COMMENTS

Drafting the Tools for Progress: A Comparative Look at a Constitutional Right to Education

Scott Foreman-Murray*

I. INTRODUCTION

Education is essential to democracy. How that education is provided for and/or guaranteed depends upon the individual country, however. The United States Constitution does not explicitly provide, nor has the United States Supreme Court found, a general right to education. Instead, the Court has found other ways of ensuring certain groups are able to receive an equal and therefore adequate education. Alternatively, South Africa and Afghanistan have each explicitly enshrined a positive right to education in their constitutions. This Comment examines how

* © 2012 Scott Foreman-Murray. J.D. candidate 2013, Tulane University Law School; B.A. 2006, Reed College.

these three countries have decided to address a right to education and the implications of those decisions. It ultimately argues that for young democracies emerging out of a troubled and segregated past, a positive social right to education is the preferable model.

Part II looks at several touchstone cases in the United States in which the Supreme Court has affirmed the importance of education, but has refused to recognize a general right to that education. Part III then discusses South Africa and its constitutional right to education. Moreover, Part III illustrates how the South African Constitutional Court has successfully adjudicated other constitutional social rights, but not yet education. Part IV examines Afghanistan's sordid history with a right to education and its current struggle to (again) realize that right. Finally, Part V provides a comparative analysis of the three models and concludes in favor of something akin to South Africa's model.

II. THE UNITED STATES

The United States Constitution does not contain an explicit guarantee of education,[1] and the United States Supreme Court has been unwilling to divine an implicit positive, general right to education within the text.[2] However, the Court has never foreclosed the possibility that there may at least be a fundamental right to some "quantum of education" within the Constitution.[3] Instead, the Court has protected individuals' negative rights to education—the right to have the government not interfere with one's education.[4] It has done this both through equal protection[5] and substantive due process claims.[6] Despite the Court's insistence that there is no fundamental right to a general education, the Court's alternative reasoning is often stretched quite thin in order to negate the state's interference with some groups' education.[7] These examples may ultimately suggest that the lack of a positive right to education in the United States simply results in jurisprudential contortionism rather than a sound model for other countries.

---

1. U.S. CONST.

2. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973); *see also* Krysten Urchick, U.S. Education Law: Is the Right to Education in the U.S. in Compliance with International Human Rights Standards? (2007) (unpublished manuscript) (on file with Michigan State University College of Law), http://www.law.msu.edu/king/2007/Urchick.pdf.

3. *Rodriguez*, 411 U.S. at 36.

4. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923); *see also* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954).

5. *See Brown*, 347 U.S. at 495.

6. *See Meyer*, 262 U.S. at 399.

7. *See Plyler*, 457 U.S. at 221-22.

A. No Positive Right to Education

In *San Antonio Independent School District v. Rodriguez*, the Supreme Court first held that there is no implicit or explicit right to education in the Constitution.[8] Parents of schoolchildren brought the suit to challenge the Texas system of financing education.[9] The particular feature at issue was the dual nature of the system, which allowed for essentially equal funding from the state, but also allowed for local property taxes that resulted in large spending disparities between communities.[10] Appellees argued that there was a fundamental right to education based on a "nexus theory."[11] Essentially, appellees maintained that because education bears such a substantial relationship to other rights—particularly to those in the First Amendment and the right to vote—the Court should distinguish it from other state-provided benefits and services.[12] Therefore, the Court should review inequities within the system under strict scrutiny.[13]

While not denying the inherent importance of education to a democratic society, the Court refused to hold that such importance alone would heighten the level of review of a state's economic or social legislation.[14] "[T]he undisputed importance of education will not alone cause this Court to depart from the usual standard" of review, the Court noted.[15] Turning to the nexus argument, the Court recognized the significance of the First Amendment and the right to vote, but reasoned that it had never before found a guarantee of the "most effective speech or the most informed" electorate.[16] Further, the Court felt that under such an argument, education would be indistinguishable from housing, food, or any other social necessities that might largely impact other fundamental rights.[17] However, despite finding no general positive right to education in the Constitution, the Court did reserve judgment on whether there may be a fundamental right to "some identifiable quantum of education."[18] If the Texas financing system had equaled "an absolute

---

8. 411 U.S. at 37.
9. *Id.* at 4-5.
10. *Id.* at 6-8, 15-16.
11. *Id.* at 35, 37.
12. *Id.* at 35.
13. *See id.*
14. *Id.*
15. *Id.*
16. *Id.* at 36.
17. *Id.* at 37.
18. *Id.* at 36.

denial of educational opportunities to any of its children," the Court noted it might have found merit in appellees' argument.[19]

A similar, though stronger and much more questionable, holding resulted in *Plyler v. Doe*.[20] While again reiterating that there is no general right to education in the Constitution, *Plyler* held that education is distinguishable from other government benefits and social welfare legislation.[21] Again involving Texas, *Plyler* arose out of a change in state law that barred illegal immigrants from attending public schools.[22] Appellees challenged the law as a violation of equal protection under the Fourteenth Amendment.[23] Appellants countered that because undocumented aliens were not considered persons under Texas law, the Fourteenth Amendment did not apply.[24]

In deciding for the appellees, the Court noted "the importance of education in maintaining our basic institutions."[25] In an argument that sounds suspiciously similar to the previously rejected nexus test, the Court reasoned that education played a significant role in the essential foundation of society and, as such, it had to take account of "the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[26] Foreclosing education to illegal aliens would block them from ever contributing to national progress.[27] In assessing the rationality of the law, the Court decreed that "costs to the Nation and to the innocent children" must be taken into account.[28]

There are two reasons why the decision in *Plyler* is odd. First, as the Court itself points out, the appellees were already discriminated against, constitutionally, by being federally classified as illegal.[29] The Court plainly states, "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'"[30] Without suspect class status, the Texas law must be reviewed under the basic rational basis standard.[31]

