

## **Interpreting the Right to an Education as a Norm Referenced Adequacy Standard**

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### **Abstract**

Our current conceptions of educational adequacy emerged out of an era dominated by equity based school resource litigation. During that time of transitioning between successful litigation strategies, legal opinions provided clues as to how future courts might view a norm-referenced approach to establishing an adequacy standard - an approach that appreciates that for certain social goods, equity and adequacy are inextricably connected. This article explores three decades of school finance litigation and attempts to define the limits of the right to an education, to glean how a norm referenced right to education argument grows out of the historical legal framework.

**Keywords** Equity, Adequacy, Norm-referenced, Litigation

### **Introduction**

Some notion of adequacy has always played a critical role in the distribution of educational resources and availability of educational opportunities. Adequacy standards have grown more complex and have emerged along several levels of educational governance from site base managed graduation standards to movement towards establishing national goals. Within this evolution of the adequacy standard there seems to be implicit links between equity and adequacy that would benefit from further exploration.

There may be instances where inequity in the distribution of educational opportunities directly affects the adequacy of an education. This is the case when the enjoyment of goods is norm referenced rather than fixed. Education that directly affects economic participation is an example. A fixed threshold level for the ability to read may have no meaning with regard to its affect on allowing people the opportunity to compete for jobs. If a significant number of children are provided educational opportunities well above the less advantaged, the threshold of what is

"adequate" becomes a product of the comparison of relative skills between peers when competing for jobs. In these cases, equity becomes important for the adequacy standard to have any meaning. The distribution of educational goods is subject to increasingly rigid standards of equity as they are more closely associated with primary goods. This is particularly true for norm referenced goods vs. fixed goods.

### **School Finance Litigation Transitions from Equity to Adequacy**

The last thirty years of the 20th century was a particularly rich period in school finance litigation and produced notions of equity and adequacy across a variety of educational contexts. An examination of key school finance litigation will show a shift from equity to adequacy based standards of judicial review. Several theories of what constitutes an adequate education have emerged ranging from a minimal education program as discussed in Rodriguez to high levels of educational excellence put forth by the Kentucky Supreme Court. A common thread through most school adequacy decisions is the connection between education and the rights of democratic participation and economic competition.

A landmark case in school finance, *Serrano v. Priest* (1971) was the first to establish a principle of fiscal neutrality as a measure of equity. In other words, the Court found that the quality of education should not be a function of wealth characteristics beyond the effect on educational quality resulting from the sum wealth of the state. The California Supreme Court invalidated the state's system of distributing school revenues on the grounds that educational quality was a function of irrelevant characteristics, specifically wealth. The *Serrano* Court quoted Horace Mann to support the, "absolute right to an education of every human being that comes into the world, and which of course proves the correlative duty of every government to see that the means of the education are provided for all" (*Serrano v. Priest*). According to the *Serrano* opinion it is incumbent upon the state to finance schools on a level playing field so that they may serve as, "the bright hope for entry of the poor and oppressed into the mainstream of American society" (*Serrano v. Priest*). The focus in this case was on student equity and used educational inputs to measure the level of inequity.

A similar decision was entered at the federal district level ordering Texas to restructure its school finance system to meet the standard of fiscal neutrality. This decision was reversed by the Supreme Court in *San Antonio Independent School District v. Rodriguez* (1973), a decision that generated different ideas about equity than those expressed by the lower court and introduced adequacy concerns to the debate. The Supreme Court ruled that disparity in educational resources across districts was acceptable as a product of a legitimate state purpose.

