

**Article: “The Brown Decision's Other Legacy: Civic Education and the Rodriguez Case”**

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# The *Brown* Decision's Other Legacy: Civic Education and the *Rodriguez* Case

The publication of Gerald Rosenberg's *The Hollow Hope: Can Courts Bring About Social Change?* (1991) spawned an ongoing argument among legal scholars about the effect that *Brown v. Board of Education* (1954) had on the civil rights movement and the end of legal segregation. Whatever the Court's precise causal role compared to subsequent waves of protest and legislation, desegregation remained on the public agenda. The same cannot be said for *Brown*'s lesson about the civic importance of education. Indeed, in the 50 years since *Brown v. Board of Education* the very notion of education providing a civic benefit has been drowned out by an emphasis on its economic (sometimes social, but mainly individual) benefits. Where democratic theorists such as Benjamin Barber (1998, 220) observe that the "logic of democracy begins with public education, proceeds to informed citizenship, and comes to fruition in the securing of rights and liberties," politicians argue that "we ought to measure every school by one high standard: Are our children learning what they need to know to compete and win in the global economy?"<sup>1</sup>

Although it is difficult to identify its genesis, one can cite instances and cases that both contributed to and were symptomatic of this change in understanding about the civic nature of education. One case of particular importance is the 1973 school funding case, *San Antonio v. Rodriguez*. In this article, I will explain why the Court decided *Rodriguez* in the way that it did, and how that decision is related to *Brown*. Before looking at the details of *Rodriguez*, however, it is necessary to briefly review what the Court said about civic education in *Brown*.

## Education and Democracy

In the spring of 1953, the Supreme Court ordered the school segregation cases held over for re-argument during the next year's term and requested that both sides answer several questions. The first asked:

What evidence is there that the Congress which submitted and the state legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools? (*Brown v. Board of Education* 1953, 973)

In *Brown v. Board of Education* (1954), the Court addressed school segregation cases from four different states in a common opinion.<sup>2</sup> The search for original intent that lay behind the Court's query, however, was driven primarily by the case from Kansas (the actual *Brown* case). Only in Kansas had a lower court determined that school facilities for non-white children were substantially the same as those reserved for whites. (Controll, Diamond, and Ware 2003, 132). This meant that the Court would have a very difficult time ruling against segregation in the Kansas schools without explicitly revisiting the *Plessy v. Ferguson* (1896) "separate but equal" standard. Indeed, this was part of the strategy of the NAACP Legal Defense and Educational Fund (Patterson 2001, 36). A successful challenge to *Plessy*, however, would require that the Court adopt a more substantive view of the Equal Protection Clause. "Equal" could no longer mean "the same."<sup>3</sup>

One source for the necessary understanding might have emerged from the intentions of those who proposed and ratified the Fourteenth Amendment. After all, if they meant to end segregated schools, then the Court could ignore limitations inherent in their language.

This foray into history was, as Chief Justice put it, "inconclusive." But this did not stop the Court from overturning *Plessy*. In one of the most widely quoted paragraphs from *Brown v. Board of Education*, Warren writes that, regardless of the situation in 1868,

[t]oday, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship . . . (1954, 493).

This newly found significance of education, not original intent, drove a more searching inquiry into whether the distribution of educational benefits complied with the Fourteenth Amendment. The Court's conclusion, however, was not so much the result of *what* the government had done about schools during the intervening period, but *why* they had done it. As understood by the Court, "Compulsory school attendance laws and the great expenditures for education" reflected an apparently new or increasing "recognition of the importance of education to our democratic society."

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Put differently, education had not increased in importance because of the benefits that it provided to individuals, but because of (democratic) social necessity. As Richard Kluger (1975, 704) has observed, Warren's words "declared its [education's] essential value to the nation's civic health and vitality."

Whether or not this understanding of education is consistent with the intent of those who wrote and approved the Fourteenth Amendment, it is certainly in keeping with the views of the Founders. Thomas Jefferson (1984, 365), in his "Bill for the More General Diffusion of Knowledge," for example, wrote that "it is believed the most effectual means of preventing this [tyranny] would be to illuminate, as far as practicable, the minds of the people at large." Therefore, he wrote, it was important that those children whose parents did not have the means, be "educated at the common expense of all."

Although in *Brown* the Court referred to education as a "right," it was also seen to be essential to the common good. And this provided an interesting and important counterbalance to the parallel view that the consequences of education were primarily economic. The civic and economic justifications for public education do not completely overlap. The civic education argument implies a profit to the individual that flows through society. The return that I receive from educating my neighbor comes to me as well as to my neighbor, in the form of good or better government. On the other hand, the economic benefit that results from education accrues primarily to the individual who has been educated. Social benefits, though perhaps significant, are residual and accidental. Carl Kaestle (2001) has argued that the close relationship between our political and economic system in the United States helps to reconcile this division. Nevertheless, even Kaestle (47) admits that there has been a "shift from the eighteenth- and nineteenth-century emphasis on the political functions of schools to a post-World War II emphasis on the economic functions of schools." One might argue this shift represents an abandoning of one of *Brown's* core messages.