---

19. *Id.* at 37.
20. 457 U.S. 202, 221 (1982).
21. *Id.*
22. *Id.* at 205.
23. *Id.*
24. *Id.* at 210.
25. *Id.* at 221.
26. *Id.*
27. *Id.* at 223.
28. *Id.* at 223-24.
29. *Id.* at 223.
30. *Id.*
31. *See id.*

Therefore the law only fails, as it did, if Texas did not have a legitimate end for its legislation.[32] It is difficult to make sense of this holding without assuming that, despite what it says, the Court is at least nodding at a fundamental right to education. Second, as noted, the Court seems to be taking account of factors that it explicitly denied in *Rodriguez*.[33] The difference between the nexus of education and the "fabric of our society" and the nexus of education and the First Amendment seems minimal to nonexistent.[34] Regardless of the seeming inconsistencies of this decision, the Court was explicit in reaffirming that there is no general right to education.[35] Relatively shortly after *Plyler*, the Court again reiterated the basic holding of *Rodriguez*.[36] More importantly, the Court reiterated that the question of "whether a minimally adequate education is a fundamental right" remains unsettled.[37]

B. A Negative Right to Education?

The Court has held that there is some sort of a negative right to education—a right to be free in one's education from government intervention.[38] In *Meyer v. Nebraska*, the Court held that a Nebraska law prohibiting the teaching of certain foreign languages was unconstitutional.[39] There, a teacher had been found guilty of instructing a pupil in German.[40] Utilizing a substantive due process argument under the Fourteenth Amendment, the Court reasoned that the right to teach and the right for parents to request instruction in a foreign language fell within the liberty guaranteed by the amendment.[41] Though the Court is not entirely specific about what the right truly is, it seems captured in the liberty to "bring up children."[42] A similar decision resulted in *Pierce v. Society of Sisters*.[43] In *Pierce*, the Court struck down an Oregon law that required students to attend public school (as opposed to private or

32. If not for the outcome of the case to the contrary, it would be fairly easy to find a legitimate reason for Texas' law—e.g., preserving state resources for its citizens.

33. *See Plyler*, 457 U.S. at 221; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

34. *Plyler*, 457 U.S. at 221; *Rodriguez*, 411 U.S. at 37.

35. *Plyler*, 457 U.S. at 221.

36. *See* Papasan v. Allain, 478 U.S. 265, 285 (1986).

37. *Id.*

38. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923); *see also* Urchick, *supra* note 2, at 3.

39. *Meyer*, 262 U.S. at 400-02. Post-World War I animosity toward the Germans likely explains the existence of the law.

40. *Id.* at 396.

41. *Id.* at 400-01.

42. *Id.* at 399.

43. *Pierce*, 268 U.S. at 534-35.

parochial).[44] Relying on *Meyer*, the Court reasoned that the law interfered with parents' liberty to raise and educate their children.[45] The Court noted that "[t]he child is not the mere creature of the State" and that therefore parents possess a strong duty to prepare the child for the world as they see fit.[46]

More famously, of course, the Court has used the equal protection doctrine to strike down discriminatory and segregative laws that interfere with a child's education.[47] In the landmark *Brown v. Board of Education of Topeka* decision, the Court held de jure segregation of children in public schools to be unconstitutional.[48] The Court reasoned that segregation created a feeling of social inferiority in black students that would have lasting, detrimental effects on their lives.[49] While primarily concerned with equal protection and not directly addressing a general right to education, the Court did provide strong support for the need for education.[50] First, the Court noted that providing education may be "the most important function of state and local governments."[51] More importantly, the Court stated, "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[52] That statement alone would seem to provide support for the formally rejected nexus theory in *Rodriguez*.[53] Despite the Court's flowery language, it must be noted that the Court insisted it was only talking about *state*-provided education and never addressed a general, constitutional right.[54]

While it is clear that *Brown* had an important effect on the American educational system, its lasting impact is uncertain.[55] As one author notes, "As an articulation of principle, *Brown* has succeeded. As a

---

44. *Id.* at 530, 534-35.
45. *Id.* at 534-35.
46. *Id.* at 535.
47. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954); *see also* Washington v. Seattle Sch. Dist., 458 U.S. 457, 474-75 (1982) (holding that the state cannot modify the political system for the purpose of discriminating racially in schools).
48. 347 U.S. at 493.
49. *Id.* at 494.
50. *Id.* at 493.
51. *Id.*
52. *Id.*
53. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).
54. *Brown*, 347 U.S. at 493.
55. *See* Eric A. Hanushek et al., *New Evidence About* Brown v. Board of Education*: The Complex Effects of School Racial Composition on Achievement*, 27 J. LAB. ECON. 349, 350 (2009).

tool of integration, it has failed."[56] Beginning with *Brown*, many school districts in the country were subject to forced integration plans.[57] That pattern peaked, however, in the 1970s and has rapidly declined since.[58] In the past several decades, de facto school segregation has decidedly increased.[59] While pinning down precise numbers has often proven difficult, several authors suggest that an increase in segregation has had an expectedly negative effect on student performance.[60]

What the above discussion suggests is that we might in fact be better off with a positive right to education. That is, over the past nearly nine decades, the Court has circled around the issue through racial desegregation, a parent's right to raise his or her child, or the equal protection claims of illegal aliens. However, our children and our nation might be better served by a clear declaration from the Court that there is a right to education, for everyone. Instead, we are left with a hypertrophy of precedent that forces members of certain groups to find relief, rather than an acknowledgement of a general right that all citizens could claim. A comparative look at the Constitution of South Africa below, however, does not necessarily recommend a constitutionally enshrined social right to education.