The majority opinion in *San Antonio Independent School District v. Rodriguez* (1973) expressed a form of adequacy argument in relation to the impact of education on First Amendment liberties and the right to vote. According to the petitioners a certain level of basic skills are necessary for these constitutional rights to carry meaning. Specifically, literacy and the ability to process and express information are the key elements of the curriculum. They argue that, "the corollary

right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge" (San Antonio Independent School District v. Rodriguez). The Court agreed that a minimum level of skills are needed to effectively participate in all aspects of a democratic society, but emphasized that the Court and the State are limited in their provision of these skills. The opinions reads that meeting these standards does not include allocating resources to guarantee the, "most effective speech or the most informed electoral choice" (San Antonio Independent School District v. Rodriguez, 1973). The Texas system was found to adequately provide educational opportunities to the children of the state of Texas and defined the appropriate level of educational effort as that necessary, "for the enjoyment of the rights of speech and of full participation in the political process" (San Antonio Independent School District v. Rodriguez).

### **Free Speech as a Norm Referenced Educational Goal**

In San Antonio Independent School District v. Rodriguez (1973), the Court recognized a connection between the right to free speech and education while holding that despite this link, it was not the State's responsibility to provide its citizenry with "the most effective speech." To understand what degree of education may be tied to the meaningful exercise of the right to speech without necessarily reaching the most effective speech, it is helpful to better understand how the law evaluates the purpose of the free speech clause. Legal scholars point to four primary purposes of the right to speech: "to assure individual self-fulfillment; to advance knowledge and discover truth; to provide for participation in decision making by all members of society; and to achieve an adaptable, more stable community" (Bitensky, 1992, pp. 596-597). These primary purposes have at times been supported by case law in which the Supreme Court has claimed that the right to free speech functions to further the democratic process, leads to the discovery of truth through the marketplace of ideas, promotes self-realization, and serves to promote political participation (New York Times Co. v. Sullivan, 1964).

Accepting any of these possible purposes behind the right to free speech one may argue that the right to education is unavoidably linked to the exercise of free speech. This is especially true if one shares the view proposed by Justice Brennan that, "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government (Richmond Newspapers, Inc. v. Virginia, 1980).

From this argument, a nexus is formed between free speech and the right to vote. Within this nexus appears to be an implied right to education. This is validated by the logic behind the right to vote being restricted by an age requirement of eighteen years. The age is not arbitrary, but rather linked to a desire to place the participatory mechanism of the government in the hands of a more educated and informed representation of the citizenry. In Richmond Newspapers, Inc. v. Virginia (1980) Justice Brennan observed that "implicit in this structural role is... the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed."

Legal scholar, Penelope Prevolos (1980), has developed an argument supporting the right to education under the free speech protection of the right to receive information. The primary roadblock in this argument is that the right to education in question is an affirmative right, while the right to receive information is generally viewed by the court as a negative right that prohibits the government from actions that interfere with access to information. This is the logic behind the negative right to education established in *Meyer v. Nebraska* (1923). Prevolos (1980), however, points to case law that deals directly with adequacy issues in providing access to information. In *CBS v. Democratic National Committee* (1973), the Supreme Court ruled that broadcasters were not compelled to sell time for editorial advertisements according to the First Amendment because the general practices of the broadcast system already provided adequate access to the information. The argument follows that if the level of access to educational opportunity fell below a minimum standard the Court may compel the State or schooling entity to provide a greater access to information in question.

Using similar logic one may argue a right to education drawing on the decision in *Richmond Newspapers, Inc. v. Virginia* (1980) in which the Supreme Court ruled that there is a First Amendment right of access to criminal trials even in those cases in which the prosecution, defense, and trial judge preferred a closed trial. The state was mandated by the court to provide access to information that the state did not wish to provide. This affirmative right to access information may be used to support a right to education that is in its simplest form an affirmative right to access information. However, it is important to understand that the comparison has weaknesses. Foremost, is the fact that educational systems in the United States do not operate at the simple theoretical level of providing access to information. Educational systems are far more complex and the content and delivery systems must be created and maintained, as opposed to providing access to a trial which merely entails providing an open forum for an existing event. Moreover, there is support for the right to an open trial in the Sixth Amendment of the Constitution, which does not exist for the right to education. Regardless of the limits of the comparison between education and trial access, the formulation of affirmative rights to access knowledge could play a supporting role in building a case for the right to education.