### *San Antonio v. Rodriguez: Brown's Bookend*

The 1954 decision sparked an intense and often-analyzed battle over its implementation, both in the courts and beyond (Patterson 2001). Just as "massive resistance" was being overcome in the South, questions of *de jure* versus *de facto* segregation were arising in the North. Late in the October 1971 term, however, the Court granted review to a different type of education case. That case, *San Antonio v. Rodriguez* (1973), provided the Court with the opportunity to revisit the civic education legacy of *Brown*. Although *Rodriguez* had a racial subtext, it did not directly address segregation. Instead, the case involved a challenge to the property-tax-based system that Texas (and almost every other state) used to fund public schools.

Those challenging the Texas system made two related arguments. First, lower per-pupil spending in poor school districts resulted from less available tax revenue, a system that discriminated against the children in those districts. The Texas system's critics also claimed that education was a fundamental right or interest, and that the relative deprivation of poorer districts was justifiable only by a showing that the system promoted a "compelling state interest."

This second line of attack allowed the Court to take up the conversation about the nature of education in a democracy. Indeed, the three-judge district court that had ruled against the San Antonio School District had recognized the lineage. They noted "the crucial nature of education for the citizenry lies at the heart of almost twenty years of school desegregation litigation" (*Rodriguez v. San Antonio* 1971, 283).

As the case found its way to the Supreme Court, the links to *Brown* were hard to miss. Thurgood Marshall, who had argued *Brown* before the Supreme Court, was now a justice. In the Virginia component of *Brown, Davis v. County School Board of Prince Edward County* (1952), the county had secured the services of one of the most prominent law firms in Richmond—Hunton, Williams, Anderson, Gray, and Moore—to assist in its defense (Cottrol, Diamond, and Ware 2003, 136). Although he had no involvement in the case, one of the more prominent members of that firm was Lewis Powell, Jr. (Jeffries 2001, 138). Powell had arrived at Hunton after turning down a job from one of his alma mater's (Washington and Lee University) most famous graduates, the noted attorney and one-time Democratic presidential nominee, John W. Davis (Jeffries 2001, 44). In the twilight of his career, Davis had opposed Marshall before the Supreme Court in *Brown*. As a member of the Court almost 20 years later, Powell would write its majority opinion in *Rodriguez*.

### **Justice Powell: A Republican Schoolmaster?**

Justice Powell did not receive the *Rodriguez* assignment because of his indirect ties to *Brown* but more likely because, as a former member of both the Richmond School Board and Virginia Board of Education, he knew more about how elementary and secondary schools functioned than anyone else on the Court. And Powell's experience on these boards interested him in *Rodriguez*. Reflected through Powell's core convictions, this experience caused Powell to largely ignore, if not intentionally misread, *Brown's* civic education lessons.

Anyone familiar with Powell's thinking and activity as an education official in the Commonwealth of Virginia might be surprised at this refusal to recognize the political and constitutional significance of education. Toward the end of his tenure on the state board of education, Powell had also sat on the Virginia Commission on Constitutional Revision (Jeffries 2001, 177–78) where he played a major part in drafting Article I, section 15, of the Revised 1971 Virginia Constitution. The section, part of the Virginia Constitution's Bill of Rights, notes that

free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents . . . by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth.

Clearly, Powell was concerned with and understood the connection between "free government" and the "diffusion of knowledge." Nevertheless, when he spoke of "free government," he had in mind what he saw as its polar opposite: communism. Indeed earlier in his career, while on the Richmond board of education, he had proposed that a course on communism be added to the high school curriculum teaching that "communism requires totalitarian dictatorship" (Jeffries 2001, 166–67).

Powell's understanding of the role of local school boards colored his view of *Rodriguez*. From the start, he saw it as a case about centralized control of the schools. In August 1972, after the Court had decided to review *Rodriguez* (but before oral argument), Powell wrote to one of his best friends in Virginia, J. Harvie Wilkinson, Jr.<sup>4</sup> In the correspondence,<sup>5</sup> Powell indicates some hostility to the district court's decision. His own experience, he wrote, set him against the idea of state-controlled (rather than local-controlled) education, and he wanted data from Wilkinson reporting how much Virginia spent per school district on education. From his years in Virginia Powell knew that per pupil spending in urban school

districts was relatively high. He intended to argue at conference that attempting to equalize state funding would harm those districts.

The numbers Powell was looking for ultimately arrived in his office on October 12, 1972, the day set for oral argument in *Rodriguez*.<sup>6</sup> Five days later, Powell brought the Virginia information to conference with him and used the numbers to support his view that, if funding were equalized in Texas, “those who would be hurt most are those who can afford the hurt the least.”<sup>7</sup>

In the margin of the notes that Powell prepared for conference, he wrote, “this case really postulates a re-structuring of our system of state and local government.” In the notes themselves, Powell wrote, “*Brown* was based on racial discrimination.” The implication was that *Rodriguez* was different, because the alleged discrimination was wealth-based. He wrote, “in a free enterprise society we could hardly hold that wealth is suspect. This is a communist doctrine but is not even accepted (except in a limited sense) in Soviet countries.”