III. SOUTH AFRICA

Despite critics of constitutional social rights who argued such rights were nonjusticiable, South Africa included a host of "positive" rights in its postapartheid constitutions. These rights were specifically designed to address the inadequacies that decades of a brutally segregated system had left behind. Now, after sixteen years of experience, South Africa and its Constitutional Court are leading examples of restrained, thoughtful social rights adjudication. However, as the specifics of South African education illustrate, having a right on paper and achieving actual progress in practice are two different things. The discussion below illuminates some success South Africa has had in enforcing social rights,

---

56. Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1334 (2004).

57. Byron F. Lutz, *Post* Brown vs. the Board of Education*: The Effects of the End of Court-Ordered Desegregation* 1 (Fed. Reserve Bd., Working Paper No. 64, 2005), *available at* http://www.federalreserve.gov/pubs/feds/2005/200564/200564pap.pdf.

58. *Id.*

59. *Id.*; McUsic, *supra* note 56, at 1334.

60. *See* McUsic, *supra* note 56, at 1354-55; Lutz, *supra* note 57, at 26 (finding an increase in black dropout rates due to increases in segregation); *see also* Hanushek, *supra* note 55, at 352-53.

but also offers a note of caution regarding how efficacious such rights can truly be.

A. Background

Both South Africa's current education system and its Constitution are indelibly shaped by its emergence from the brutal system of apartheid. Following the National Party's[61] victory in 1946, the government quickly implemented a racially segregated system of education and then formalized it in the Bantu[62] Education Act of 1953.[63] The Act transferred authority from provincial control to the national government.[64] Education then became another tool in the apartheid government's efforts to dehumanize and control the black population.[65] Under this system, black South Africans were to be educated only for manual labor and service to the white population.[66] As the Minister of Native Affairs bluntly stated during the floor debates on the Act, "There is no place for [black South Africans] in the European community above the level of certain forms of labour."[67] Under apartheid, the inequality between white and black education grew stark.[68] By the end of that era, there were severe, statistically demonstrable disparities between the two races in everything from per capita spending to school attendance.[69]

Both the interim South African Constitution of 1993 and the current Constitution of 1996 include provisions guaranteeing the rights to education and equality under the law.[70] This is only natural as the draftings of both documents were explicit responses to apartheid. The preamble to the current Constitution opens by establishing itself as a tool to help overcome a divided past,[71] and it goes on to state that it is in part intended to "[h]eal the divisions of the past and establish a society based

---

61. The National Party represented the white minority that instituted apartheid. *See* Eric Berger, *The Right to Education Under the South African Constitution*, 103 COLUM. L. REV. 614, 616 n.6 (2003).

62. *Bantu* roughly means "native." *See* Bantu Education Act 47 of 1953 § 1(i) (S. Afr.).

63. *See id.* § 2(a)-(b); Berger, *supra* note 61, at 616.

64. Bantu Education Act 47 of 1953 § 2(a)-(b); Alfreda A. Sellers Diamond, *Constitutional Comparisons and Converging Histories: Historical Developments in Equal Educational Opportunity Under the Fourteenth Amendment of the United States Constitution and the New South African Constitution*, 26 HASTINGS CONST. L.Q. 853, 872 (1999).

65. Berger, *supra* note 61, at 616.

66. *Id.*

67. Sellers Diamond, *supra* note 64, at 872-73.

68. *Id.* at 874.

69. *Id.* at 874-75.

70. S. AFR. CONST., ch. 2, §§ 9, 29, 1996; S. AFR. (INTERIM) CONST., ch. 3, §§ 8, 32, 1993.

71. S. AFR. CONST., pmbl., 1996.

on democratic values, social justice and fundamental human rights."[72] This theme is continued when the preamble further asserts that the ultimate goal of the Constitution is to create a "united and democratic South Africa."[73] The Bill of Rights, which contains the right to education, can then be viewed as the specific elaboration of these lofty goals.[74]

B. Constitutional Right to Education: What the Right Should Look Like

Section 29 of the Constitution of 1996 guarantees three broad rights: (1) the right to an education, (2) the right to receive an education in the official language of one's choice, and (3) the right to establish independent educational institutions.[75] All three are responses to apartheid and the effects of the Act of 1953.[76] The most important of these rights for the purposes of this Comment is the first—the basic right to education. This right is actually divided into two separate provisions, one seemingly absolute and one more tempered. Under section 29, "Everyone has the right a. to a basic education, including adult basic education; and b. to further education, which the state, through reasonable measures, must make progressively available and accessible."[77]

The South African Constitutional Court has left the meaning of a right to education almost completely undefined.[78] A basic reading of the right seems to offer two plausible alternatives. Either (1) there is only a right to a physical place to go to school, with no comment on the quality or sufficiency of such school; or alternatively, (2) there is a more substantive right to an adequate and/or equal education.[79] While the narrowest reading would argue for only the first interpretation, several scholars, as well as comparable precedent, persuasively explain that the

---

72. *Id.*
73. *Id.*
74. *Id.* ch. 2, § 29.
75. *Id.*
76. *See* Sellers Diamond, *supra* note 64, at 872-74.
77. S. AFR. CONST., ch. 2, § 29, 1996.
78. *See* Lorette Arendse, *The Obligation To Provide Free Basic Education in South Africa: An International Law Perspective*, 14 POTCHEFSTROOM ELECTRONIC L.J. 96, 98 (2011). *But cf. Head of Dep't: Mpumalanga Dep't of Educ. v. Ermelo* 2010 (2) SA 415 (CC) para. 106 (S. Afr.) (holding that the Department of Education is bound to take proactive steps to achieve the constitutional obligation of providing basic education in the official language of one's choice).
79. *See* Berger, *supra* note 61, at 625.

right implicitly guarantees an adequate and equal education.[80] Eric Berger has presented the best textual defense of the latter argument.[81]