The ambiguity of the *San Antonio Independent School District v. Rodriguez* (1973) Court in addressing the adequacy issue makes it difficult to specify at what point a school system would be in noncompliance, but the Rodriguez decision shed new light on the legal foundations of examining adequacy. Worth noting is how the argument against the state in this case might change if an intersection between equity and adequacy issues was proposed. One can imagine a relative denial of educational opportunity through a highly unequal distribution of resources effectively altering the adequacy standards. In other words, the inequity of the finance system may be so great that the minimum skills did not provide the appropriate preparation for children to participate in a competitive society.

Although this specific argument was not offered in *San Antonio Independent School District v. Rodriguez* (1973), the stated goals of education (i.e., to acquire skills for

the enjoyment of free speech rights and democratic participation) lend themselves to a norm referenced standard of adequacy. For example, if every child received only a fourth-grade education we can expect that the minimal literacy skills needed to read and cast a ballot would be available to all. If every child who was capable of benefiting from a college education was provided one, not only would the skills needed for voting be available to all, but also the ability to understand complex policy issues, study the process of democratic government, articulate political positions and persuade others. In both cases the right to participate in the political process is available and although one group of citizens is capable of participating on a more complex level, all children achieve the basic skills needed to exercise this right. However, if half the children (group A) receive a fourth-grade education and half (group B) complete college, group A's participation in the political process will be severely compromised by the existence of Group B. Group B will represent such a relatively informed electorate that it serves to undercut the very principles of a democratic governance structure.

San Antonio Independent School District v. Rodriguez (1973) is clear in asserting that it is not within the Court's purview to, "guarantee to the citizenry the most effective speech or the most informed electoral choice." However, the Court does hold that citizens are expected to enjoy "full participation in the political process" (San Antonio Independent School District v. Rodriguez). It may be argued that the goal of "full participation" provides an example of an adequate education outcome that when absent constitutes an absolute deprivation. In this case, full participation can be seen as a norm referenced or skill based threshold (e.g., ability to read and comprehend complex political issues).

### **Considering Equity and Adequacy Together**

It is common for equity and adequacy to be considered in concert with each other. This is especially true for cases that turned on legal interpretation of education clauses found in state constitutions. The first of these cases, Robinson v. Cahill (1973), judged the constitutionality of the New Jersey school financing system by its success in providing, "a thorough and efficient system of public schools."

The Constitutional provision for an educational system was determined by the Court to establish a foundation level of 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" (Robinson v. Cahill, 1973) As with earlier attempts to define adequacy levels, the court was unclear as to the specific foundation level necessary to reach the adequacy standard it supplied. However, the emphasis on competition in Robinson v. Cahill appears to lend itself to a norm-referenced analysis of adequacy by interpreting the education clause to provide opportunities that equip children to compete in the labor market.

The New Jersey Court combined constitutional adequacy measures with equity consideration. Interestingly, while their definition of a sufficient education was expressed using output standards, equity demands were evaluated on the basis of revenue per pupil. This has been a common approach for dealing with these two concepts and highlights the need for better knowledge of how inputs become observable outcomes that meet performance standards. In the majority opinion the

Court established the minimum criteria for meeting the constitutional standard as the lowest spending district meeting the threshold of the adequacy provision while all additional efforts are the product of local decision-making to exceed state obligations (Robinson v. Cahill, 1973).

According to this approach inequities are allowable within a system that provides a minimally adequate educational level to all. Establishing the criteria that define educational opportunity should not be confused with developing adequacy standards. In *Edgewood v. Kirby* (1989), the Texas court focused on tax payer equity and creating a resource base for local districts that was not a factor of district wealth. In summing up the Court's reasoning it states that an efficient system of public free schools must provide, "a direct and close correlation between a district's tax effort and the educational resources available to it . . . districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort" (*Edgewood v. Kirby*).

