

Economic and Social Rights in the United States: An Overview of the Domestic Legal Framework

by Jessica Schultz

DESPITE ITS STRONG COMMITMENT to civil liberties, the United States government is conspicuously reluctant to recognize economic and social rights (ESR) within its own borders. This article explores legal avenues available to pursue ESR claims in the absence of explicit Constitutional guarantees. The purpose is twofold: first, by framing U.S. cases in the context of international law, the article highlights opportunities to bring domestic jurisprudence in line with well-established human rights standards. Second, the U.S. domestic experience can be instructive for advocates in other countries who are struggling to overcome similar obstacles to the recognition of ESR.

The framework of legal obligations under international human rights instruments provides a useful device for organizing domestic ESR strategies. Under international law, governments are obliged to *respect, protect and fulfill* the human rights of those within their borders. This means that the government must refrain from encroaching upon people's existing rights (respect); it must protect people from violations by third parties (protect); and finally it must establish political, economic and social systems that provide everyone access to the guaranteed right (fulfill). Running through these three levels of obligations are the overarching human rights principles of *non-discrimination* and *progressive realization*. The International Covenant on Economic, Social and Cultural Rights (ICESCR) prohibits discrimination in access to ESR on the grounds of "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Progressive realization obliges a government to fulfill ESR "to the maximum of available resources". This means that they must not pursue policies that either deprive people of the most basic element of each right ("the minimum core content"), or actually decrease people's access to a right ("the principle of non-retrogression"). In the following sections, the article examines U.S. caselaw through the lens of these obligations.

There are numerous avenues available to pursue ESR under domestic law - this article focuses on three. First, nearly every state constitution guarantees an adequate education, and a few state courts have recognized other rights implied by general welfare provisions. Second, advocates can anchor their claims on Equal Protection guarantees, as well as federal, state and local anti-discrimination laws. Finally, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution can be used to prevent rollbacks in social benefits.

DEFENDING ESR UNDER THE RUBRIC OF NON-DISCRIMINATION

ANTI-DISCRIMINATION LAWS IN THE U.S. can be used to address both access to and adequacy of ESR. These laws include the equal protection clauses of federal and state constitutions, and federal, state and local statutes. The rights to education, work, and shelter have been litigated extensively through anti-discrimination actions.

The Fifth and Fourteenth Amendments of the U.S. Constitution limit the power of the government to discriminate against members of certain groups. The Fourteenth Amendment of the U.S. Constitution provides that: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has interpreted this protection to apply to the federal government as well, through the Fifth Amendment Due Process Clause.

In interpreting equal protection, however, the Supreme Court does not consider differential treatment to be discriminatory *per se*. Rather, to establish discrimination where a law is neutral on its face, a victim must prove both impact and purpose. That is, the law must have a disproportionate or disparate effect on the group to which the victim belongs, and the state must have enacted the law with such effect intentionally in mind. This is one point of departure from international law, which prohibits treatment that has *either* discriminatory purpose *or* effect.

The Court has fashioned a series of tests to determine the constitutionality of laws that explicitly distinguish between various protected categories of individuals. Depending on the classification involved, the Court reviews state action according to one of three standards of judicial scrutiny. If a law or practice discriminates on the basis of race, citizenship or national origin, or if it burdens the exercise of a "fundamental" right, a "strict scrutiny" standard applies. The state must demonstrate that the challenged classification is justified by a compelling government interest and is "narrowly tailored" to further that interest. If the law or practice explicitly discriminates on the basis of gender or legitimacy, the Court applies an "intermediate" standard of review, where a classification must serve "important governmental objectives" and must be "substantially related" to the achievement of those objectives. Finally, other "non-suspect" classifications are generally upheld as long as the State demonstrates

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a “rational basis” for making its distinction. In areas of social and economic policy, “a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”

Whereas U.S. courts require more than a “rational basis” to justify explicit distinctions only on the basis of race, citizenship, national origin, gender and legitimacy, Article 2 of the ICESCR bans discrimination “of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*” (emphasis added). This definition prohibits any distinction that impairs a person’s exercise of his or her rights. The Committee on Economic, Social and Cultural Rights (ESCR Committee) has found discrimination in various domestic laws that make distinctions on the basis of age, health status and disability.

