

The Enforcement of Socioeconomic Rights and the Global Constitutional Canon

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As Jack Balkin and Sandy Levinson have noted there are many different legal canons, distinguished from one another by their different audiences (Balkin & Levinson, 1998). Recently, scholars of socioeconomic rights have begun to create what we might call our own canon of high-court cases interpreting constitutional provisions pertaining to those rights. These cases address a common concern in the theoretical literature that courts should not and/or will not make the complicated and controversial budgetary choices required to enforce socioeconomic rights. The emerging global canon of socioeconomic rights cases is often used to understand whether, when, and how courts will enforce constitutional rights to socioeconomic goods.

Many of the cases within the global, rights-focused canon demonstrate that high courts have, in reality, enforced such rights all over the world. For example, Kim Scheppele demonstrates that the Russian and Hungarian constitutional courts enforced such rights in the last decade of the twentieth century, insisting, even in the face of pressure from international financial institutions to constrict social safety nets, that government must provide a minimum standard of social welfare protection (Scheppele, 2004). In 2000, the South African Court famously enforced the constitutional right to housing, and two years later, found that the state policy of providing AIDS drugs only within a small number of research-oriented sites violated the state's constitutional duty to secure the right to health.¹ In a similarly well-known opinion India's constitutional court has also enforced socioeconomic rights, interpreting the Indian Constitution's right to life to include a right to "the bare necessities of life."² Thus, India's court has found a constitutional right to emergency medical care from the state³ as well as a constitutional right to food.⁴

The canonical socioeconomic rights cases in the American context are, by contrast, not examples of judicial enforcement of socioeconomic rights. In *Rodriguez v. San Antonio* (1973), the Court held that federal Constitution does not contain the right to education, and in *Dandridge v. Williams* (1970), the Court declared that "The intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." While rights scholars have generally concluded (through examination of their emerging canon) that courts can enforce

¹ See *Government of Republic of South Africa v Grootboom*, 2001 (1) SA 46 (CC) and *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002

² *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* (1981) 2 SCR 516.

³ *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 3 S.C.J. 25.

⁴ *People's Union for Civil Liberties v. Union of India & Others*, (2001)

socioeconomic rights, questions remain about whether this is true for courts within the United States.

In this schmooze ticket, I look at one particular socioeconomic right, the right to education, within the United States. I consider what this history can tell us about the canon we use to understand the enforcement of socioeconomic rights in constitutions. Through this examination, I suggest that scholars of socioeconomic rights may want to expand their emerging canon to include new sites of enforceability. In particular, the history of American education rights suggests that the actions of legislatures and the rulings sub-national courts are good candidates for inclusion in a rights-based canon. This ticket begins with a brief description of the origins of constitutional education rights in American state constitutions. Its second section uses this history to argue that a constitutional canon should include legislation, not only judicial rulings. The third section suggests that the rulings of subnational constitutional courts, at least in federalized countries like the United States, may also warrant inclusion in even a global canon. Finally, I conclude by noting that courts enforced constitutional education rights most vigorously almost a century after states ratified them. This timing suggests that we should be careful not to interpret the absence of a particular kind of ruling from a legal canon at one point in time to imply the impossibility of that type of jurisprudence.

I. The Origins of Education Rights in U.S. State Constitutions

Although the federal Supreme Court has declared that there is no right to education in the federal constitution, since the 1970s, state courts throughout the U.S. have been enforcing the education rights in state constitutions with vigor. The textual rights themselves are far older than these rulings, and were generally created in the nineteenth century. Few of these provisions actually use the phrase “the right to education.”⁵ Instead, they contain instructions, often in great detail, to legislatures about educational policy. Many state constitutions require the state to establish a public or common school system. Some also required legislatures to preserve and actively manage their school funds. Still other constitutional provisions obligated state governments to finance schools through particular forms of taxation and appropriation.

The movement to add these education provisions to state constitutions emerged in a context that is difficult to imagine today. At the beginning of the nineteenth century, the entire concept of statewide and state-sponsored education was highly controversial. Simply bringing public school systems into existence was an enormous political challenge, to which groups of reformers (generally organized at the state level) dedicated themselves. These groups often referred to themselves as “friends of education,” and frequently dubbed their organizations “teachers’ unions.” Such organizations appeared in every existing state shortly before the Civil War (Cremin, 1980, 177). They were primarily occupied with bringing public, or “common” school systems into being, and their movement for reform was consequently known as the common school movement.