In the *Edgewood v. Kirby* (1989) decision, the Court never directly connected district tax base with educational opportunity. However, in defending the need for a more equitable distribution of resources the Court assumed a link between revenue per pupil and educational opportunity. The Court defined the specific educational opportunity lacking in low-wealth districts as, "broader educational experiences including more extensive curricula, more up-to-date technological equipment, better libraries and library personnel, teacher aides, counseling services, lower student-teacher ratios, better facilities, parental involvement program, and better drop-out prevention programs" (*Edgewood v. Kirby*). The greatest contribution of the *Edgewood v. Kirby* Court to the adequacy debate is the definition of core educational opportunities that defined when a school had failed to reach the court's threshold for adequacy.

Despite this description of the specific educational opportunities in question, the Court did not follow up by establishing a minimum standard for the delivery of these opportunities. It appears that the Court was merely attempting to justify the need for higher standards of equity by illustrating the impact of the present system on low wealth districts. Moreover, the Court placed faith in the efficacy of a more equitable system to provide these opportunities without explicitly setting a minimum standard of resource allocation or performance.

The constitutionality of the finance system in New Jersey was revisited in *Abbot v. Burke* (1990), and the New Jersey Court faced similar equity and adequacy arguments as those faced by the *Edgewood v. Kirby* (1989) Court. However, in New Jersey the difficulty in linking funding and educational outcomes was directly addressed. Recognizing the number of factors that play upon a child's ability to take advantage of educational opportunities the Court acknowledged that equalizing funding for education could not bridge the gap (*Abbot v. Burke*, 1990). Summing up their logic for pursuing a more rigid equity standard in spite of this admission the decision read, "the constitutional answer is that [poor urban children] are entitled to pass or fail with at least the same amount of money as their competitors" (*Abbot v. Burke*).

The equity standard established in *Abbot v. Burke* (1990) orders the state to provide more than simply a guaranteed tax base for less wealthy districts. In addition to providing an equitable distribution of available resources for poorer urban districts, "the state must assure that their educational expenditures per pupil are substantially equivalent to those of the more affluent suburban districts, and that, in addition, their special disadvantages must be addressed" (*Abbot v. Burke*). Although minimum expenditure standards were established in *Abbott* opinion for local education agencies, this is still considered an equity argument. The expenditure levels are adjusted relative to other districts rather than an adequacy standard.

The Kentucky reforms that evolved from *Rose v. Council for Belter Education* (1989) took on a broader task of redesigning the entire educational delivery system. The Kentucky decision marked the beginning of the most recent wave of school finance litigation, which is dominated by adequacy arguments stemming from state education clauses. In successful litigation, low adequacy standards, or basic education systems, were rejected by state courts in favor of high educational standards linked to constitutional rights and contemporary needs of citizens. Attentiveness to the changing importance of education was illustrated not only through reference to the competitive nature of economic participation, but also directly through holdings such as, "what was adequate in the past is inadequate today" (*Abbot v. Burke*, 1990) in New Jersey, and "The definition of a proper education is not static and necessarily will change" in *Campbell v. Wyoming* (1995).

The *Rose v. Council for Belter Education* (1989) Court did not limit its finding of the inadequacy of the state education system to the finance structure as it affected the plaintiffs. Instead it called for sweeping changes at every level of educational governance and policy. Issues of equity, adequacy, and efficiency were raised, and it was ordered by the Court that the remedy reach throughout, "the whole gamut of the common school system in Kentucky," and seek to, "re-create, re-establish a new system of common schools in the Commonwealth" (*Rose v. Council for Belter Education*). Responding within a year of the *Rose v. Council for Belter Education* decision, the state legislature moved forward with the Kentucky Education Reform Act of 1990. This bill echoed in many ways the Supreme Court opinion that inspired it and called for changes in finance, governance, and curriculum.

The existing finance structure in Kentucky was replaced with a three-tiered funding mechanism. The first of these tiers is a guaranteed base proposed that is adjusted for each district. The base adjustments are determined by the number of students enrolled in free and reduced lunch programs as a measure of at-risk students, transportation costs, and number of exceptional children as measured through pupil weight formula. State aid is then allocated to compensate for the difference between the guaranteed base and a minimum required tax effort of 3 mills. Additional provisions allow the raising of additional local revenues up to 30 percent of the calculated guaranteed base.

