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FRANCESCA BIGNAMI* & CARLA SPIVACK**

Social and Economic Rights as Fundamental Rights†

TOPIC IV. C

This report uses the definition of "social rights" in "The Toronto Initiative for Economic and Social Rights," and focuses on two of these rights which have been litigated in the United States: the right to social security, at the Federal level, and the right to education, at the state level. We note that the U.S. Constitution does not expressly recognize any of the social rights listed in the introduction to this national report, and that American courts and legal scholars are generally skeptical about protecting social rights through constitutional law. The limited exceptions to this skepticism appear in the prohibition on discrimination against the indigent with respect to the exercise of "fundamental rights" like the right to travel and the guarantee of procedural rights before welfare rights may be terminated. All fifty state constitutions recognize the right to education to varying degrees, although only some deem it a fundamental right. While some state courts consider challenges to educational schemes to be non-justiciable, and defer to the legislature, others have heard such cases, most of which are based on equal protection or educational quality rationales. We conclude, however, that the United States is likely not in total compliance with the education component of the International Covenant on Economic, Social, and Cultural Rights.

INTRODUCTION

Since there is no generally accepted definition of social rights under either international or U.S. law, this report begins from the definition employed in the academic project "The Toronto Initiative for Economic and Social Rights" (TIESR).[1] This project compares the existence and enforcement of economic and social rights in constitu-

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1. *See* Courtney Jung, Coding Manual: A Description of the Methods and Decisions Used to Build a Cross-National Dataset of Economic and Social Rights in Developing Country Constitutions (2010), *available at* http://www.tiesr.org/TIESR%20Coding%20Manual%208%20March%202011.pdf.

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tions throughout the world and has identified seventeen separate economic and social rights. In the social rights category are:

(1) The right to social security not related to employment

(2) The rights of children

(3) The right to healthcare

(4) The right of access to land

(5) The right to housing

(6) The right to food and water

(7) The right to education

(8) The right to development

(9) The right to a safe or healthy environment

(10) The right to state protection of the environment

These rights overlap significantly with those identified in another large-scale academic initiative, The Comparative Constitutions Project,[2] and is largely an elaboration of the social rights guaranteed in the International Covenant on Economic, Social, and Cultural Rights. As reported by the TIESR, these rights are not expressly guaranteed under the U.S. Constitution; only a few of them are expressly guaranteed under the constitutions of the fifty U.S. states. We have therefore decided to focus our report on two sets of rights, which have been at the heart of some of the most significant American debates in the area of social rights and which are afforded some measure of constitutional protection. At the Federal level, we examine the right to social security and the material goods necessary for subsistence, which is indirectly (and fairly minimally) protected under the Fourteenth Amendment to the U.S. Constitution. At the state level, we examine the right to education, which is recognized in all fifty state constitutions to some extent and has been the object of a significant amount of litigation in the courts.

I. Social Rights in National Legal Scholarship

How does the national legal scholarship see the question of protection of social rights?

Is the need to protect social rights questioned?

Are social rights perceived as different from other types of rights?

2. *See* Comparative Constitutions Project, http://comparativeconstitutionsproject.org (last visited Oct. 18, 2013).

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Are social rights perceived as limitations or threats to the "first generation" rights?

What are the most important questions of social rights protection discussed by the national legal scholarship?

What do you consider as the most original contribution of your national legal scholarship to the study of social rights?

Although it is difficult to generalize, both because of the diverse nature of social rights and the variety of approaches that characterize American academia, American legal scholarship is on the whole skeptical of protecting social rights through constitutional law. During the 1960s and the early 1970s, there were a few prominent members of the legal academy who advocated including welfare rights in the Fourteenth Amendment, as part of the right of equal treatment and the right to government respect for "life, liberty, or property" (so-called "substantive" and "procedural" due process).[3] This coincided with both the heyday of the progressive Warren Court and the height of the welfare-rights social movement. Scholarly interest in the topic, however, stalled in the 1980s and the 1990s, again in tandem with the political and legal climate of the times—this time a conservative Supreme Court and an increasingly right-leaning political culture, epitomized by the repeal in 1996 of the Aid to Families with Dependent Children Act, one of the pillars of the American welfare state. As the legal historian William Forbath put it, writing in 2001:

> [L]ike Banquo's ghost, the idea of constitutional welfare rights will not die down, but it is not exactly alive, either. No fresh or even sustained arguments on its behalf have appeared for over a decade; only nods and glancing acknowledgments. Some liberals, like Ronald Dworkin, now use the idea to affirm their steely distance from heedless activism and free-form interpretive methods; poverty has become the paradigmatic social wrong they would not dream of viewing as a constitutional wrong.[4]

Over the past decade, there has been renewed interest in the subject, at least in part because of developments in comparative constitutional law and the importance of social rights in the jurisprudence of constitutional courts in other parts of the world.[5] In-

3. *See* Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); *see generally* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

4. William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1825 (2001).

5. *See, e.g.*, Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008); Robin West, *Unenumerated Duties*, 9 U.PA. J. CONST. L. 221 (2006);

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terestingly, however, even scholars on the liberal end of the political spectrum have sounded a fairly cautious note when considering the arguments for social rights in American constitutional law. Important examples of this attitude can be found in two fairly recent and influential monographs by Mark Tushnet and Cass Sunstein.

In *Weak Courts, Strong Rights*, Mark Tushnet suggests that constitutional courts, including the U.S. Supreme Court, can effectively and legitimately protect social rights by pairing a strong constitutional commitment to welfare rights with a weak form of remedy for the violation of those rights.[6] He identifies three types of so-called "weak-form review," which contrast with the injunctive remedies traditionally associated with judicial review in American constitutional law and which accord the legislative and executive branches a substantial role in constitutional interpretation and lawmaking: a mandate to interpret statutes consistent with fundamental rights (New Zealand); a mandate to interpret statutes consistent with fundamental rights and, if not possible, to issue a declaration of "incompatibility," leaving it to the legislative branch to decide whether to repeal the offending piece of legislation (the United Kingdom); and a "dialogue" model in which judgments of a constitutional court can be construed not as a definitive statement on the constitutionality of statutes but as an invitation to the political branches to respond with better justifications or future action. Tushnet argues that the experience of South Africa's Constitutional Court, which has held in favor of social rights, but has allowed the political branches considerable discretion in how it designs public programs to accommodate those rights, suggests that an approach that combines welfare rights with weak-form judicial review is a productive one that warrants consideration in the United States.[7]

In *The Second Bill of Rights*, Cass Sunstein argues, based on the intellectual history and political and institutional developments of the New Deal, that social and economic rights are a fundamental part of the American political tradition.[8] He highlights Roosevelt's commitment to social and work-based rights, outlined most exhaustively in Roosevelt's 1944 speech on "a second Bill of Rights," and canvasses the various New Deal programs which gave effect to this vision and

Katharine Young, *Redemptive and Rejectionist Frames: Framing Economic, Social, and Cultural Rights for Advocacy and Mobilization in the United States*, 4 NORTHEASTERN U. L. J. 323 (2012).

6. MARK TUSHNET, WEAK COURTS, STRONG RIGHTS (2008); *see also* Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1918 (2004).

7. For a recent challenge to this position, albeit in the comparative and not American context, *see* David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L. J. 189 (2012).