Common school proponents and their allies in state constitutional conventions were entirely clear about their intention to use their state constitutions to force

⁵ Article 1 § 27 of The North Carolina Constitution of 1868 is the exception to this rule. It stated “The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”

legislatures into action, and they drafted constitutional provisions precisely for this purpose. For instance, Ohio's constitutional provision about education was created in direct response to educational activists' sense that the legislature must be constitutionally obligated to establish common schools. During Ohio's constitutional convention of 1850, the state's common school movement was so frustrated with the state legislature's history of inaction that it decided to seek a constitutional provision that would leave the legislature with no choice but to act (O'Brien & Woodrum, 2004, 612). In arguing on behalf of an explicit constitutional mandate, one delegate explained: "It has been said that we ought to trust the management of this interest to the General Assembly. . . [However] our system of common schools instead of improving in legislative hands, has been degenerating" (Ohio Constitutional Convention, 1851, 702. Also cited in O'Brien and Woodrum 2004). Another said "I desire to lay a plan such as within certain limits the Legislature shall be bound to carry out" (Ohio Constitutional Convention, 1851, 16). As we know, this idea of binding the legislature, or limiting its discretion defines constitutional rights. Ohio's common school movement championed these binding mandates in their attempts to ensure that governments would be forced to establish and support public schools.

In many states, educational reformers also pursued the inclusion of specific instructions about how to finance public education. For example, in Kentucky, one of the central concerns of the state's educational professionals and reformers was the state legislature's misuse of the school fund. When a constitutional convention was called in 1849, the Superintendent of common schools and many educational activists saw in the convention an opportunity to control the legislature, and lobbied the convention's delegates accordingly (Connelley & Coulter, 1922, 767). One delegate to the constitutional convention reported that "If there was any one subject on which I was thoroughly and fully instructed, it was to rescue from the vacillation of the legislation of the state, the common school fund. . . and place it beyond the control of the legislation of the commonwealth and its changeable character" (Kentucky Constitutional Convention, 1849, 893). The convention ultimately passed an extremely detailed provision about the school fund, specifying the amount of the principal and mandating that the current fund along with any future additions should be "held inviolate" for the purpose of sustaining a system of free common schools and could be appropriated for no other purpose. It also mandated that the school fund and its dividends must be invested in a safe and profitable manner, and gave instructions for the distribution of these funds to county schools.

Although Kentucky's constitutional provision was only about the management and distribution of the school fund, and did not include sweeping statements about educational rights, its proponents nonetheless identified these constitutional provisions with the creation of education rights. For instance, one delegate to Kentucky's constitutional convention asked:

Am I to be told that we must look to the legislature for our rights; and that we are to be denied protection of the Constitution? . . . Are we of the mountains, who are poor, to be taxed to improve the rivers and roads of you who are wealthy? And then, sir, when the general government has set apart a fund, for the purpose of general and equal education. . . is it right for us to be told that there is no constitutional security for us, and

that our rights are to be disregarded? (Kentucky Constitutional Convention, 1849, 887)

This delegate argued that only by placing detailed, financial instructions for the legislature in the constitution itself, could those in need of public education feel secure in the knowledge that the legislature would attend not only to projects that further advantaged the wealthy, but also to those that benefited the poor.

Concerns about school financing also motivated common school proponents to mandate educational taxation and appropriations as part of their constitutions. Here too, constitutional convention delegates explained that a constitutional mandate was necessary to overcome legislative opposition to school taxes and spending. For example, one delegate to Maryland's Reconstruction convention reported that "for the last fifteen years, I believe, there has been a constant effort made to obtain such legislation, and at every session of the legislature that effort has failed" (Maryland Constitutional Convention, 1864, 1221). This delegate had, himself, served in the legislature in 1856, and labored on the committee that had drafted common school legislation. He explained the obstacle to its passage: "The same objections were made then, by members from the lower counties of the state, that are made now upon this floor, against a system of public schools. I was told by men from counties, where there was no system of public education, that they would never consent to have their property taxed to educate 'the brats of poor white men.'" He went on to say, "I am very glad this committee has made such a report as this, taking the matter out of the hands of the legislature, and providing by a vote of the people of the state to give us a system of public instruction by which 'the brats of poor white men' may get an education"(Maryland Constitutional Convention, 1864, 1221). To this end, the constitutional convention drafted a provision stating that, if the legislature failed to enact a system of common schools after the state superintendent had made a report on the most desirable system, the superintendent's proposed system would simply become law. The provision ultimately passed, and was included in the state's new (albeit short-lived) constitution. The subsequent legislature levied a statewide tax for the support of a system of common schools.