Berger submits that the right to education in section 29 must be read in conjunction with the Bill of Rights as a whole.[82] The opening of the Bill of Rights, section 7, plainly states, "The state must respect, protect, promote and fulfill the rights in the Bill of Rights."[83] This phrase clearly demands a positive duty on the part of the South African government to "promote and fulfill" the right to education.[84] Further, implicit in that demand is the suggestion that the duty encompasses more than merely opening schools but, instead, an active obligation to make sure that such schools are adequate.[85] Moreover, Berger points to section 39 of the Bill of Rights to support his position.[86] Section 39 holds that when interpreting the Bill of Rights, a court "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom."[87] The argument then is that in order to truly nurture the democratic ideals underlying the Constitution, the government's duty must extend beyond merely opening schools.[88] This is something akin to the nexus argument rejected by the United States Supreme Court in *Rodriguez*.[89] To allow otherwise would be to accept that the South African government could open and maintain truly failing schools—schools where no one is in any way educated—yet still be adhering to the demands of sections 7, 29, and 39. Such a reading is deeply dissatisfying and is belied by related case history.

Despite early criticisms of constitutionally enshrined social rights being unenforceable, the Constitutional Court has consistently, though infrequently, given effect to the positive rights contained in the Bill of Rights.[90] Moreover, fear that these constitutional provisions would allow the Court to overreach in its authority has proven unfounded. In fact, the

---

80. *Id.* at 625-26; Vincent Calderhead, *The Right to an 'Adequate' and 'Equal' Education in South Africa: An Analysis of s.29(1)(a) of the South African Constitution and the Right to Equality as Applied to Basic Education*, SECTION27, at 4 (Mar. 2011), http://www.section27.org.za/wp-content/uploads/2011/04/The-Right-to-a-Basic-Education.pdf.

81. Berger, *supra* note 61, at 625-26.

82. *Id.* at 626.

83. S. AFR. CONST., ch. 2, § 7, 1996.

84. Berger, *supra* note 61, at 626 (quoting S. AFR. CONST., ch. 2, § 7, 1996).

85. *Id.*

86. *Id.*

87. S. AFR. CONST. ch. 2, § 39, 1996.

88. Berger, *supra* note 61, at 626.

89. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1982).

90. *See* Eric C. Christiansen, *Using Constitutional Adjudication To Remedy Socio-Economic Injustice: Comparative Lesson from South Africa*, 13 UCLA J. INT'L L. & FOREIGN AFF. 369, 377 (2008).

Constitutional Court has more often been criticized for undue restraint rather than adjudicatory recklessness.[91] The Court has yet to define the exact meaning of the right to education, but a review of some of the Court's comparable decisions involving other social rights clarifies what the right to education *should* look like. Three fundamental cases are particularly helpful.[92]

In 1997, the Constitutional Court first gave meaning to what the right to health care under section 27 entails.[93] While recognizing the lofty goals of the Constitution, the Court nonetheless maintained that the rights enshrined in the Bill of Rights are limited by—and therefore balanced against—the availability of resources.[94] There, a hospital with only limited resources refused to give dialysis to a terminally ill kidney patient.[95] Due to a constrained budget, the hospital deprioritized the treatment for terminal patients.[96] The patient challenged the decision under section 27, which states, "No one may be refused emergency medical treatment."[97] Initially, the Court noted:

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.[98]

Despite such an acknowledgement, the Court recognized that an absolute duty to fulfill the obligations under section 27 would be untenable.[99] Therefore, the Court struck a very delicate balance by holding that while the state must comply with the terms of the Bill of Rights and the positive rights contained therein, it is not an unfettered obligation. That

---

91. *Id.*

92. *See Minister of Health v. Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (S. Afr.); *Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.); *Soobramoney v. Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) (S. Afr.); *see also In re Certification of the Constitution of the Republic of S. Afr.* 1996 (4) SA 744 (CC) (S. Afr.).

93. *See Soobramoney* 1998 (1) SA 765 (CC) para. 11; *see also* S. AFR. CONST., ch. 2, § 27, 1996.

94. *Soobramoney* 1998 (1) SA 765 (CC) para. 11.

95. *Id.* para. 1.

96. *Id.* paras. 2-3.

97. *Id.* para. 7 (quoting S. AFR. CONST., ch. 2, § 27, 1996).

98. *Id.* para. 8.

99. *Id.* para. 11.

is, by rejecting the plaintiff's claim, the Court attempted to give meaning to section 27, while keeping it viable and not merely idyllic.

Several years later the Constitutional Court faced a similar issue in deciding what the right to housing in section 26 of the Constitution entails.[100] There, the Court held that the state housing program failed to advance the constitutional right to housing and was therefore unconstitutional.[101] In that case, respondents were a group of citizens who the government had evicted from the land on which they squatted in barely livable conditions.[102] The respondents brought suit under section 26 when the government failed to provide temporary housing while low income housing was being constructed on the same land the squatters were occupying.[103] Section 26 provides, "Everyone has the right to have access to adequate housing."[104] The Court largely focused its analysis on subsection 2 of section 26, which avers, "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."[105] The Court reasoned that "[m]ere legislation" is insufficient to realize the right.[106] Instead, reasonable *implementation* is also required from the state in order to fully effectuate the right.[107]

Though the outcome of that case was more favorable to the right than the outcome in *Soobramoney v. Minister of Health (Kwazulu-Natal)*, the Court's decision in *Republic of South Africa v. Grootboom* was not oblivious to practical considerations.[108] Despite such qualifications, the Court still felt it must enforce the positive social obligations imposed by the Bill of Rights.[109] In doing so, the Court took the entire Bill of Rights into account, including its overall purpose, noting that the preamble of the constitution enshrines a commitment by the South African people to

---

100. S. AFR. CONST., 1996; *Republic of S. Afr. v. Grootboom* 2001 (1) (SA) 46 (CC) para. 99 (S. Afr.).

101. *Grootboom* 2001 (1) SA 46 (CC) para. 99.

