rights and Needs," 87–109.
27. *Ibid.*, 105.
28. Joel Feinberg, "The Nature and Value of Rights," in *Philosophy of Law: Rights and Their Foundations*, ed. Jules L. Coleman (New York: Garland Publishing, 1994), 133.
29. Michael A. Rebell, "Fiscal Equity Litigation and the Democratic Imperative," *Journal of Education Finance* 24 (1998): 23–50.
30. *Ibid.*, 47.
31. Schrag, *Final Test*, 61–95.
32. See The Council of Costing Out, "Underfunded Schools, Discounted Dreams," <http://www.cfequity.org/costoutpepbrochure.pdf>.
33. Greg Winter, "Court Panel Says New York Schools Need Billions More," *New York Times*, December 1, 2004.