II. Legislation as Part of a Constitutional Canon

The origins of America's constitutional education rights suggest that legislation (both national and subnational) may warrant inclusion in the rights-focused canon. After all, the authors of America's constitutional education rights intended to realize their promises not through judicial opinions, but through statutes. They expected that new constitutional rights would force legislatures to establish statewide school systems or improve their quality by increasing their funding. Thus, when a new constitution had been ratified, they did not typically litigate, but continued their attempts to shape public sentiment and demand legislative change. For instance, after Pennsylvania's new education provision was added to its constitution in 1872, prominent educators immediately drew up a revised school code that they presented to the legislature.⁶ Similarly, after the passage of its amendment to centralize school taxes, the California

⁶ See the Forty-First Annual Report of the Superintendent of Common Schools, published in the *Pennsylvania School Journal*, January 1875, vol. 23, no. 7, 233.

Council on Education focused its efforts on lobbying for legislation to bring the provision into effect.⁷

One way that education activists and constitutional conventions attempted to ensure that legislatures would obey their constitutional directives, even without the promise of court enforcement, was to draft extremely clear and detailed provisions. For instance, an education advocate in Indiana explained: “The Constitutional injunction is direct, positive, immediate, and coming with the authority and sanction of an immense majority of the people.”(Read, 1852, 7). Thus, he concluded that “The question of free schools is no longer a question in Indiana. . . It is the sworn duty of the Legislature to carry out this great provision in the Constitution”(Read, 1852, 7). North Dakota’s education provision in the Constitution of 1889 even specified that the legislature must establish schools “at their first session after the adoption of this constitution.” The hope was that it would be embarrassing for legislators to ignore such explicit commands and that if legislators were to thwart these provisions, it would harm their electoral prospects. This electoral threat was particularly palpable because new constitutions and new constitutional provisions had generally just been ratified through a statewide vote. Since constitutional rights are sometimes drafted with an eye toward legislative compliance, even in the absence of judicial rulings, it would seem that the legislation realizing constitutional rights might be just as worthy of inclusion in a rights-focused canon as judicial rulings that either nullified legislation or required the legislature to pass new statute.

Thinking of legislation as a legitimate mechanism for the realization of socioeconomic rights might give us another way to interpret Gerald Rosenberg’s study *The Hollow Hope*, which famously demonstrated that Southern schools remained segregated even after *Brown V. Board of Education*, and were only desegregated when Congress passed the Civil Rights Act of 1964. Instead of concluding that even the most prominent cases in our current constitutional canon have made little difference in the actual world, and that courts must therefore possess a fatal allure for progressive reformers, we might emphasize instead the finding that, with respect to *de jure* segregation, Congress successfully enforced the Fourteenth Amendment’s promise of equal protection. Thus, we could read Rosenberg’s findings to suggest that legislation like the Civil Rights Act should be considered alongside high court cases, and included in the body of materials we use to understand the political meaning and assess the enforceability of constitutional rights. If we broaden the emerging canon in this way, we see the enforcement of socioeconomic rights in the United States as well.

III. Subnational constitutional rulings in a global canon.

We may also want to broaden the canon of global rights cases to include the rulings of subnational courts, particularly those in federal systems. In the United States, at least, federalism has rendered state constitutions, and therefore state courts, likely venues for the inclusion (in constitutions) and enforcement (by courts) of socioeconomic rights. After all, state and local governments were responsible for maintaining the public welfare long before the national government understood its job to include such things. Public

⁷ “The Legislative Situation,” *Sierra Educational News*, San Francisco, February 1921, vol. 17, no. 2, 59

education is a perfect example of a socioeconomic good for which state governments have long been primarily responsible, and which, at least in part as a consequence, appear in their most explicit form in America's state constitutions. State courts have thus been the tribunals that enforced these rights, not because they are or were less important than federal rights, but because the federal system led nineteenth century reformers to focus their efforts primarily at the state level and twentieth centuries litigators to turn to state courts as an alternative to the federal judiciary.