8. CASS SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004).

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which have persisted, in one shape or another to this day. These rights, in particular the right to some type of social security, the right to education, and the right to be free from monopoly form part of what Sunstein calls America's "constitutive commitments."[9] By constitutive commitment, however, Sunstein means something that falls short of a constitutional right that can be enforced by the Supreme Court. It is a form of right and duty that is recognized by popular consensus to be fundamental to the political community, and therefore cannot be eliminated by a simple legislative vote, but nevertheless cannot serve as the basis for challenging or demanding government action before the courts. They are values that should guide the democratic process, rather than explicit rights that can be invoked before the courts, at least not rights that go any further than the existing and very limited Supreme Court jurisprudence discussed in the next section. Although, like Tushnet, Sunstein writes favorably of the South African experience, he does so because of the Constitutional Court's use, in Tushnet's words, of soft-form judicial review and, at least for the time-being, he does not appear to believe that such an approach would be consonant with American constitutional culture.[10]

Although there are certainly many reasons for this academic caution, at least one seems to be a heightened sensitivity to the institutional limitations of the judicial branch, at least as compared to other legal cultures. There are two types of limits that figure in the scholarship. The first is a pronounced concern for what the constitutional scholar Alexander Bickel called the counter-majoritarian difficulty: the danger that the least democratic branch of government, namely the Supreme Court, will override the will of the people as expressed through popular elections and the work of the legislature.[11] In the realm of social rights, given the broad fiscal implications of guaranteeing certain minimum entitlements to housing, healthcare, food, and other elements of subsistence, the counter-majoritarian difficulty has loomed large and most scholars have concluded that the resource allocation decisions at the core of social welfare programs are best left to democratically elected legislatures. The second type of limit is technical. Perhaps because of the extensive powers and activism of American courts, especially during the 1960s and 1970s with court-supervised desegregation of public institutions, there is a substantial literature pointing to difficulties of making policy through litigation and to the limited capacity of courts to effect the broad and complex social change often called for in their

9. *Id.* at 99-100.
10. *Id.* at 229.
11. *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962).

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decisions.[12] In these analyses, the legislative and executive branches are generally pitted as the most appropriate venues for policymaking given their ability to dedicate the resources, political will, and technical expertise often necessary to accomplish large-scale social, political, and economic change. These limitations, of course, are particularly pronounced in the area of social welfare, which is further removed from the traditional realm of courts as compared to areas such as, say, equal rights or criminal procedure, and since the success of entitlements programs is closely tied to their ability to finely calibrate basic needs, fiscal resources, and human incentives so that such programs are sustainable and politically feasible in the long-run. Both the democratic legitimacy and effectiveness concerns are evident in the recent American scholarship on social rights, including the two monographs presented earlier.[13]

II. Constitutional Protection of Social Rights

Does the national Constitution of your country provide for protection of social rights?

What are the rights protected?

How is the subject entitled to protection defined in the Constitution? The individual, the citizen, the family, a group of persons? Which groups? Are social rights constitutionally guaranteed to non-nationals?

How is the debtor of social rights defined? Is it the State, public authorities, public bodies, private bodies?

What is the content of the rights? What are the obligations of the legislator? What are the obligations of the administration? What are the obligations of other actors?

Does the national Constitution differentiate the scope and methods of protection of social rights and other rights?

Does the normative structure of constitutional social rights vary? Is it possible to distinguish different types of constitutionally protected social rights?

Is there a constitutional mechanism of protection vis-à-vis the legislator? How does it operate? Are there any instruments that ensure protection against the inaction of the legislator?

How do you evaluate the efficiency of social rights protection offered by the Constitution and the constitutional justice?

What do you consider as the most original contribution of your national Constitution to the protection of social rights?

12. *See generally* Gerald N. Rosenberg, The Hollow Hope (1991); Donald L. Horowitz, The Court and Social Policy (1977).

13. *See* Sunstein, *supra* note 8, at 210, 228; *see generally* Tushnet, Strong Courts, *supra* note 6.

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The U.S. Constitution does not expressly recognize any of the social rights listed in the introduction to this national report. Furthermore, even though in theory, social rights could have been recognized as a form of "liberty" under the Fourteenth (and Fifth) Amendment's Due Process Clause, the Supreme Court has never done so. The furthest that the Court has gone is to find that in some cases, the states must afford special treatment for the indigent because the failure to do so would lead to impermissible discrimination under the Equal Protection Clause: in certain contexts the state is required to provide assistance to the poor, or at least is barred from imposing certain fee requirements, in order to enable them to exercise certain core rights connected to the right to a fair trial, voting, and the right to travel. These holdings are based on the Equal Protection Clause, given the discrimination against the poor that would result if such requirements were imposed or remedial measures refused, as well as the other fundamental right at stake in the case. These cases were mostly decided in the 1960s, by the liberal Warren Court, and many believed that they boded well for a general right to subsistence, but, by the early 1970s, the Court had become far less receptive to welfare rights, and there have been very few developments in the case law since that time.

The line of cases in the fair trial area begins with *Griffin v. Illinois*.[14] That case involved an Illinois law that required defendants appealing their criminal conviction to pay for a copy of their trial transcript. The Court held that by imposing a fee, which the indigent were not in a position to pay, the state "discriminates against some convicted defendants on account of their poverty" and denies their citizens "equal justice";[15] the state, therefore, was under a duty to provide the transcript to the indigent at no cost. This was followed by *Douglas v. California*, in which the Court found, based on the right to a fair trial ("procedural" due process) and equal protection, that the indigent had a right to be provided with counsel on their first appeal from a criminal conviction.[16] In 1971, the Court extended this logic to the civil context. In *Boddie v. Connecticut*,[17] it held that it was a de-

14. 351 U.S. 12 (1956).

15. *Id.* at 17-19. In a number subsequent cases, the Court has required that other types of fees related to the criminal process be waived for indigent defendants seeking to appeal their convictions. Burns v. Ohio, 360 U.S. 252 (1959); Douglas v. Green, 363 U.S. 192 (1960); Smith v. Bennett, 365 U.S. 708 (1961); Eskridge v. Washington State Bd. of Prison Terms & Paroles, 357 U.S. 214 (1958); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Long v. District Court, 385 U.S. 192 (1966); Gardner v. California, 393 U.S. 367 (1969).

16. 372 U.S. 353 (1963). Some consider the Court's famous decision in Gideon v. Wainwright to be part of this doctrinal trajectory. There the Court found a constitutional right to have the state pay for defense counsel in criminal trials, but the Court's finding rested on the requirements of due process and what it considered essential to a fair trial, and not also on the Equal Protection Clause.

17. 401 U.S. 371 (1971).