102. *Id.* para. 4. Most of the squatters lived in shacks with no water or sewage and very little electricity. *Id.* para. 7.

103. *Id.* para. 13.

104. S. AFR. CONST., ch. 2, § 26, 1996. Respondents also challenged the state's (in)action under Article 28—"Children"—which states, "Every child has the right . . . to basic . . . shelter." *Id.* ch. 2, § 28.

105. *Id.* ch. 2, § 26.

106. *Grootboom* 2001 (1) SA 46 (CC) para. 42.

107. *Id.*

108. *Id.* para. 94 ("[T]he state is not obliged to go beyond available resources or to realise these rights immediately."); *Soobramoney v. Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) (S. Afr.).

109. *Grootboom* 2001 (1) SA 46 (CC) para. 96.

social justice.[110] This view is known as the "purposive" approach to rights adjudication.[111] Here, the purpose was found to be to ameliorate the suffering of the lowest of South African society through the right to adequate housing. As the Court succinctly yet importantly held in regard to all of the social rights in the Constitution, "these are rights, and the Constitution obliges the state to give effect to them."[112] In light of this language and the purposive method, it is unlikely the Court would exclude education from those rights to which the state must give effect.

In 2002, a unanimous Constitutional Court found that the state had failed to fulfill the obligations of section 27 by restricting the distribution of an antiretroviral drug that helped prevent the transmission of HIV.[113] The issue was not whether the right was justiciable, as that had been settled by *Soobramoney* and *Grootboom*. Instead, the issue was whether the applicants had demonstrated that the state fell short of its obligation under the Bill of Rights.[114] Citing *Grootboom* and an earlier case, the Court first noted that at the very least there is a "negative obligation" for the state not to interfere with the right of healthcare.[115] Likewise, the Court again emphasized the need to take into account the poverty of the group affected.[116] The Court reasoned, "The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society."[117] Again, the Court emphasized the purposive approach in order to arrive at a plain sense reading of the right.[118] The right's meaning is only understood in light of its purpose, which is best understood through an examination of its historical and social context.[119]

What these three examples demonstrate is that (1) social rights are decidedly rights and therefore must be justiciable, (2) the state must fulfill its reasonable and progressive constitutional social obligations, (3) what is reasonable will take into account the limited resources of the state, and (4) reasonableness will be determined through a purposive interpretation. Like housing in *Grootboom* and healthcare in *Soobramoney* and *Minister of Health v. Treatment Action Campaign*,

110. *See id.* para. 94.
111. Calderhead, *supra* note 80, at 7-8.
112. *Grootboom* 2001 (1) SA 46 (CC) para. 94.
113. *Minister of Health v. Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) paras. 2, 135 (S. Afr.).
114. *Id.* para. 25.
115. *Id.* para. 46 (citing *Grootboom* 2001 (1) SA 46 (CC) para. 34).
116. *Id.* para. 36.
117. *Id.*
118. *Id.* para. 35.
119. *Id.* para. 24.

education is also a positive right provided for in the Bill of Rights and is therefore justiciable.[120] Taking into account these cases, the purposive approach, the history and social context of apartheid, and the direction of the preamble, it seems clear that the right to education in section 29 must provide something more than a facility—it must provide an adequate education.[121] As in *Grootboom*, the state must reasonably implement education, not simply provide it.[122] However, deciding that South Africa should be doing more hardly proves that positive social rights provide more protection than the negative social rights found in other countries' constitutions. Part III.C will briefly examine the current state of South African education, which poses some serious concerns for the efficacy of social rights.

C. Inadequacies in South Africa's Educational System: What the Right Actually Looks Like

Although the above discussion demonstrates that a right's inclusion in the Constitution can lead to the advancement of social justice as described in the preamble, in general, improvement of social welfare in South Africa has been slow and irregular.[123] The Constitutional Court has rarely been willing to enforce social rights.[124] The basic right to education has never been adjudicated, though, as has been argued, it certainly could be.[125] More importantly, the right to education should be adjudicated. Education in South Africa is still largely segregated and unequal.[126] Since the end of apartheid, literacy has risen only a little over five percent among South African children.[127] Compared to whites, black students perform substantially worse in school.[128] These disparities are clear geographically, with the predominantly white Western Cape province performing much better than the rest of the majority black country.[129] And compared to their cohorts in the rest of Sub-Saharan Africa, South African students perform near or at the lowest percentile of every ranking.[130] These difficulties have been exacerbated in recent years

120. *Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC); *Grootboom* 2001 (1) SA 46 (CC); *Soobramoney v. Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) (S. Afr.).
121. *See* Berger, *supra* note 61, at 635; Calderhead, *supra* note 80, at 4.
122. 2001 (1) SA 46 (CC) para. 42.
123. Christiansen, *supra* note 90, at 372.
124. *Id.*
125. Arendse, *supra* note 78, at 97.
126. Berger, *supra* note 61, at 616-17.
127. Christiansen, *supra* note 90, at 395.
128. Calderhead, *supra* note 80, at 3.
129. Berger, *supra* note 61, at 620-21.
130. Calderhead, *supra* note 80, at 3.

through teacher shortages, budget cuts, austerity measures, and the frequent requirement of "users' fees" charged to students.[131]

These facts are damning. The construction of the South African Constitution is in many ways laudable. It has dealt masterfully with what could have been a much more severely divided society. As such, some have argued that it is capable of serving as a model to other emerging liberal states.[132] However, given the stark disparities that still exist in the country, one must pause before advocating such an exportation. This idea will be reexamined following an analysis of the state of constitutional social rights in Afghanistan.

