Educational Rights Talk in Search of a Question

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If Anne Newman's title can be trusted, the question she sets out to answer is how American courts might "help translate [or transform] moral claims about educational opportunity into legal rights with policy traction." The question is not well framed. Judges are presented with *legal disputes* to resolve, and must respond to the *legal arguments* before them. In so doing, they interpret and apply *law*. The *sources of law* they draw upon include constitutional provisions, statutes, precedent, common law principles, canonical restatements, and other, less authoritative sources.

According to one influential theory, it is permissible for judges to interpret the law in light of the moral principles *implicit* in the system of law — the best system of moral principles that the system of law as a whole can be seen to embody.[1] Even on this theory, however, a judge's task is to interpret and apply law, not to give legal effect to extra-legal moral ideas. It is not a judge's place to "transform" or "translate" a moral right as such into a legal right. The judiciary is not a *source* of rights, and in suggesting otherwise, Newman misrepresents its role.

Newman blurs the distinction between the *creation* of a legal right to adequate education and the *adjudication* of disputes in which the violation of a right is claimed. Moreover, she dismisses the legislative and constitutional amendment processes, the primary mechanisms by which governmental duties and corollary personal rights are legally established. Newman does not actually answer her question on how courts might transform educational moral rights into legal rights, and that is probably just as well.

What is Newman's aim in revisiting *Rodriguez* and *Rose* if not to answer the question suggested by her title? The point, she says, is "to explore the relationship between legal rights, educational opportunity, and the ideal of equal citizenship." In speaking of "*the* relationship" between these three things she seems to have in mind from the start that certain legal rights to educational opportunity are required to fulfill her *preferred* "ideal of equal citizenship." The specific contours of the rights and the ideal are never specified, but this *is* a thesis of sorts. What ensues is not an "exploration," but an attempt to measure the two decisions against this nebulous standard. Newman argues, in effect, that existing school finance systems do not provide the education to which children are morally entitled.

"Education is constitutive of political rights rather than instrumentally related to them, [and this is] a difference that is critically important toward advancing a right to education," Newman says. This seems to be Newman's primary thesis, apart from her sensible but unsurprising defense of rights claims and civic activism as tools for advancing educational equality. The formulation, "education *is constitutive of* political rights," is obscure. What does this mean? Political rights are constituted or formed by education? Political rights are composed of education? Philosophically

and legally, this is unintelligible. So how can it be "critically important" to advancing educational rights?

The plaintiffs in *Rodriguez* argued that because education is a prerequisite to the meaningful or effective exercise of constitutional rights such as free speech, education is an implicit, fundamental right. Newman seems to be saying that, in order to make this argument more legally potent, education must be understood not as "a contingent means" or "instrumentally related" to the exercise of political rights, but as a *necessary* means, the "primary" means, or a constituting factor. These are not equivalent claims, and the latter two do not follow from the first.

We agree that education is necessary to the meaningful or effective exercise of political rights, but it does not follow that it is the "primary" way "to empower individuals to use their political liberties." We would need to know what "primary" means, along with a fuller empirical account of the factors that enable the exercise of political liberties to be efficacious. Social status, wealth, income security, military service (especially in a time of war), and access to mass media are undoubtedly important to the efficacy of political speech. For this reason, many theorists of democracy take more seriously than Newman does the court's assertion that "[e]mpirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process…."[2]

It may be true, as Newman says, that education is the only means through which a person can develop the cognitive skills essential to meaningful political engagement, but other factors do matter a great deal. The court in *Rodriguez* was reluctant to set a precedent that might seem to acknowledge not only an implicit constitutional right to education, but similarly implied rights to respected employment, immunity to dismissal from work on political grounds, and access to politically important media.

Newman fails to provide any cogent grounds for asserting a relationship between education and political rights stronger than what all parties to this debate accept: Education is necessary for the meaningful exercise of constitutionally guaranteed liberties. This makes the relationship between education and political rights more than contingent, as Newman insists. But it is not clear why she thinks this yields a more potent legal argument for an implicit constitutional right to some quantity or quality of *state-funded schooling*.

The legal question that still remains is why a liberty right would entail a welfare right to public education funded in a particular manner, when what is at stake is not an absolute deprivation of free speech, but a potentially reduced capacity to exercise free speech well. That is the legal crux of the *Rodriguez* decision. The plaintiffs did not characterize education as a fundamental right hoping the court would somehow "transform" a moral claim into a legal right with policy traction. It was a strategic move by which the plaintiffs hoped to trigger strict scrutiny. The absolute deprivation of a fundamental right, had the plaintiffs been able to demonstrate one, would have shifted the burden of proof to the government of Texas under this heightened

10.47925/2006.091

standard of review. Because there was no absolute deprivation, the burden of proof remained with the plaintiffs to show that the school finance regime in Texas was not rationally connected to a legitimate state interest in local control.

According to Newman, what made all the difference in *Rose* was the Kentucky court's "view that education is inextricably linked to the exercise of political rights rather than merely instrumentally related to them." There is nothing in the text of the decision on which to base this claim. Indeed, it would have been absurd for the Kentucky court to consider whether education was intrinsically related to the exercise of rights enshrined in the constitution of the State of Kentucky, given that "an efficient system of education" was explicitly guaranteed. Newman adds that the Kentucky Court's list of seven capacities that an "efficient" system of education would promote demonstrates its understanding of education as "constitutive of political rights." We think it would be remarkable if the good Justices of the Supreme Court of Kentucky could even say what this means. More importantly, this assessment of what distinguishes the two cases overlooks their radically different legal contexts. The plaintiffs in *Rose* did not claim that educational rights are implicit in or entailed by political rights. The court was asked to determine whether the legislature had fulfilled its constitutional duty to "provide an efficient system of common schools throughout the state."[3]

A more even-handed reading of the decisions would find that while they both concern the adequacy of school finance provisions, it is misleading to think of *Rose* as "advancing a right to education" and *Rodriguez* as "condon[ing]" the *status quo*. The *Rose* court did not "endorse" or "declare" or "find in favor of" a right to education. It *judged* that the state of Kentucky had failed to uphold an established legal duty to provide an efficient school system. The *Rodriguez* decision hinged on the absence of a clear legal basis for subjecting the Texas school finance laws to strict scrutiny.

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1. Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986).

2. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). On the importance of employment and military service to political efficacy, see Judith Shklar, *American Education: The Quest for Inclusion* (Cambridge, Mass.: Harvard University Press, 1991), and Sigal Ben-Porath, *Citizenship Under Fire: Democratic Education in Times of Conflict* (Princeton: Princeton University Press, 2006). On the relevance of material circumstances to political standing and efficacy, see also Jean Hampton, *Political Philosophy* (Boulder: Westview Press, 1997), 158–59, and Randall Curren, *Aristotle on the Necessity of Public Education* (Lanham, Md.: Rowman and Littlefield, 2000), chaps. 4, 6, and 7, and "Civic Education in the Liberal and Classical Traditions," *The School Field* 13, no. 1–2, 2002: 107–120.

3. *Rose v. Council for Better Education, Inc.* 790 S.W.2d 186 (Ky. 1989).

10.47925/2006.091