Another element of the newly formed Kentucky finance system was a series of categorical programs that addressed concerns of the Court and the larger reform agenda. A major component of this focused on capital outlay. The Facilities Support

Program of Kentucky initiative provided \$100 per pupil for building maintenance and construction and mandated an additional .5 mills tax effort committed to debt service. Other categorical aid serviced the development of youth centers, pre-school programs for at-risk youth, remedial programs, professional development, and technological updates in school instructional supplies and materials.

Governance structure reforms were highlighted by the move towards increased local decision making. At the heart of this initiative was the creation of school site councils that included teachers, parents and one school administrator. These councils were developed for the purpose of overseeing the selection of instructional materials, hiring all levels of personnel, designing curriculum, extracurricular activities, teacher development and other school management decisions as they arise. This facet of the KERA is a direct result of the reform's preamble, which highlights the need for a unified commitment throughout the community. At the district level new requirements were established for the hiring of district level administrators and the election of board members. Finally, the state board of education was reorganized and a new Board of Elementary and Secondary Education and the Chief State School Officer was put in place.

Curriculum reforms were built upon the competencies established by the Court and generated a list of specific learning goals and outcomes. Moreover, the state developed a new assessment program and instructional, as well as curricular, guidelines. In many cases these reforms were accompanied by categorical aid from the state. Among the reform initiatives included were the creation of a State Textbook Commission, a newly founded Education Professional Standards Board to oversee the certification and training of teachers, and a system of rewards and sanctions tied to school performance. At the local level, despite the move towards decentralized governance, many of the initial local responses to the new reforms were influenced by state mandates and categorical funding. Reform measures that brought state dollars with them received the most attention while underfunded programs such as the professional development mandate received less local support. As a result, the teacher training outlined in KERA to prepare teachers for implementation of the new competencies focused curriculum was not fully realized (Odden, 1993). In addition to the categorical spending, local officials tended to concentrate new reform money in line with the broader reform agenda of new student achievement goals, curriculum frameworks, and the statewide performance assessment program. This led to increased spending on classroom materials and supplies and locally developed professional development programs.

## **Conclusion**

A variety of different adequacy and equity arguments have played key roles in shaping educational policies but several patterns have emerged, especially in the ways Courts view educational adequacy. Perhaps the most notable contribution of the courts has been to identify social goods that are Constitutionally "important" or "fundamental" and their dependence on certain levels of educational attainment. Although often vague, these primary goods have served as justification for courts in their efforts to compel states to provide more educational resources in more equitable ways. These goods include meaningful participation in the political process, ability to enjoy constitutional rights such as the right to free speech, and



capacity to compete and participate in the labor market. Demands for fiscal neutrality in the distribution of resources were ultimately accompanied by judicial attempts to defend education's role as, "the bright hope" for the poor and the key element in equipping children for the marketplace, citizenship, and the expression of the most fundamental constitutional liberties. Early attempts to define adequacy standards pushed no farther than establishing the link between some undefined level of educational opportunity and broader outcome goals. In a sense the court became increasingly clear about what an education is adequate for, without conveying how much of an education is actually adequate.

The default position was to look at low thresholds of educational adequacy that focused on basic skills curriculum. Part of the rationale for stopping short of well-defined threshold standards was the lack of strong knowledge that linked resource inputs with educational outcomes. The *Edgewood v. Kirby* (1989) Court pointed out the difficulty in setting adequacy standards, especially considering the many factors at play in a child's educational development. Despite this admission, the *Edgewood v. Kirby* Court and similar state decisions that followed, identified several key factors in providing educational opportunities that reached far beyond the basic skills curriculum. Most notably, the courts have recognized high levels of political participation and economic competition as important social goods worthy of constitutional protection. Moreover, the most recent wave of education finance litigation has included logic that combines equity and adequacy arguments.

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