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nial of due process to require welfare recipients, seeking a divorce in state court, to pay fees and costs in order to obtain access to the judicial process. This holding, however, rested on the fundamental interest of marriage and the monopoly of the state courts over dissolution of marriage, and therefore it has been extended in some civil contexts[18] but not others.[19]

The lead case in the voting rights area is *Harper v. Virginia State Bd. of Elections*.[20] There the Supreme Court struck a poll tax (voters were required to pay $1.50 to cast their ballot) imposed by the State of Virginia. The holding was based both on the Equal Protection Clause and the finding that the right of suffrage in state elections was a "fundamental political right," protected under the previous case law of the Court even though nowhere expressly guaranteed in the Constitution. The Court found that the poll tax discriminated between those able to pay the fee and those unable to pay the fee and that discriminating between voters on such grounds "as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."[21] Several years later, this line of reasoning was used to strike state laws that imposed fees, this time not on voters but on individuals wishing to stand as candidates for office.[22]

The final category of equal protection cases, attached to the right to travel, touches upon social rights more directly than either the fair trial or voting rights cases. The principal federal welfare statute of the time, the Aid to Families with Dependent Children Act, relied entirely on state implementation and many states imposed a minimum residence requirement before individuals could apply for benefits, so as not to become magnets for the poor. In *Shapiro v. Thompson*,[23] the Court held that the one-year waiting period written into the laws of a number of states was unconstitutional based on the Equal Protection Clause and the right to interstate travel, which, like the right to suffrage, was not recognized in a specific constitutional provision but was well established in the jurisprudence of the Court. In this situation, the discrimination was not between rich and poor, but between indigents that had and had not resided in the state for one year, the former of which qualified for benefits and the latter of

18. Little v. Streater, 452 U.S. 1 (1981) (right of indigent to have state pay for blood grouping test in paternity suit); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (right of indigent parent to state-appointed counsel in state proceedings seeking the termination of parental status).

19. United States v. Kraus, 409 U.S. 434 (1973) (no right of indigent to have filing fees waived to obtain discharge of his debts in bankruptcy court); Ortwein v. Schwab, 410 U.S. 656 (1973) (no right of indigent to have filing fees waived to obtain court review of state administrative agency decision reducing or terminating public assistance).

20. 383 U.S. 663 (1966).

21. *Id.* at 668.

22. Bullock v. Carter, 405 U.S.134 (1972); Lubin v. Panish, 415 U.S. 709 (1974).

23. 394 U.S. 618 (1969).

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which did not. The Court found that the policy justifications offered by the states for the discrimination, many of which were specifically designed to discourage the poor from traveling to the state so as to reduce the burden on the state budget, were constitutionally impermissible because they burdened the constitutional right to travel. On these same grounds, the Court in a later case struck a one-year residence requirement for receiving nonemergency medical care.[24]

In the early 1970s, the Court rejected a number of attempts to extend this equal protection law to areas not associated with historically important fundamental rights, and there have been very few developments in constitutional law on social rights since then. In *Dandridge v. Williams*,[25] the litigants claimed that the State of Maryland's rules for administering AFDC (welfare benefits) were unconstitutional because they imposed an absolute maximum on welfare grants, thereby discriminating between children in large families and children in small families (those in large families could expect to receive lower per capita benefits under the program) and depriving them of the satisfaction of their basic needs. Absent the connection with the right to travel, however, the Supreme Court reviewed the Maryland regulation under the permissive rational basis test and found that the state's justification for the regulation was plausible and therefore the statutory maximum was permissible. In *San Antonio School District v. Rodriguez*,[26] the litigants challenged a state funding scheme for education based on local property taxes, which was (and is) common to most states, and which led to far higher expenditure per student in rich localities. Although the Court recognized that the state scheme did lead to unequal expenditure for students residing in different districts, it again used the rational basis test to find that the discrimination was justified by the state's goal of promoting local control over education. In doing so, it expressly declined to engage in the more searching scrutiny evident in the earlier cases because it held that there was no absolute deprivation of the benefit, since all children received some education, and that there was no fundamental right to education. In *Maher v. Roe*, the Court rejected on similar grounds a claim to state-funded abortions for indigent mothers.[27]

To consider briefly the question of why, outside of these limited areas, the Supreme Court has been hostile to social rights, there are at least three explanations in the scholarly literature. Cass Sunstein has put forward a political explanation based on the changing composition of the Supreme Court: in the late 1960s the Court was on the

24. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).
25. 397 U.S. 471 (1970).
26. 411 U.S. 1 (1973).
27. 432 U.S. 464 (1977).

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verge of recognizing social and economic rights but it was stopped in its tracks by the appointment of a number of conservative justices after the election of the Republican President, Richard Nixon.[28] The legal historian William Forbath has suggested that the discourse of the welfare rights movement, which was responsible for bringing many of the important cases to the Supreme Court, ran counter to a longstanding (American) republican tradition of work-based citizenship, and that political and legal advocacy framed in terms of work, both opportunities to work and compensation for work, might be more successful.[29]

Lastly, the political scientist Elizabeth Bussiere has argued that the reasons are to be found in the previous jurisprudence of the Court and the doctrinal legacy of *Lochner*.[30] Her thesis is as follows: As is well known, in *Lochner*, the Supreme Court found that the "life, liberty, or property" protected by the Constitution included "liberty of contract" and struck a state law regulating working time as an interference with liberty of contract. This conservative jurisprudence, however, increasingly came under political pressure during the New Deal and, in 1938, the Supreme Court reversed course and declared that it would henceforth presume that legislation impinging upon economic rights was constitutional and would engage in more exacting judicial review only in the case of rights protected by the Bill of Rights, rights affecting the integrity of the democratic process, and rights of "discrete and insular" minorities which, if unprotected, might be excluded from the democratic process.[31] This put into place a "double-standard" of judicial review—a permissive standard of review for government action that infringed upon economic rights and a more exacting one for government action that infringed upon constitutionally enumerated rights and rights essential to the democratic process. When, in the late 1960s, the Warren Court expanded legal guarantees for welfare recipients, it did so not on the basis of a fundamental right to welfare—an economic right which it found received virtually no protection under the post-*Lochner* "double-standard"—but on a variety of alternative constitutional and statutory grounds that have proven to be unsatisfactory substitutes.

This section now turns to state constitutional law and the right to education. Although the U.S. Supreme Court has held that educa-

28. SUNSTEIN, *supra* note 8, at 162-71.

29. William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1825 (2001).

30. ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION 99-101 (1997); *see also* Elizabeth Bussiere, *The Supreme Court and the Development of the Welfare State: Judicial Liberalism and the Problem of Welfare Rights*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999).

31. U.S. v Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

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tion is not a fundamental (federal) right,[32] all fifty states guarantee, to some extent, the right to education in their constitutions.[33] The language of these provisions varies. At a minimum, most call for a system of "free public schools."[34] Many go into more detail, adding such language as "general, suitable and efficient,"[35] "thorough and uniform,"[36] "uniform, efficient, safe, secure and high quality,"[37] "quality basic education,"[38] "free from sectarian control," and "non-segregated and nondiscriminatory."[39] The Florida constitution goes so far as to specify class size limits.[40] The state of Mississippi provides the lowest level of protection for education, making the state's provision and funding of schools discretionary.[41] In general, state courts have construed the words "thorough" and "efficient" to require basic quality and equality in the educational experience of the children of the state.[42]

In interpreting these various constitutional provisions, some state courts have found education to be a fundamental right while others, following the Supreme Court's lead, have declined to do so.[43] The states which have determined education to be a fundamental right subject any discriminatory practices in education to strict scrutiny, the highest level of scrutiny available to courts to analyze the disparate treatment of groups of similarly situated people with respect to a fundamental right. By way of contrast, many state courts construe the legislature's power under broad plenary grants such as "to establish and maintain a system of public education" as precluding the judicial branch from intervening in the decision making process at all.[44] State constitutions which use the strongest language to protect education and which call it a fundamental right do not nec-

32. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 33-35 (1973) (holding that for a right to be fundamental, it must be protected either explicitly or implicitly in the text of the Constitution, and that such protection does not exist for education as a right).