IV. AFGHANISTAN

While the United States and South Africa have struggled to overcome their racially segregated pasts, Afghanistan's recent history is one of a different type of segregation. Since the early eighties, Afghanistan has suffered from a religiously mandated "gender apartheid"[133] that treats women as inferior members of society.[134] While the latest Constitution of Afghanistan makes several promises regarding an equal, fundamental right to education, the low status of Afghan women prevents them from actually realizing such a right. The following discussion begins with a brief history of the right to education in Afghanistan to better illuminate that while progress is possible in that country, much remains to be done to achieve it. With so many problems facing Afghanistan, it can be difficult to see what use positive social rights have provided the Afghan people.

A. Background

Though Afghanistan has had multiple constitutions throughout its history,[135] the right to education was enshrined in the very first version.[136] In addition to abolishing slavery and torture and establishing equal

---

131. Berger, *supra* note 61, at 617-18.

132. Christiansen, *supra* note 90, at 372.

133. *See* Nusrat Choudhury, *Constrained Spaces for Islamic Feminism: Women's Rights and the 2004 Constitution of Afghanistan*, 19 YALE J.L. & FEMINISM 155, 157 (2007); Mir Hekmatullah Sadat, *The Implementation of Constitutional Human Rights in Afghanistan*, 11 HUM. RTS. BRIEF, no. 3, 2004, at 48, 48.

134. Caroline B. Fleming, *"Even in Dreams, They Are Coming": Islamic Fundamentalism and the Education of Women in Afghanistan*, 11 WM. & MARY J. WOMEN & L. 597, 599 (2005).

135. Some, counting provisional constitutions that were never universally, formally adopted, put the number at ten. *See* Sadat, *supra* note 133, at 49.

136. Saïd Amir Arjomand, *Constitutional Developments in Afghanistan: A Comparative and Historical Perspective*, 53 DRAKE L. REV. 943, 945-46 (2005).

protection, the Constitution of 1923 made free primary education mandatory.[137] The Constitution of 1923, established under King Aman-Alla Khan, essentially enshrined an authoritarian constitutional monarchy.[138] Although Khan had initially envisioned the education provision applying to women generally, backlash compelled him to limit the right to girls under the age of twelve.[139] The next Constitution, adopted in 1931, retained the education provision, but eliminated all references to women.[140]

The Constitution of 1964 was revolutionary. In fact, some have called it "the finest in the Muslim world."[141] Besides other reforms, such as denying royal participation in government and promising equal rights "without any discrimination or preference," the Constitution of 1964 provided for general, compulsory education in language that necessarily applied to women.[142] Article 34 of the Constitution of 1964 began, "Education is the right of every Afghan and shall be provided free of charge by the State and the citizens of Afghanistan."[143] The rest of the article elaborated on the right, noting the obligation of the government to implement "balanced and universal education."[144] Equally important, the Constitution of 1964 offered women complete equality in Afghan law and society.[145] This was probably partly due to the influence of six women in the *Loya Jirga* (constitutional assembly) who drafted the document.[146]

The success of article 34 and the Constitution of 1964 was immediate as shown through a sharp increase in literacy and political participation in the 1960s and 70s.[147] In that same period, Afghanistan enjoyed the highest percentage of students who attended foreign higher educational institutions and then returned home.[148] Compared to their neighbors, women in Afghanistan were better able to participate in civil society. This participation included the right to vote, to hold government posts, to marry whom they chose, and to attend coeducational

---

137. *Id.* at 945-46.
138. *Id.*
139. *Id.* at 947.
140. *Id.* at 948-49.
141. *Id.* at 960 (internal quotation marks omitted).
142. AFG. CONST. tit. III, arts. 25, 34, 1964; *see also* Arjomand, *supra* note 136, at 952; Fleming, *supra* note 134, at 608.
143. AFG. CONST. tit. III, art. 34, 1964.
144. *Id.*
145. Fleming, *supra* note 134, at 608.
146. Arjomand, *supra* note 136, at 951.
147. Fleming, *supra* note 134, at 598.
148. *Id.* at 609.

institutions.[149] By 1979, approximately fifteen percent of the legislature was female.[150] At the same time, Afghan universities counted more women than men among their students.[151]

Unfortunately, when the Soviet Union took control of the country in 1979, many of these reforms were undone, not by the Soviets themselves, but in resistance to their invasion.[152] The Soviets initially tried to expand female inclusion and equality, but faced backlash from the *mujahadeen* (Islamic militia).[153] In a particularly telling quote, one Afghan later recorded, "The government said our women had to attend meetings and our children had to go to schools. This threatens our religion. We had to fight."[154] After years of civil war, the resulting power vacuum was filled by the brutally conservative Taliban, which dissolved most women's rights, including the right to education.[155]

By 1994, the government closed all schools for girls and prohibited women from working outside the home.[156] Women who violated Taliban rule were beaten, raped, amputated, and executed.[157] This was a stunning reversal for a country that, prior to the Taliban, counted forty percent of its doctors and seventy percent of its teachers as women.[158] By the end of the (official) Taliban rule in 2001, Afghan female literacy was between three and four percent, ranking as the worst in the world.[159] In a single year of American occupation, there were more than thirty attacks on schools—all preceded by pamphlets objecting to female education.[160]

B. The Constitution of 2004

The Constitution of 2004 contains certain echoes of the liberal Constitution of 1964. The *Loya Jirga* that drafted the current Constitution was twenty percent female.[161] Though on the first day of debate a leading cleric admonished that women should not be viewed as equals, these

---

149. *Id.* at 598.

150. *Id.* at 598-99.

151. Jennifer Kristen Lee, *Legal Reform To Advance the Rights of Women in Afghanistan Within the Framework of Islam*, 49 SANTA CLARA L. REV. 531, 535 (2009).

152. Fleming, *supra* note 134, at 599.

153. *Id.*

154. *Id.* (internal quotation marks omitted).

155. *See id.* at 599-600.

156. *Id.* at 600, 611; Lee, *supra* note 151, at 537.

157. Lee, *supra* note 151, at 537; *see also* Fleming, *supra* note 134, at 611 (describing the rape of a young girl and the murder of her father because she had attended school).