Because the people most affected by social and economic rights violations frequently do belong to a “suspect category” under the equal protection clause, constitutional claims are commonly invoked to enforce social and economic rights such as the right to education and shelter. In *Brown vs. the Board of Education*, for example, the Supreme Court relied on the Equal Protection Clause to hold that a racially segregated public school system was unconstitutional. . Even if the quality of tangible factors like curriculum, teachers and facilities was comparable in all-black and all-white schools, the Court found that racial separation generated a sense of inferiority that inevitably impaired their ability to learn: “[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”

ANTI-DISCRIMINATION STATUTES

ESR advocates can also refer to anti-discrimination measures in federal, state and local statutes. The Fourteenth Amendment provides Congress with the power to pass any laws necessary for its enforcement. Because the Amendment was originally interpreted to cover only government action, Congress enacted the Civil Rights Act of 1964 to reach *individuals* who discriminate against others on the basis of race, color, religion or national origin. This extension coincides with the ESCR Committee’s interpretation of the principle of non-discrimination to cover acts by both public authorities and by private individuals. It is also consistent with states’ obligation to prevent third parties from encroaching on individual rights. Titles VI and VII of the Act specifically prohibit discrimination in federally funded programs (Title VI) and in the workplace if the employer is engaged in interstate commerce (Title VII).

In certain situations, federal, state and local anti-discrimination statutes provide protection to groups outside the traditional suspect classes. The Fair Housing Act, for example, prohibits discrimination based on race, religion, national origin, sex, familial status or disability. Some state laws prohibit discrimination based on grounds linked to poverty. In New Jersey, the legislature enacted a statute that prohibits landowners from refusing to rent or lease a house or apartment based on the prospective tenant’s source of lawful income.

FULFILLMENT OF ESR AND STATE CONSTITUTIONS

TO THE EXTENT THAT *SUBSTANTIVE RIGHTS* IN THE U.S. are recognized, they are found mainly in state constitutions. The most far-reaching ESR jurisprudence arises from courts considering the right to education, which all state constitutions guarantee. The framing and judicial interpretation of the right to education has undergone changes over the years. Between 1971 and 1973, advocates used the federal Equal

Protection Clause to argue that education was a “fundamental right” and that policies which resulted in per-pupil spending disparities infringed upon that right. Courts applied strict scrutiny analysis to examine those policies. In 1973, however, the Supreme Court ended its strict scrutiny approach cases with its decision in *San Antonio Independent School District v. Rodriguez*, which held that wealth is not a suspect classification for the purpose of equal protection review, and that education is not a fundamental right. Between 1973 and 1979, advocates attacked unfair school finance systems with the equal protection and education clauses in state constitutions. This strategy had mixed success because it was difficult to distinguish spending from other variables that impact educational opportunity. Advocates finally abandoned reliance on equal protection arguments in favor of an approach focusing on the adequacy of education.



Protestors in the United States demand broader assistance for the poor.
Credit: Harvey Finkle

Three cases in particular illustrate how the right to education has been defined over the past decade in state courts: *Edgewood Independent School District v. Kirby* (*Edgewood*), *Rose v. Council for Better Education* (*Rose*), and *Campaign for Fiscal Equity v. New York* (*CFE*). The *Edgewood* case, decided in 1989, was one of the first cases to use an “adequacy” rather than “equity” argument to challenge school finance systems. The Texas Supreme Court found that the state’s property tax-based system for financing public education violated the state constitution. Article VII, Section 1 of the Texas constitution declares that “a general diffusion of knowledge” is “essential to the preservation of the liberties and rights of the people”. To that end, the section states that “it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of free schools.”

The court held that “efficient” conveys the meaning of effective or “productive of results” as well as the economical use of resources. It found that “[t]he present system provides not for a diffusion that is general, but for one that is limited and unbalanced. The resultant inequalities are thus directly contrary to the constitutional vision of efficiency.” In particular, the court noted that while efficiency does not require a per capita distribution, there must be direct and close correlation between a district’s tax effort and the education resources available to it. Throughout Texas, the tax burden and money raised varied dramatically, with the wealthiest areas enjoying both disproportionately low taxes and well-resourced schools. Rather than ordering a specific remedy or requiring the legislature to raise taxes, the court set a time limit for the legislature to develop a new financing system.

Also in 1989, the Supreme Court of Kentucky had the opportunity to examine its own constitutional mandate to provide an “efficient sys-

tem of common schools throughout the state". In *Rose*, the court went into much more explicit detail about what efficiency requires. It found that an efficient system of education must aim to endow each child with seven specific capacities; including knowledge of economic, social and political systems, strong communications skills, and sufficient training in academic or vocational fields to choose and pursue his or her life work intelligently.