33. Roger J. Levesque, *The Right to Education in the United States: Beyond the Lure and Lore of the Law*, 4 ANN. SURV. INT'L & COMP. L. 205 (1997).

34. *See, e.g.,* ARK. CONST art. 14, § 1; COLO. CONST. art. 9, § 2; GA. CONST. Art. 8, § 1.

35. ARK. CONST. art. 14, § 1.

36. COLO. CONST. art. 9, § 2.

37. FLA. CONST. art. 9, § 1.

38. VT. STAT. ANN. tit. 16, § 1.

39. IND. CODE. § 2-33-1-1.

40. FLA. CONST. art. 9, §1(a) (1)-(3).

41. "It shall be the duty of the Legislature to encourage by all suitable means, the promotion of intellectual . . . improvement, by establishing a uniform system of free public schools. The legislature may, in its discretion, provide for the maintenance and establishment of free public schools." MISS. CONST. art. VIII, § 201.

42. Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory*, 32 GA. L. REV. 543, 572-77 (1998).

43. *See, e.g.*, Lujan v. Colorado, 649 P.2d 1005, 1022 (Colo. 1982).

44. Allen W. Hubsch, *The Emerging Right to Education under State Constitutional Law*, 65 TEMPLE L. REV. 1325, 1328 (1992).

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essarily in practice offer greater protection for it than states which do not use this language.[45]

III. Protection of Social Rights under Other Constitutional Rules and Principles

Are there other constitutional or jurisprudential principles used as tools for the protection of human rights?

Is there protection offered by the following constitutional principles:

protection of legitimate expectations,
protection of vested rights,
precision of legislation,
non-retroactivity of legislation,
due process
other general constitutional principles?

Probably more significant than the (federal) substantive rights described above are the (federal) procedural rights established by the Warren Court for recipients of public benefits. In *Goldberg v. Kelly,* the Court decided that welfare (AFDC) benefits, and by extension other types of social benefits, were "property" deserving of procedural protection under the Due Process Clause.[46] The Court found that once an individual establishes his or her eligibility for benefits, the government must abide by the Due Process Clause in terminating those benefits. The procedural guarantees afforded by the Due Process Clause were not absolute but depended on the "grievousness" of the loss. In a subsequent case, *Mathews v. Eldridge*, the Court said that it would weigh three different factors to determine the procedure due: "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substituted procedural requirement would entail . . . ."[47] These seminal cases have been followed by a number of others involving the issue of when there is a "legitimate claim of entitlement"[48] giving rise to a property interest and, once a property interest is recognized, what type of procedure is due. In the social rights arena, it is clear that once an individual has been found to qualify for a benefit, whether that be housing, medical care, subsistence payments, or food vouchers, he or

45. Roger J. Levesque, *The Right to Education in the United States: Beyond the Lure and Lore of the Law*, 4 Ann. Surv. Int'l & Comp. L. 205, 217 (1997).
46. 397 U.S. 254 (1970).
47. 424 U.S. 319, 335 (1976).
48. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

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she has a right to procedure before (and after) the state can terminate the benefit. The nature of that procedure, however, varies considerably: in the seminal cases, the Supreme Court decided that termination of subsistence (AFDC) benefits requires a pre-termination oral hearing at which the individual may be represented by an attorney (but not a state-funded attorney), while termination of medical disability benefits only requires the agency to build a paper record, to which the recipient has an opportunity to respond in writing, without an oral hearing. These procedural due process rights are significant, especially because they extend to most government social assistance programs.

By contrast with procedural due process, non-retroactivity is of little use to recipients of government benefits. The doctrine of non-retroactivity (sometimes spoken of in conjunction with vested rights and legitimate expectations, neither of which, however, constitute separate legal grounds) is relevant when benefits being paid are revoked. Benefits granted under a government scheme can be threatened under a number of circumstances: (1) a wrong benefit determination was made under the existing law and regulations and the government agency wishes to recoup monies already paid or to offset the amount against future payments; (2) a government agency issues a regulation that reduces or eliminates benefits in the future or with retroactive effect; (3) the legislature enacts a law that reduces or eliminates the benefit, often with retroactive effect in the sense that worker contributions were paid to a social security scheme with the expectation of a certain level of future benefits, which were then disappointed by a change in the law. In the case of an individualized agency determination (1) or a congressional law (3), non-retroactivity principles are of no assistance. Although the government statute might limit recoupment of the benefit to, say, cases of fraudulent behavior, as opposed to agency mistake, at the constitutional level, apart from the procedural due process rights discussed above, there is no right related to substantive fairness that will assist the individual.[49] In the case of legislative changes to social security programs, the Court has found that individuals that participate in such programs do not acquire a property right, but rather are recipients of "public benefits." As a result, legislation is scrutinized under a lax standard of "arbitrariness" (which economic legislation of this nature is almost certain to satisfy) and neither substantive due process and takings law[50] nor equal protection law,[51] which considers the differ-

49. *See generally* Marie A. Failinger, *Contract, Gift or Covenant? A Review of the Law of Overpayments*, 36 LOY. L. REV. 89 (1990).

50. Flemming v. Nestor, 363 U.S. 603 (1960). On the differences between the protection of property under procedural due process, substantive due process, and takings law, see generally James Y. Stern, *Property's Constitution*, 101 Cal. L. Rev. 277 (2013).

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ence in treatment between different classes of beneficiaries, affords protection to individuals. Only in the case of agency regulations may constitutional concern for non-retroactivity and preserving expectations as to what is and is not owed by the federal government be of some aid to individuals. In *Bowen v. Georgetown University Hospital*[52] the Court examined an administrative rule setting down the formula for calculating wages for purposes of calculating overall reimbursement to medical providers under the federal old-age health insurance program (Medicare). The rule applied to services that had been provided prior to the issuance of the rule and that had already been reimbursed according to a different formula. Because the rule changed the amount of the benefit, presumably requiring that medical providers repay the amounts in excess of the new benefit formula, the Court saw this as a particularly troubling form of retroactivity and found that the agency had exceeded its statutory power in promulgating the rule. The finding was based on both the terms of the congressional statute delegating rulemaking power to the agency and a canon of statutory construction containing a presumption against retroactivity. Based on *Bowen*, an agency rule retroactively reducing welfare and other forms of subsistence benefits, without strong authorizing language in the statute, would likely fail judicial review.

IV. Impact of the International Protection of Social Rights

Did your state ratify international treaties that pertain to social rights? Are they directly applicable in your domestic legal order?

Do these treaties have an impact on the national legal system? Did they trigger any changes in national legislation or practice?

Does the case-law of international bodies protecting human rights impose any changes in national legislation pertaining to social rights?

In particular, did the case-law of the European Court of Human Rights and other regional human courts have an impact on national law in the field of social rights?

What are the most important social rights cases brought from your country to international rights protecting bodies?

What are the lessons you draw from the international litigation (pertaining to social rights) started by applicants from your country?

International law on social rights has very little, if any, effect on U.S. law.[53] The U.S. has signed, but not ratified, the International Covenant on Economic, Social, and Cultural Rights, the Convention

51. Richardson v. Belcher, 404 U.S. 78 (1971).
52. 488 U.S. 204 (1988).
53. *See generally* Young, *supra* note 5, at 336-38.