Though they only began in the 1970s, by 2007, state high courts had considered the constitutionality of state systems of public school financing in all but seven states, and the challenges to state financing for education prevailed in 26 of these case (Paris, 2010, 46). Although subnational courts issued these rulings, they have shaped the financing of millions of children's education throughout the nation. Many state courts issued sweeping and highly consequential rulings requiring states to revise their systems of school financing, and placing themselves at the center of the policymaking process in the name of education rights. These rulings are unmistakable instances of judicial enforcement of positive constitutional rights.

In 1973, for instance, the New Jersey Supreme Court found that the state's constitutional mandate, created in 1875, to establish a "thorough and efficient" system of free public schools could "have no other import" but to mandate that the state create an equal educational opportunity for all children.⁸ The court then cited the efforts of the state's common school reformers to centralize the system of taxation for education. These common school reformers argued that the less centralized taxation for schooling was, the less equal the state's educational opportunities would be, and New Jersey's highest court declared itself to be in firm agreement with the state's nineteenth century reform movement:

It is . . . difficult to understand how the tax burden can be left to local initiative with any hope that statewide equality of educational opportunity will emerge. The 1871 statute embraced a statewide tax because it was found that local taxation could not be expected to yield equal educational opportunity. Since then the State has returned the tax burden to local school districts . . . There is no more evidence today than there was a hundred years ago that this approach will succeed.⁹

Consequently, the court ruled that the state's system of school financing violated the "thorough and efficient" clause of the state constitution, and continued "Whatever the reason for the violation, the obligation is the State's to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its continuing obligation."¹⁰ The New Jersey court is not alone in having issued such a strong defense of the right to education nearly a century after the provision was adopted.

When the Kentucky Supreme Court was asked to interpret its state's common school provision in 1989, it declared the state's entire system of school financing unconstitutional. Like the common school reformers of the nineteenth century, Kentucky's highest court understood the constitutional instructions to "provide for an

⁸ Robinson v. Cahill, 287 A. 2d 187 (1972), 519

⁹ Robinson v. Cahill, 287 A. 2d 187 (1972), 516

¹⁰ Robinson v. Cahill, 287 A. 2d 187 (1972), 519

efficient system of common schools throughout the State” to impose a duty on state government. Thus, the court explained “The obligation to so provide [for a system of common schools in Kentucky] is clear and unequivocal and is, in effect, a constitutional mandate.”¹¹ To support this assertion, the Court quoted extensively from the records of the state’s 1890 constitutional convention, and cited delegates’ statements about both the obligatory and redistributive nature of the constitution’s common school mandate. The court explained that it must enforce that mandate.

The Kentucky court even went on to address the question of whether it had the authority to enforce this socioeconomic right, or as the court put it “to stick our judicial noses” into this arena of legislative policymaking. Its answer was an unequivocal yes. The court explained that it had little choice but to become involved:

It is our sworn duty, to decide such questions when they are before us by applying the constitution. The duty of the judiciary in Kentucky was so determined when the citizens of Kentucky enacted the social compact called the Constitution and in it provided for the existence of a third equal branch of government, the judiciary. . . . To avoid deciding the case because of "legislative discretion," "legislative function," etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.¹²

Although school financing formulas are just the sort of decisions about the allocation of public resources that courts are often believed to lack the capacity to review, the Kentucky court actually characterized it as “literally unthinkable” that it would do anything else.