Like its Texas counterpart, the Kentucky court did not require the state legislature to enact any specific legislation, such as raising taxes. Its instructions were nevertheless quite onerous to the General Assembly, which had to "recreate and re-establish a system of common schools". The Assembly quickly passed the Kentucky Education Reform Act of 1990, which resulted in tax legislation that increased revenues by more than one billion dollars. Revenues for all school districts increased by at least eight percent and, in some districts, up to twenty-five percent. To some observers, the *Rose* decision "constitutes one of the most comprehensive interventions by a state judiciary into the realm of legislative policymaking for education."

In the decade since *Rose*, Kentucky schools have steadily improved. For the first time, Kentucky students in all three grades tested in 2001 matched or exceeded the national average on a basic skills assessment. The relative success of school reform in Kentucky, as opposed to other states, is due in large part to effective citizen advocacy groups that not only laid the groundwork for reform but also monitored implementation in the succeeding years.

Over a decade after the first adequacy decisions came down in Texas, Kentucky and other states, education reform advocates won a major victory in New York. In *CFE*, New York's Court of Appeals held that Article 11 of the state constitution entitled all students an "opportunity for a *meaningful high school education*, one which prepares them to function productively as civic participants" (emphasis added). This ruling elaborates on the Court's previous determination that Article 11 requires a "sound basic education". It also reinstates most of the trial court's decision holding that the current system of school funding is unconstitutional.

During the seven-month trial, Justice DeGrasse of the trial court evaluated the adequacy of New York City public school education by examining both the resources available, or "inputs", and measures of student achievement, or "outputs". Among inputs, the court considered whether students benefited from minimally adequate teaching of reasonably up-to-date basic curricula. It looked at evidence of teacher certification, professional development opportunities, and salaries. It also noted that the schools had poor physical facilities, were overcrowded, and suffered a chronic shortage of books. Among outputs, the court evaluated evidence of graduation and dropout rates, and student performance on standardized tests. The schools performed poorly in both categories. To establish a causal link between the current funding system and the poor condition of city schools, the court questioned whether increased funding could provide New York City with better teachers, better school buildings and better technology. Although the requirements of a right to education cannot be gauged by funds alone, the court found as a matter of fact that additional financial resources were required to address the crisis.

The Court of Appeals affirmed the trial court's analysis and gave the State approximately one year to reform its public school system by achieving the following objectives: ascertaining the costs of reforming the public school system, providing public schools with necessary resources, and establishing a system of accountability to ensure the effective use of these resources, particularly financial resources.

In the area of education, these cases demonstrate courts' willingness

to develop detailed tools to assess a state's compliance with its constitutional mandates. The standards they prescribe exceed the "core minimum" content required under international law. Articles 13 and 14 of the ICESCR stipulate that primary education shall be compulsory and available free to all. Secondary education "shall be made generally available and accessible to all by every appropriate means." In addition, the "material condition of teaching staff" must also continuously improve. The *Rose* and *CFE* decisions demand even more by enumerating specific skills students need to pursue economically productive and politically engaged lives.

OTHER ESR RIGHTS: SOCIAL ASSISTANCE AND SHELTER

While many courts have recognized a robust right to education arising from state constitutional language, other social and economic rights have received far less extensive attention. However, there are a few outstanding examples that demonstrate the promise of a state constitutional approach, especially with respect to welfare assistance and housing. In *Tucker v. Toia*, the New York Court of Appeals made a broad interpretation of Article XVII of the New York Constitution: "the aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions . . . as the legislature may . . . determine." It found that the language imposed "a positive duty upon the state" to provide welfare payments to anyone considered indigent under the state's need standard even if they could not present papers proving that they received no support from relatives.

Another well-known New York case, *Callahan v. Carey*, relied on Article XVII of the state constitution to challenge the city's inadequate emergency shelter system. In this case, the National Coalition for the Homeless filed a class-action suit on behalf of homeless men in Manhattan, relying on various provisions of the New York Constitution and other state and municipal laws to demand that the city to provide shelter to any man who requested it. The brief cited legislative history from the 1938 New York constitutional convention to argue that the language in Article XVII was intended to confer rights to those "who must look to society for the bare necessities of life".