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on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities. As a member of the United Nations and as a party to the International Covenant on Civil and Political Rights (ICCPR), the U.S.'s record on rights is subject to review by the Human Rights Committee (the compliance body established under the ICCPR) and the Human Rights Council (responsible for the UN's Universal Periodic Review of states' human rights records). Social rights, however, have not yet been squarely addressed in these reviews, at least in part because they are only tangentially included in the ICCPR (incidental to the right of equal protection) and because the U.S. contests that the social and economic rights listed in the Universal Declaration of Human Rights are part of international customary law.

V. Social Rights in Ordinary Legislation

To which extent does the ordinary legislation in your country ensure the protection of social rights?

Is this legislation in conformity with the national Constitution and the international instruments ratified by your country?

Are there any original legislative tools or mechanisms of protection of social rights created in your country?

There are a multitude of federal statutes that protect social rights in the United States. They are generally believed to have been introduced in three waves: during the New Deal, with legislation such as the Social Security Act which provides for old-age pensions, unemployment insurance, and assistance to needy widows and children; as part of Lyndon B. Johnson's Great Society, with programs such as Medicare and Medicaid, which afford medical care to the old and the poor; and most recently, the Affordable Care Act which guarantees universal healthcare for all citizens.[54] However, given the absence of social rights in the U.S. Constitution and the U.S.'s nonratification of international instruments guaranteeing social rights, none of these statutes are designed to give effect to such rights.[55]

VI. Justiciability of Social Rights

Are social rights considered justiciable in your country? To which extent?

What is the role of the judge?

What are the practical effects of such justiciability?

54. Lance Gable, *The Patient Protection and Affordable Care Act, Public Health, and the Elusive Target of Human Rights*, 39 J.L. Med. & Ethics 340, 340-42 (2011).

55. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 Syracuse L. Rev. 1, 15, 23 (2005).

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What are the most prominent examples of social rights cases successfully brought to courts by the litigants?

To address the justiciability issue, this section analyzes the right to education at the state level, which is a particularly vibrant area of social rights litigation. In both civil law and common law, to say that a right is justiciable means that an individual has a right to go to court and sue to enforce that right. A right has little meaning if it is not justiciable. Some constitutions or laws, however, may provide for "aspirational guarantees," which direct governments to implement certain measures or programs but which do not give individuals the right to sue for enforcement. Such a guarantee, for example, might appear in a treaty calling for an international right to peace and security, which does not contemplate an individual's cause of action to enforce it.[56] This is a particularly salient question in the matter of the right to education, because not all state constitutions refer to education as a right: some, as noted above, instead grant the legislature broad plenary grants over the area, such as granting them the power to "to establish and maintain a system of public education." Such language has led some state courts, also as noted above, to deem the financing of public education a matter beyond the jurisdiction of the courts; in such instances, we would say that funding discrepancies among schools is non-justiciable. Such plenary language, however, does not always lead courts to defer to legislative decision-making; many state courts have heard education funding cases even when the state constitution contains this wording.

This section examines litigation over the following issues which arise in the context of education: discriminatory school funding, the education of juveniles in detention, the rights of homeless children, the children of undocumented workers, children receiving welfare, and the rights of disabled children.

A. Funding

Under the U.S. Supreme Court's analysis of the Federal Constitution in *Rodriguez*, the fact that state constitutions mention education suggests that it at least potentially has the status of a fundamental right under state law. Many states, however, have rejected the *Rodriguez* "explicit or implicit" test in this context.[57] If education lacks status as a fundamental right, discrepancies in state education funding are subjected to rational basis review, which has usually resulted in the upholding of state funding schemes.[58] Other states have

56. Katharine G. Young & Julieta Lemaitre, *The Comparative Fortunes Of The Right To Health: Two Tales of Justiciablity in Colombia and South Africa*, 26 HARV. HUM. RTS. J. 179, 179 n.2 (2013).

57. Hubsch, *supra* note 44, at 1331.

58. *See, e.g.*, Lujan v. Colorado, 649 P.2d 1005, 1022-23 (Colo. 1982) (constitution and interpretive case law support implicit objective of local control of school financing

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found education to be a fundamental right and have subjected discriminatory funding claims to strict scrutiny.

The issue of school funding has been litigated in all fifty states; some have experienced many years of litigation.[59] Many of the state cases dealing with the right to education have presented claims that school financing is unequal and discriminatory,[60] or that the state constitution requires that school funding be sufficient to provide a minimum level of educational quality for all students.[61] The difficulty of defining "minimum quality," however, has led many state supreme courts to defer to legislative decisions about what constitutes an adequate education.[62] Other courts, however, have sustained equal protection or education quality claims and have delegated to the legislature the implementation of the judicial definition announced. The Washington Supreme Court, for example, has asserted that it has "ample power" to enforce state educational rights.[63]

Funding issues in state education cases arise because public schools are paid for by local property taxes, which results in better schools in districts with the highest property values. Most state courts, however, have held that poverty is not a suspect classification and that these funding schemes are therefore not subject to strict scrutiny.[64] Many courts have held that education in this respect is no different from other government services such as fire and police, which are also funded through local taxation and not subject to equal protection analysis.[65]

There are some notable exceptions to this trend, however: both the California and Wyoming courts have held disparate funding of

system); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 788 (Md. 1983) (historical financing of public schools evidenced purpose of establishing local control over such schools); Board of Educ. v. Nyquist, 439 N.E.2d 359, 367 (N.Y. 1982) (state public school financing system ensured local control over educational expenditures and services in community), *appeal dismissed*, 459 U.S. 1138 (1983); Board of Educ. v. Walter, 390 N.E.2d 813, 820-22 (Ohio 1979) (applying local taxes to school financing system satisfies purpose of local control of education) (quoting Wright v. Council of Emporia, 407 U.S. 451, 478 (1972) (Berger, J., dissenting), *cert. denied*, 444 U.S. 1015 (1980)); Olsen v. State, 554 P.2d 139, 146-48 (Or. 1976) (objective of school financing system is to ensure control by local voters); Buse v. Smith, 247 N.W.2d 141, 150-55 (Wis.1976) (constitutional provision that town and city taxes will be applied to local district education system is proof of objective of local control over school system).

59. John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning The War?*, 57 VAND. L. REV. 2351, 2355 (2004).

60. Hubsch, *supra* note 44, at 1325.

61. *Id.*

62. *See, e.g.*, *McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981).

63. Seattle School District v. State, 585 P.2d. 71 (Wash. 1971).

64. *See, e.g.*, Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1019-22 (Colo. 1982) (wealth rejected as suspect classification); Thompson v. Engelking, 537 P.2d 635, 645-46 (Idaho 1975) (same).

65. *See, e.g.,* Robinson v. Cahill, 303 A.2d 273, 283 (N.J.), *cert. denied,* 414 U.S. 976 (1973).