These state court opinions highlight the fact that state governments raise revenue and then make consequential decisions about how to distribute it, and that these decisions can even work against the direction of federal government policies. As one article on federalism put it, states can “enact laws, regulate, and raise and spend money without having to secure authority from any other level of government.”¹³ State courts may (as in the case of the new judicial federalism) establish rights that the Supreme Court has not found the federal Constitution to guarantee. Thus, the existence of state-level constitutional systems can provide a vehicle through which national interest groups attempt to craft policies that diverge, not only from one another’s policies, but also from those of the federal government and its judiciary. It is even possible to use state’s lawmaking powers to resist the federal Supreme Court’s rulings. For example, in the wake of *Roe v. Wade*, anti-abortion activists have used state legislatures to restrict access to abortions, both resisting the original ruling and facilitating further litigation through which its scope has been limited.¹⁴

Indeed, America’s state courts (and governments) have sometimes looked beyond national policy to draw instead from the global-rights canon in their own lawmaking efforts. As Judith Resnick has argued, state governments have provided “ports of entry”

¹¹ *Rose v. Council*, 790 S.W.2d 186, 205

¹² *Rose v. Council*, 790 S.W.2d 186, 209

¹³ Briffault, R. (1994). What about the 'ism' - Normative and Formal Concerns in Contemporary Federalism. *Vanderbilt Law Review*, 47, 1303-1353.

¹⁴ Segers, M. C., & Byrnes, T. A. (1995). *Abortion politics in American states*. Armonk, NY: M.E. Sharpe.

for international human rights law into American jurisprudence. Although the federal Supreme Court has typically been hesitant to ground its rulings in transnational agreements or norms, state courts have (on occasion) considered these sources of transnational law when interpreting their own constitutions.¹⁵ America's federal system provides opportunities for state supreme courts and to make consequential constitutional rulings. It makes little sense to exclude these rulings from transnational constitutional canons simply because they are issued by subnational courts.

CONCLUSION

The fact that education rights were drafted with the idea that legislatures would realize them, even without pressure from courts, suggests that we may want to consider legislative action as an additional site of rights' enforcement. The fact that state courts later did enforce these rights suggests that we may also want to include subnational rulings even in a transnational, rights-focused canon. These expansions of the emerging canon on socioeconomic rights might help us move even further in answering long-standing questions about their enforceability, and I believe it is certainly necessary to arrive at an accurate picture of the American rights tradition. I want to end, however, by noting a concern that the story of American education rights raises about the way we use and understand legal canons. In particular, I want to suggest that the gap in time between the writing of these provisions and their enforcement by state courts provides a cautionary tale about how to interpret any constitutional canon that we construct. State courts began to insist on new systems of school financing many decades after those provisions were created, demonstrating that courts may begin to enforce pieces of a constitution even after long periods of inaction. Thus, the content of a canon at any particular time can offer only limited information about the direction in which the relevant law will evolve.

Canons are often very useful for tracing a single path along which legal understandings have developed, but while law is path-dependent, it is also remarkably flexible. As Oliver Wendell Holmes explained in 1897, it is important to study the history of legal reasoning in order to know what the law is, but Holmes cautioned that, "when you get the dragon [or legal canon] out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step." Holmes was arguing that lawyers, legal academics, and judges should seek to understand the canonical history, but should not feel bound by it. Instead, they slay the dragon, drastically revising legal understandings to meet the evolving needs of society.

While I am certainly not arguing that we should slay the existing canon, I do think the case of education rights in America suggests that canons should not be interpreted as the limits of what is possible. Courts and legislatures can and do develop new ideas about their role in constitutional governance, and as a result, old constitutional texts can then begin to matter in very new ways. Fifty years after the passage of constitutional education rights, for instance, it would have seemed very unlikely that American courts would (or even could) compel states to revise their systems of school financing in the name of common school mandates. Almost a hundred years after their passage, however, state high courts were enforcing them in just this way.

¹⁵ Resnik, J. (2006). Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry. *Yale Law Journal*, 115(7), 1564-1671.

If we look at a single legal canon, frozen in time, it may well come to seem that some pieces of a constitution have always been important, while other pieces have never mattered and are thus unlikely ever to matter. These pieces of constitutional text are likely to look useless or dead if no cases enforcing them appear in the/a canon. Their apparent inefficacy is thrown into even sharper relief by the pieces of the constitution that do form the backbone of the canon in question. However, the many-decade gap between the passage of American education rights and their judicial enforcement suggests that we may want to think about seemingly dead provisions as merely dormant or hibernating. Thus, while the presence of a particular type of ruling in a canon is incontrovertible evidence that such a ruling is possible, the absence of a particular type of ruling is simply not good evidence that such a ruling is impossible.

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