158. Fleming, *supra* note 134, at 600.

159. *Id.* at 611.

160. *Id.* at 615.

161. Arjomand, *supra* note 136, at 955.

women were able to secure certain explicit guarantees in the final document.[162] Article 22 declares, "The citizens of Afghanistan, man and woman, have equal rights and duties before the law."[163] Further, the current Constitution establishes a bicameral parliamentary system with quotas for female participation.[164] In the *Wolesi Jirga* (lower house), twenty-five percent of the seats are reserved for women.[165] In the *Meshrano Jirga* (upper house), one-third of the seats are appointed directly by the president, and of that one-third, half must be women.[166]

The new Constitution contains roughly four articles that deal with education.[167] Arguably most important are Articles 43 and 44. Article 43 begins, "Education is the right of *all citizens* of Afghanistan, which shall be offered up to the B.A. level in the state educational institutes free of charge by the state."[168] Article 44 then states, "The state shall devise and implement effective programs to create and foster balanced education for women, improve education of nomads as well as eliminate illiteracy in the country."[169] These provisions, and the Constitution of 2004 in general, are clearly very promising for a more equally applied right to education. However, two structural features of the Constitution leave serious doubts as to how effective it can truly be.

First, the power of judicial review is granted not only to the highest court, but also to lower courts.[170] This essentially fails to recognize the supremacy of the Constitution and may make enforcement of rights extremely difficult.[171] Second, Article 3 states, "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan."[172] This provision then allows a court to strike down any law it believes contravenes Islam. The danger is that a conservative judiciary could handily undo all of the progressive gains made in the new Constitution.[173] This, in fact, seems to be what happened under the first Chief Justice of the Supreme Court of Afghanistan.[174] Some have therefore argued that the very inclusion of Islam in the Constitution will necessarily be

162. Sadat, *supra* note 133; Arjomand, *supra* note 136, at 956.
163. AFG. CONST., ch. 2, art. 22, 2004.
164. *See* Arjomand, *supra* note 136, at 956; Choudhury, *supra* note 133, at 156.
165. Arjomand, *supra* note 136, at 956; Lee, *supra* note 151, at 539.
166. Arjomand, *supra* note 136, at 956; Lee, *supra* note 151, at 539-40.
167. AFG. CONST., ch. 2, arts. 43-46, 2004.
168. *Id.* ch. 2, art. 43 (emphasis added).
169. *Id.* ch. 2, art. 44.
170. Arjomand, *supra* note 136, at 959.
171. *Id.*
172. AFG. CONST., ch. 1, art. 3, 2004.
173. Choudhury, *supra* note 133, at 157.
174. *See id.* at 180-81.

detrimental to women's rights and, by extension, the right to education.[175] Alternatively, others have argued that a flat out condemnation of constitutionalized Islam does little good.[176] As secular arguments for equality are reputed as Western machinations, one author submits that a progressive interpretation of Islam, as has been utilized in countries such as Malaysia and Morocco, will better serve the rights enshrined in the new Constitution.[177] Regardless of the method, as will be discussed in Part IV.C, Afghanistan still has a long way to go before the right to education in its current Constitution is fulfilled.

C. Results of the Constitution of 2004 and the Current Situation

Despite the progressive promise of the Constitution of 2004, there are many obstacles to the realization of the rights enshrined therein. First, the actions of the first Supreme Court of Afghanistan appointed under the new Constitution have raised serious concerns about the effectiveness of the new Constitution.[178] Just ten days after the conclusion of the drafting of the Constitution, the Court declared a television performance by a woman to be "un-Islamic."[179] Further, the Court attempted to ban coeducation under similar reasoning.[180] In both of these situations the Court had no case before it and was not issuing an advisory opinion.[181] Instead, the Court simply issued a clearly unconstitutional declaration.[182] These and similar rulings may reflect the fact that women make up only around three percent of the judiciary in the country as whole.[183] Moreover, uneducated and untrained conservatives dominate much of the male judiciary.[184]

Although there is some optimism because the parliament later rejected the reappointment of the Chief Justice involved in the cases mentioned above, there is still serious reason for concern.[185] The United States is likely exacerbating the failures of the judiciary by implementing policies that seek to encourage the resolution of disputes by tribal

175. *See id.* at 163.
176. *See id.* at 160-63.
177. *Id.* at 160-61.
178. *See id.* at 180-81.
179. *Id.* at 180 (internal quotation marks omitted).
180. *Id.* at 181. The Court has also upheld clearly illegal child marriages. *Id.* at 181-82.
181. *Id.* at 180-81.
182. *Id.* at 180.
183. *Id.* at 182.
184. *Id.* at 181.
185. *Id.* at 184.

courts.[186] In a country where much of the populace already boycotts the state judiciary, the millions of dollars the United States spends on promoting tribal courts is likely counterproductive to the achievement of the rights established in the Constitution.[187] These tribal courts are particularly bad for women as they often adjudicate disputes through the use of *ba'ad*, the practice of offering young girls and women as payment.[188]

There is at least one clear sign of success in the area of education. As early as 2005, girls began enrolling in schools for the first time in years and the overall elementary education population has risen.[189] By 2006, the enrollment of all children in school had grown to over five million as compared to only roughly three-quarters of a million in 2001.[190]

Despite this modest, though remarkable, success, female illiteracy remains entrenched with roughly eighty percent of the female population unable to read.[191] With approximately one-third of Afghan districts not even offering schools for girls, it is difficult to imagine all Afghans receiving a college degree as guaranteed in the Constitution.[192] Moreover, in rural areas, women and girls are still attacked with acid or sexually assaulted if found out of the house without a male escort.[193] Teachers are frequently kidnapped and beheaded with little consequence.[194] Afghanistan decidedly remains "a haven for severe human rights abuses against women and girls."[195] Under such circumstances, one must wonder if the Constitution of 2004 provides true rights or simply hollow words that have little relationship to the day-to-day lives of the Afghan people. However, if one is optimistic that the general problems of the country will continue to be resolved, having such constitutional rights may prove to be a very useful tool. That is, they will not only provide an ideal, but if

---

186. Jean MacKenzie, *The Afghan Justice Quandary: The U.S. Increasingly Backs the Power of Local Councils. Are Women's Rights Being Sacrificed in the Process?*, GLOBALPOST (Mar. 7, 2012), *available at* http://www.salon.com/2012/03/07/the_afghan_justice_quandary.