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education to trigger strict scrutiny analysis.[66] In the landmark case of *Serrano v. Priest*,[67] the California Supreme Court ruled that the quality of a child's education must be a function of the wealth of the state as a whole, not of the wealth of the school's local community.[68] The Court held that education was a fundamental right in California, and held that strict scrutiny would apply to the state's system of public school funding.[69] It then noted that the Supreme Court had already protected the right to vote and the right to defense in criminal cases from unequal protection based on wealth, and determined that education was a right deserving of the same level of protection.[70] It concluded the state's system of education financing discriminated against people on the basis of wealth in violation of the equal protection clause of the Federal Constitution.[71]

Some other state courts followed suit in strengthening the right to education. In 1972, the New Jersey Supreme Court ruled that state's system of school funding was unconstitutional based on the state's education mandate.[72] This approach became the new model for litigants pushing states to overturn unequal state funding of education.[73]

In 1979, the West Virginia Supreme Court declared that education was a fundamental right in that state, subject to strict scrutiny, and in passing sharply criticized the holding in *Rodriguez* with respect to the Federal Constitution: it observed that even the General Assembly of the United Nations "appears to proclaim education to be a fundamental right of everyone, at least on this planet."[74]

The Kentucky Supreme Court ruled in 1989 that the state's school funding system was unconstitutional because:

> Without exception, [witnesses] testified that there is great disparity in the poor and the more affluent school districts with regard to classroom teachers' pay; provision of basic educational materials; student-teacher ratio; curriculum; quality of basic management; size, adequacy and condition of school physical plants; and per year expenditure per student

66. Serrano v. Priest, 487 P.2d 1241, 1250-55 (Cal.1971) (school financing system based on district tax collection created suspect classifications where wealth differed between districts); Washakie County Sch. Dist. v. Herschler, 606 P.2d 310, 334 (Wyo.) (unequal distribution of state funds to school districts on basis of wealth created unconstitutional suspect classification) (citing Serrano, 487 P.2d at 1250), *cert. denied*, 449 U.S. 824 (1980)).

67. 487 P.2d 1241 (Cal. 1971).

68. Serrano, 487 P.2d at 1244.

69. *Id.* at 1257.

70. *Id.* at 1258.

71. *Id.*

72. Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973).

73. Dayton & Dupre, *supra* note 59, at 2365.

74. 255 S.E.2d 859, 864 n.5 (W. Va. 1979).

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> . . . . The quality of education in the poorer school districts is substantially less in most, if not all, of the above categories.[75]

In 1993, Tennessee determined that its school funding system failed even a rational basis test. Recognizing a "direct correlation between dollars expended and the quality of education a student receives," the state Supreme Court found that funding inequity caused educational harm to students in economically disadvantaged districts.[76]

Implementing rights requires money; school funding based on local property taxes is inherently unequal. Some state courts have been willing to intervene in this issue, while others defer to the legislature.

B. Juveniles in Detention

Many institutions for juvenile offenders in the United States fail to provide even basic educational services; in others, the classes that are available meet irregularly, fail to satisfy state-mandated minimum requirements for instructional time, and follow no coherent curriculum.[77] Yet these juveniles are not exempt from coverage of state constitutional guarantees of the right to education. In fact, this population is arguably in particular need of the state's education resources: juveniles in detention are much more likely to have learning disabilities than those in the overall population.[78] Among other things, jurisdictional confusion adds to their plight: in many states, it is unclear whether the state education agency or the department of juvenile justice has oversight of the education of children in detention.[79]

Judicial decisions and state correctional facilities offer little assurance of education to incarcerated youth. For example, Pennsylvania law provides that an expelled minor under the age of seventeen has a right only to very minimal education, about five hours per week, and one older than seventeen has no right to educa-

75. Rose v. Council for Better Ed., 790 S.W.2d 186, 190 (Ky. 1989).

76. Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 144 (Tenn. 1993).

77. HUMAN RIGHTS WATCH, HIGH COUNTRY LOCKUP: CHILDREN IN CONFINEMENT IN COLORADO 46 (1997) (reporting observations of Human Rights Watch visit to facility and audit conducted by Colorado Division of Youth Services).

78. Harriet R. Morrison & Beverly D. Epps, *Warehousing or Rehabilitation? Public Schooling in the Juvenile Justice System*, 71 J. NEGRO EDUC. 218, 220-21 (2002).; OPEN SOCIETY INSTITUTE, RESEARCH BRIEF NO. 2, EDUCATION AS CRIME PREVENTION 2-3 (1997), *available at* http://www.prisonpolicy.org/scans/research_brief__2.pdf.

79. *See* BRUCE I. WOLFORD, JUVENILE JUSTICE EDUCATION: "WHO IS EDUCATING THE YOUTH" 4 (2000), *available at* http://www.edjj.org/Publications/educating_youth.pdf; JUVENILE JUSTICE EDUCATIONAL ENHANCEMENT PROGRAM, 2004 ANNUAL REPORT TO THE FLORIDA DEPARTMENT OF EDUCATION 84 (2004), *available at* http://www.criminologycenter.fsu.edu/jjeep/research-annual-2004.php.

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tion at all.[80] Maryland's correctional statutes make no provision for the education of youth whatsoever.[81] And the Supreme Court of the State of Washington recently ruled that incarcerated children over the age of 18 have no right to basic education, holding that the state's "Basic Education Act" (requiring that all children between five and twenty-one years old have access to basic education) did not apply to incarcerated youth.[82]

C. Homeless Children

The education of homeless children is another issue implicating the implementation of education as a right. Due to transportation, legal, social, bureaucratic and familial barriers, less than fifty percent of homeless children in the United States attend school.[83] To the extent that these barriers are part of the state apparatus, and to the extent that the state has failed to take measures to alleviate them, they implicate the state's enforcement of this right.

Legal barriers stem from state residency and documentation (for example immunization records) requirements for school attendance. Some school districts in which homeless shelters are located designate families as non-residents to prevent the children from attending school.[84]

In 1987, Congress passed the McKinney-Vento Act to address the problem of homelessness; Title VII of the Act addresses the problems of homeless children in enrolling in school and receiving an education. Its intent is "to ensure that all homeless children and youth have access to the same free, appropriate public education, including a public preschool education, as provided to other children and youth."[85] The Act was re-authorized as part of the No Child Left Behind Act of 2001.[86] The Act requires that each state educational agency establish an Office of State Coordinator for the Education of Homeless Children and Youth. This office is responsible for supervising the implementation of the Act, including "providing technical

80. Brian B. v. Commonwealth of Pennsylvania Dep't of Educ., 230 F.3d 582 (3d. Cir. 2000) (citing 22 Pa. Code § 12.6(e)).

81. Michael Bochenek, *No Minor Matter: Children in Maryland's Jails*, HUMAN RIGHTS WATCH, http://www.hrw.org/reports/1999/maryland/Maryland-08.htm (last visited May 3, 2003).

82. Tunstall v. Bergeson, 5 P.3d 691, 697 (Wash. 2000).

83. H.R. CONF. REP. No. 174, 100th Cong., 1st Sess. 93 (1987), *reprinted in* 1987 U.S.C.C.A.N. 441, 472; *see also* Jonathan Kozol, *A Reporter at Large, The Homeless and Their Children*, NEW YORKER , Jan. 25, 1988, at 65, 80 (asserting that the "transient existence [of homeless children] cuts them from the rolls").

84. NATIONAL COALITION FOR THE HOMELESS, BROKEN LIVES: DENIAL OF EDUCATION TO HOMELESS CHILDREN 5 (1987).

85. UNITED STATES DEP'T OF EDUC., REPORT TO CONGRESS, FISCAL YEAR 2000: EDUCATION FOR HOMELESS CHILDREN AND YOUTH 4 (2000).