After difficult negotiations, plaintiffs and defendants entered into a consent decree requiring New York City to furnish sufficient beds for every homeless man applying for shelter determined to meet certain needs criteria. The consent decree mandated, among other things, a minimum of three feet between beds, and one toilet for every six residents. These standards demonstrate courts' capacity to fashion remedies addressing complicated social issues. Other courts have recognized a right to shelter based on "general welfare" provisions of their state constitutions as well as state and local statutes. In 1975, the New Jersey Supreme Court held that a zoning ordinance in Mount Laurel township violated the constitutional requirement that the state's police power promote "public health, safety, morals or the general welfare". Because the land use controls excluded low- and moderate-income families from the municipality, they were deemed invalid. The court stated that "[t]here cannot be the slightest doubt that shelter, along with food, are the most basic human needs", and that it was beyond dispute that adequate housing is "an absolute essential in promotion of the general welfare required in all local land use regulations." The court imposed an obligation on every developing municipality to provide a realistic opportunity for "decent and adequate low and moderate income housing". Unfortunately, the court failed to provide any guidance about how to fulfill this mandate. Instead, it granted the township 90 days to reform its land use regulations. For nearly ten years Mount Laurel and the other municipalities affected did virtually nothing to comply with the judgment.

In 1983 six cases stemming from the above decisions were consoli-

dated in the New Jersey Supreme Court as “*Mount Laurel II*”. In his opinion, Chief Justice Wiletz declared that without more forceful judicial intervention, “Mount Laurel will not result in housing, but in paper, process, witnesses, trials and appeals.” It was time, he wrote, to “put some steel into the doctrine”. Providing a “realistic opportunity” for the production of low and moderate income housing meant more than eliminating exclusionary zoning regulations. Each municipality was obliged to prove, by a preponderance of the evidence, “a likelihood - to the extent economic conditions allow- that the lower income housing will actually be constructed.” Faced with heavy pressure to respond to this ruling, in 1995 the New Jersey legislature passed the Fair Housing Act. This Act codified the doctrine elaborated in the first Mount Laurel case and created a Council on Affordable Housing to monitor compliance with the decrees. As a result of the Mount Laurel decisions, between 1987 and 1992 the state constructed or rehabilitated approximately 54,000 low- and moderate-income housing units.

While the *Callahan* and *Mount Laurel* cases demonstrate the possibility of claiming a right to shelter in U.S. courts, they fall far short of recognizing a right to adequate housing as defined under international law. General Comment No. 4, adopted by the ESCR Committee, elaborates seven criteria of housing adequacy. These include: security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location (access to employment,



*A woman rests during a protest for adequate housing in the United States.
Credit: Harvey Finkle*

health care, schools, etc.); and cultural adequacy. Although a government does not need to provide free housing to everyone, it has an obligation to prioritize its policies to benefit the most vulnerable and disadvantaged. While the *Callahan* targets such a group - the homeless- it does not address whether the remedies provided are adequate to meet its needs. Some aspects of adequacy, like security of tenure and accessibility, are covered separately by federal, state and local statutes.

NON-REGRESSION OF ESR AND THE DUE PROCESS CLAUSE

THE EDUCATION, WELFARE AND SHELTER CASES described are representative of courts' attempts to elaborate the substance of state constitutional rights. “Progressive realization”, as noted above, requires a government to fulfill ESR to the maximum of available resources. The principle of “non-retrogression”, in contrast, provides that there can be no degradation of rights already realized. The Due Process Clause of the Fifth Amendment is one tool for resisting encroachment upon existing ESR. It demands that the government provide protections like notice and

a hearing when it attempts to deprive a person of her “life, liberty, or property”. In the Supreme Court decision *Goldberg v. Kelly*, the scope of “property” interests covered under the clause was expanded to include welfare payments. The Court explained that since a government benefit provides an eligible recipient with “the very means by which to live,” the government may not impair that recipient’s interest arbitrarily. The same analysis was applied in the Washington D.C. shelter case *Williams v. Barry*. There, the court held that the city must afford procedural protections before cutting off funds to support shelters for homeless males. Although no right to shelter exists independently in the jurisdiction, the city had “charted a course of deliberate, consistent action that solidified and expanded the homeless person program.” Its beneficiaries could therefore claim a legal interest in continued use of those services.

CONCLUSION

DESPITE EFFORTS BY THE U.S. GOVERNMENT to restrict the recognition of ESR, advocates have advanced successful claims using a range of tools, from non-discrimination statutes to specific constitutional language. The decisions described above demonstrate that ESR are justiciable. They affirm a court’s capacity to assess the availability of resources, to balance competing demands on those resources, and to monitor the adequacy of complex social policies. However, they also reveal areas that fall short of human rights standards. As ESR practitioners recognize, creative strategies and solutions drawn from different domestic contexts are required to better redress such discrepancies.

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