187. *Id.*; *see also* Kara Jensen, *Obstacles To Accessing the State Justice System in Rural Afghanistan*, 18 IND. J. GLOBAL LEGAL STUD. 929, 947 (2011).

188. MacKenzie, *supra* note 186.

189. Fleming, *supra* note 134, at 614-15.

190. Choudhury, *supra* note 133, at 196.

191. *Id.*

192. *Id.*

193. Fleming, *supra* note 134, at 615.

194. Terri Judd, *The Defiant Afghan Women Promised a Better Life Who Refuse To Be Victims*, BELFAST TELEGRAPH (June 13, 2007), http://www.belfasttelegraph.co.uk/news/world-news/the-defiant-afghan-women-promised-a-better-life-who-refuse-to-be-victims-13450141.html.

195. Lee, *supra* note 151, at 533.

the state judiciary can be strengthened, they will also provide a justiciable right that will help move the country forward.

V. ESTABLISHING A BASELINE AND A TOOL

Three distinct models have now been discussed. The first model is the United States, which rejects a general right to education, but has taken pains to find ways to ensure certain groups are not denied an education.[196] The second model, South Africa, has enshrined the right to education, but has not adjudicated it despite a faltering educational system. However, South Africa has proven that it is capable of adjudicating some positive social rights.[197] This at least leaves one with the impression that if the right case is brought, the Constitutional Court will hear it and might be able to address some of the lasting inequities in the system. Finally, Afghanistan's Constitution, like South Africa's, recognizes a positive right to education.[198] What distinguishes Afghanistan from South Africa, however, is its impotent and even detrimental judiciary. Whereas South Africa has shown it is capable of enforcing its social rights, Afghanistan has proven essentially incapable of enforcing any right.

Based simply on results, it is possible to advocate for the United States' constitutional scheme. Though it has backslid some since the 1970s, the United States has a more equal, adequate, and impressive educational system than the other two countries. However, it must not be forgotten that desegregation was painfully slow. Nearly sixty years passed between the Supreme Court holding that separate but equal constituted equality and its demand that schools desegregate with all deliberate speed.[199] Further, as the strained logic of *Plyler* demonstrates, the Court has often had to be very creative in order to grant access to education without actually finding a positive right to it.[200] Education jurisprudence would certainly be clearer with at least some recognition of a basic right to education. More importantly, groups and individuals outside of a suspect class could find judicial relief from inadequate and unequal education. If advising an emerging democracy on drafting its constitution, it would be difficult to recommend the United States as a

196. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982).

197. *See Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) para. 99 (S. Afr.).

198. AFG. CONST., ch. 2, art. 43, 2004.

199. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954); Plessy v. Ferguson, 163 U.S. 537 (1896).

200. *Plyler*, 457 U.S. at 223-24.

model and then tell them to hope for a court that produces *Brown* and not *Plessy*.

South Africa's model is more helpful. By explicitly enshrining the right to education, South Africa possesses not just a goal, but a tool. While education adjudication has been lacking, the right remains available. When a case finally is heard, lawyers will not have to make wildly "creative" arguments, but instead simply point to section 29 and say that the state has failed to live up to its obligation to fulfill the purpose of the right and to achieve "a united and democratic" country.[201] This is particularly important given South Africa's repressive history and the danger of sliding backwards towards segregation.

Similarly, this is why it still makes sense, despite the harsh realities of life there, for Afghanistan to have constitutional social rights. The Afghan Constitution was drafted under the perception that not only would the country progress, but it would progress because of the Constitution.[202] Although it may be a long time before a court in Afghanistan is competent enough to enforce the right, once there is such a court, the tool will be there waiting. To accept that the shortcomings of the judiciary make the social rights in the Constitution meaningless is to accept that the country will never improve. The increase in school enrollment numbers belies such an argument.[203] Furthermore, the inclusion of the supremacy of Islam in the Afghan Constitution, while by no means fatal, gives stronger support for the inclusion of a right to education.[204] The inclusion of the right will encourage the courts to find a more progressive reading of the Qur'an when interpreting women's education. Future judiciaries may be able to balance holy teaching with the goals of the Constitution and arrive at a more functional, more just, and more democratic society.

This is by no means an indictment of the United States Constitution per se, but instead a recommendation against it as a model of education specifically and social rights more generally. Countries emerging out of strife need not construct complicated jurisprudential fascia when they can point to solid foundational rights instead. The state does not need to pretend to be able to provide for every want in society. However, emerging democratic states need to protect certain rights. Given the

---

201. S. AFR. CONST., pmbl., § 29, 1996.

202. AFG. CONST., pmbl., 2004 (explaining that the constitution was adopted for the creation of "a civil society void of oppression, atrocity, discrimination, as well as violence, based on rule of law, social justice, protecting integrity and human rights, and attaining people's freedoms and fundamental rights").

203. Choudhury, *supra* note 133, at 196.

204. AFG. CONST., pmbl., 2004.

United States' history, it chose to focus solely on political and civil rights, but perhaps erred in failing to formalize the fundamental importance of education. Other democracies must recognize, as South Africa and Afghanistan have, that a well-educated citizenry is imperative to a lasting democracy. Hopefully in both of those countries, the constitutional right to education will provide the tools to produce such citizens.