86. No Child Left Behind Act, Pub. L. No. 107-110, Tit. X, §1032, 115 Stat. 1425 (2002).

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assistance, resources, coordination, data collection and overseeing compliance for all local educational agencies."[87] The Act also requires local educational agencies (school districts) to appoint staff liaisons to ensure that homeless students are properly identified, enrolled, and attending schools.[88] Problems such as lack of funding, indadequate monitoring of state compliance, and state and school district opt-out options, however, have impaired the Act's effectiveness.[89] Morever, "the extent of the right to sue for enforcement remains unclear."[90] In addition, several states have adopted statutes or regulations to ensure access to education for homeless young people.[91]

D. Children of Undocumented Workers

The seminal case with respect to undocumented children is *Plyler v. Doe*,[92] which stemmed from the fact that in May, 1975, the Texas legislature voted to withhold funds from school districts in the state which paid for the education of children "not legally admitted" into the United States and authorized local school districts to deny school enrollment to these children.[93] Plaintiffs, a class of school-age children of Mexican origin who could not establish that they had been legally admitted to the United States, filed suit, claiming violations of Equal Protection through the Fourteenth Amendment. In granting a permanent injunction, the U.S. Supreme Court acknowledged that education was not an enumerated fundamental right, but went on to say that neither was it "some governmental 'benefit' indistinguishable from other forms of other so-called social welfare legislation."[94] The Court ascribed education's "elevated importance" to its fundamental role in maintaining the fabric of our society and described its denial to some isolated groups of children as an "affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers to presenting unreasonable obstacles to advancement on the basis of individual merit."[95] The *Plyler* decision established the right to an education for the children of undocumented residents. Nonetheless, since this decision, several states have tried to undermine the

87. BARBARA J. DUFFIELD ET AL., AMERICAN BAR ASSOCIATION, EDUCATING CHILDREN WITHOUT HOUSING 7-8 (Amy E. Horton-Newell et al. eds., 3rd ed. 2009).
88. *Id.* at 13.
89. Comment, *For Better or For Worse?: A Closer Look at the Federal Government's Proposal To Provide Adequate Educational Opportunities For Homeless Children*, 51 HOW. L.J. 863, 880 (2008).
90. Clifton S. Tanabe & Ian Hippensteele Moblee, *The Forgotten Students: The Implications of Federal Homeless Education Policy For Children in Hawaii*, 2011 B.Y.U. EDUC. & L.J. 51, 58 (2011).
91. *See, e.g.,* Colo. Rev. Stat. §§ 22-1-102, 22-1-102.5, 22-33-103.5 (2002).
92. Plyler v. Doe, 457 U.S. 202, 220 (1982).
93. *Id.*
94. *Id.* at 221.
95. *Id.* at 222.

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ruling and sought ways to turn these children away from public schools.[96]

There are an estimated two million school age children of undocumented parents in the United States today.[97] The fight for their educational rights has consisted largely of the fight to enforce *Plyler* at the local level.[98] In 1994, for example, California voters passed Proposition 87, which, among a host of other restrictions on the lives of the undocumented, banned undocumented children from public education.[99] Although a federal judge found almost all aspects of the law unconstitutional on either *Plyler* or preemption grounds, and although the plaintiffs settled the case before the Ninth Circuit could rule on the substantive issues, Proposition 87 set off a wave of laws in several other states restricting the rights of the undocumented and their children. Many of the biggest obstacles to the right to education appear at the local school district level, because schools themselves administer the law.[100] Several schools, for example, have tried to require social security numbers and parents' driver's licenses as a way to uncover lack of documentation.[101]

Other approaches have been less systemic: in Illinois, for example, a school refused to enroll a student whose B-2 Tourist visa had expired;[102] in 1992, INS authorities in El Paso, Texas, harassed a group of students suspected of being undocumented by "driving over the football practice field and baseball diamond, entering the football locker rooms, surveilling with binoculars from the football stadium, and using binoculars to watch flag girls practicing on campus;"[103] in 2004, administrators at a school in northern New Mexico turned three of its own students over to the Border Patrol when it found the students just beyond school grounds.[104]

Other communities, notably those in border states, however, have supported the rights of undocumented children to go to public school. A recent survey of school personnel in six Arizona public

96. Maria L. Ontiveros & Joshua R. Drexler, *The Thirteenth Amendment and Access To Education For Children Of Undocumented Workers: A New Look at* Plyler v. Doe, 42 U.S.F. L. REV. 1045, 1046 (2008).

97. JEFFREY S. PASSEL, PEW HISPANIC CTR., SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY (2007) (estimating that according to the 2005 census, 1.8 million undocumented children resided in the United States).

98. Michael A. Olivas, *Immigration Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, U. CHI. LEGAL F. 27, 36-45 (2007).

99. CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION NOVEMBER 8, 1994, at 92 (1994) (adding Cal Educ. Code § 48215(a)).

100. Ontiveros & Drexler, *supra* note 96, at 1055.

101. Olivas, *supra* note 98, at 39.

102. Rosalind Rossi, *State Strips Schools of $3.5 million: District Following Law, It Claims, by Refusing to Enroll Immigrant*, CHI. SUN-TIMES, Feb. 24, 2006, at News-8.

103. Murillo v. Musegades, 809 F. Supp. 487, 490-96 (W.D. Tex. 1992).

104. Amy Miller, *APS Safe for Migrant Students*, ALBUQ. J., June 2, 2006, at A1.

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school districts found that the vast majority with an opinion on the issue supported the law established by Plyler and believed "a law prohibiting undocumented students from attending public schools would have a negative (36%) or very negative (35%) impact on the relationship between their school and the community."[105]

E. Children Receiving Welfare

Many state laws make it difficult or impossible for children over a certain age who depend on welfare to complete their high school education.[106] New York law, for example, requires that children age sixteen or older who rely on welfare benefits be assigned to placements with the "Work Experience Program;" while the law requires that those nineteen or under who are in secondary school receive work assignments which do not interfere with their schoolwork, those over nineteen who have not finished high school receive no such accommodation.[107] Thus, the work assignments which are required for their receipt of benefits often take these children away from school during class times and conflict with class schedules.[108] Because they depend on state assistance to meet their basic needs, foregoing benefits to stay in school is not a realistic option.[109]

The state of the law is not completely clear. In 1998, a group of high school students in New York City sued the city and the state seeking to enjoin them from assigning those who attended school work placements that interfered with their class and study requirements.[110] Although the trial court judge granted a preliminary injunction, the Appellate Division reversed on the grounds that the plaintiffs had not exhausted their administrative remedies;[111] by the time the case made its way back to the appellate court, the plaintiffs had either dropped out of school or graduated, making the case moot.[112] The state Constitution, however, may limit the discretion of state officials to impose welfare requirements which interfere with the recipient's ability to attend school.[113]

On the other hand, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) passed in 1996[114] imposes

105. Nina Rabin et al., *Understanding Plyler's Legacy: Voices from Border Schools*, 37 J.L. & EDUC. 15, 17 (2008).
106. *See, e.g.,* Sarah Fleisch Bodack, *Can New York City Prevent Welfare Recipients From Finishing High School?,* 34 COLUM. J.L. & SOC. PROBS. 203 (2000).
107. N.Y. Jur. 2d Public Welfare and Old Age Assistance, § 79, Public assistance employment programs (2013).
108. *See, e.g.*, Matthews v. Barrios-Paoli, 676 N.Y.S.2d 757 (Sup. Ct. 1998).
109. Bodack, *supra* note 106, at 204.
110. Matthews, 676 N.Y.S.2d *at* 757.
111. Matthews v. Barrios-Paoli, 270 A.D.2d 152 (N.Y. App. Div. 2000).
112. Bodack, *supra* note 106, 211 n. 69 (2000).
113. DON FRIEDMAN, AN ADVOCATE'S GUIDE TO THE WELFARE WORK RULES, EMPIRE JUSTICE CENTER (2000).
114. 42 U.S.C. § 652(k).

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school attendance requirements on some at-risk groups of young people: for exmple, it requires teen mothers to attend school in order to receive welfare and does not impose time limits or work requirements while they are full-time students. The Act left many implementation details to the states, however, and the states vary considerably in their support of school attendance, especially for those over eighteen who have not finished high school.

F. Children with Mental and Physical Disabilities

At the Federal level, the Individuals with Disabilities Education Act (IDEA), guarantees to all disabled children (who live in states that choose to receive the associated federal funds) a right to a "free, appropriate, public education" (FAPE).[115] The definition of a "FAPE" has been the source of considerable litigation;[116] parents and school officials often disagree about what constitutes an "appropriate" education.[117] The law itself defines FAPE as "special education and related services that have been provided at public expense . . . meet the standards of the state educational agency . . . include an appropriate preschool, elementary school, or secondary school education . . . and are provided in conformity with [an] individualized education program . . . ."[118] but fails to define "appropriate."

The terrain for the legal debate was laid out by the Supreme Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.[119] In *Rowley*, the Court held that the "appropriate" standard did not require a school district to offer a hearing disabled child a sign language interpreter, employing instead a minimalist interpretation of the law which required only that the disabled child receive "some educational benefit."[120]

Some courts have adhered to this minimalist interpretation. For example, the First Circuit held that a school was not required to implement a curriculum specially designed for a child with autism because the school's regular curriculum was "adequate" in giving the child *some* educational benefit, and refused to address the parent's claim that the specialized curriculum would better serve the child's

115. 20 U.S.C. §§1400-1482 (2006).

116. *See, e.g.*, Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & EDUC. 367, 377-78 (2001).

117. David Ferster, *Broken Promises: When Does a School's Failure To Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education*, 28 BUFF. PUB. INT. L.J. 71, 76 (2010).

118. 20 U.S.C. § 1401(9) (2006) (emphasis added).

119. 458 U.S. 176 (1982).

120. *Id.* at 200.

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needs.[121] This "some or adequate benefit" test has been adopted by the First, Eighth, Tenth, Eleventh and D.C. Circuits.[122]

Other courts, however, have read the law less minimally, and have ratcheted up the FAPE standard to a "meaningful benefit" standard, under which FAPE requires "significant learning" and calls for "more than trivial educational benefit."[123] In an autism case paralleling the First Circuit's, for example, the Sixth Circuit compared the school's curriculum for autistic children with one preferred by the parents and stated that "there is a point at which the difference in outcomes between two methods can be so great that provision of the lesser program could amount to a denial of a FAPE."[124] The Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits have adopted this interpretation.[125]

While it has not expanded the definition of a FAPE since 1975, Congress has passed several amendments to IDEA and added considerably to its funding over the years; this, combined with evolving standards for special education in the years since IDEA first became law, have together led most commentators to agree that the "meaningful benefit standard" reflects the underlying meaning and purpose of the law.[126]

All of these regimes conform to the requirements of the Federal Constitution; as discussed, the state constitutions often provide more protection for this right. The International Covenant on Economic, Social, and Cultural Rights, which the United States has signed but not ratified, recognizes the right of everyone to free education for the primary level and calls for "the progressive introduction of free education" for the secondary and higher levels.[127] It also calls on signatory states to take specific steps to achieve these goals, including providing free, universal and compulsory primary education, generally available and accessible secondary education, including vocational training, and accessible higher education, all of which are to be available to all without discrimination.

121. L.T. T.B. ex rel. N.B. v. Warwick School Committee, 361 F.3d 80, 86 (1st Cir. 2004).

122. Philip T.K. Daniel & Jill Meinhardt, Commentary, *Valuing the Education of Students with Disabilities: Has Government Legislation Caused a Reinterpretation of a Free Appropriate Public Education?*, 222 ED. L. REP. 515, 519 (2007) (summarizing range of approaches in the courts).

123. *See e.g.,* Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 247 (3d Cir. 1999) (stating IEP must provide "meaningful benefit"); Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 861-62 (6th Cir. 2004) ("The IDEA requires an IEP to confer a 'meaningful educational benefit' . . . gauged in relation to the potential of the child at issue.").

124. Deal, 392 F.3d at 862.

125. Daniel & Meinhardt, *supra* note 122, at 519 (summarizing range of approaches in the courts). R

126. David Ferster, *supra* note 117, at 76, 86. R

127. International Covenant on Economic, Social and Cultural Rights Art 13, §1.

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The United States is not bound by the Covenant, and, as the above discussion indicates, may fail to fully to comply in certain respects. While primary education in all the states is free, compliance issues may arise with respect to the access of several disadvantaged groups to an education which, as the Covenant requires, is "directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms" and enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups."[128] As noted above, homeless children, children of the undocumented, and those dependent on welfare may have their access to a fully effective education affirmatively impaired by state or local laws and regulations, or simply undermined by failure of local school authorities to accommodate them by identifying them, providing transportation, or by monitoring local school compliance.

VII. Institutional Guarantees of Social Rights

Which national bodies are the institutional guarantors of social rights?

Are there any specific bodies created especially for the protection of social rights? What are their powers?

How do you evaluate the effectiveness of these national bodies?

To the extent that social rights exist in U.S. law, they are mostly guaranteed by courts. Individual federal agencies responsible for administering social programs operate pursuant to elaborate procedural requirements and, like all government agencies, they have Inspector Generals who are responsible for conducting audits designed to protect both the public interest and individuals. However, in contrast with other legal systems, there are no "Ombudsmen" dedicated to protecting social rights in general or specific social rights such as the rights of the child. State law follows the same pattern as Federal law: the site for the enforcement of social rights are the courts of law.

VIII. Social Rights and Comparative Law

Did your national legal system influence foreign legal systems in the area of social rights?

Did other foreign legal systems influence your national legal system in the area of social rights?

Can you give examples of provisions, principles or institutions (in the area of social rights) borrowed from other legal systems?

128. *Id.*

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Do your domestic courts rights quote judgments or legislation from other jurisdictions when adjudicating on social rights?

The U.S.'s skeptical attitude towards social rights has influenced other jurisdictions in at least two ways. First, the feeble social rights in federal constitutional law and the U.S.'s opposition to international instruments on social and economic rights has undermined the status of social rights in international law.[129] Second, U.S. constitutional law and legal scholars have been influential in the drafting of new constitutions in democratizing nations and the lack of social rights in the U.S. constitutional template, as well as the ambivalent attitude of many legal scholars, may have discouraged some jurisdictions from including strong, or strongly enforceable, social rights.[130]

129. *See* Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365 (1990).

130. *See, e.g.*, Cass R. Sunstein, *Against Positive Rights*, *in* WESTERN RIGHTS?: POST-COMMUNIST APPLICATION 225, 225-32 (András Sajó ed., 1996).

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