As it turned out, the conference vote on *Rodriguez* was closely divided. Justices Douglas, Brennan, White, and Marshall favored affirming the three-judge panel. Powell, along with Chief Justice Burger, and Justices Blackmun and Rehnquist, voted to reverse. Powell records Potter Stewart as favoring reversal, but Justice Douglas’ notes have a question mark by Stewart’s name. In a sense, both reports were accurate. Stewart was, in the words of Douglas “inclined to reverse.” Nevertheless, Stewart was unhappy with the evolving two-track standard, which demanded heightened scrutiny for laws that infringed upon rights deemed “fundamental.” Stewart correctly understood that the Court had appropriated the traditional equal protection test to apply to what he viewed as the absolute guarantees of the Bill of Rights. Even if the Court reversed the three-judge panel, they were likely to include (as indeed they did) an acknowledgment that strict scrutiny would apply if education were deemed a fundamental right or interest. Ultimately, this would cause Stewart to concur, rather than simply sign on to Powell’s opinion in *Rodriguez*.

Although Stewart’s vote was never really in play, his concerns about the Court recognizing a fundamental right to an education forced Powell to clarify his own thoughts on that topic. In a memo to Stewart dated February 14, 1973, Powell assures Stewart that “since I find that education is not fundamental in a constitutional sense, I have no occasion to discuss what tests are used once such a right is found.” But how did Powell arrive at the conclusion that education was not fundamental “in a constitutional sense?”

In a 16-page memorandum that Powell sent to his clerk, Larry Hammond, on the day of oral argument in *Rodriguez*, the Justice reflected on his approach to this case. He admitted that, after reviewing the briefs his initial reaction “was that the factual assumptions and legal conclusions of the district court were probably erroneous.” He then explains that, “next to law, education was my primary intellectual interest for many years.” What he had discovered is that those who “point out the obvious defects [of public education] . . . overlook the merits of a system which has sustained a quality of democracy not found (I believe) in any other major country.” Throughout the memo, he credits the local school board as the “dynamic force behind the overall effectiveness of our public school system.” A state takeover of education funding would, in Powell’s mind, destroy that sacred institution.

He recognizes, nevertheless, that as a matter of constitutional law, it would be difficult to sustain the Texas funding system, and role of the local school boards, if education were to be declared a fundamental right or interest. The strict

scrutiny standard would have to be invoked, and the state would not be able to prove that its finance system furthered a compelling state interest, as required by that standard. The solution was to conclude that education was not a fundamental interest recognized by the Constitution.

Throughout the drafting of his opinion in the case, the importance of local school boards was never far from his mind. Dissenting in *Rodriguez*, Thurgood Marshall suggested that the local control justification for Texas’ system of school funding was “an excuse only” (*San Antonio v. Rodriguez* 1973, 127). When Powell saw this on the first draft that Marshall circulated throughout the chambers, he wrote in the margin “not so.” About a week after reviewing Marshall’s draft, Powell wrote another memo to Hammond where he expressed concerns about this theme in Marshall’s dissent, arguing that he [Powell] knew “from personal experience, that the local school boards in Virginia have far more operational responsibility than the State Board of Education.”

All of this culminated in his opinion upholding the Texas funding scheme, released on March 21, 1973. The three-judge district court had ruled in favor of plaintiffs based on what it termed “the grave significance of education to both the individual and to society.” (*Rodriguez v. San Antonio Independent School District* 1971, 283). Powell spoke approvingly of the district court’s assessment of education, but concluded, “the importance of a service performed by the State does not determine whether it must be regarded as fundamental . . .” (*San Antonio v. Rodriguez* 1973, 31).

Powell subtly changed the direction of the claim. The three-judge panel had insisted upon education’s “significance to society,” but Powell’s opinion speaks of education as a benefit “performed by the State.” He is not blind to the social benefits of education. Powell notes in his opinion that “the electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed” (36). But he backs away from this forceful, almost Jeffersonian, support for the link between democracy and education, concluding that the Court had “never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice” (36). One can understand why J. Harvie Wilkinson III, a Powell law clerk (and future federal appellate court judge), would later refer to the Court’s decision in *Rodriguez* as “the foremost decision of judicial forbearance” (1979, 260).

## Conclusion

In *San Antonio v. Rodriguez*, Justice Powell refused to extend the civic education legacy of *Brown*. His understanding of democracy was filtered through the prism of anti-communism and through his experiences as a member of the Richmond school board. In *Rodriguez* these themes ran together. If the decision of the lower court was affirmed, funding, and hence control, would shift from the local level to the state level. Indeed, in Powell’s mind, there was no reason to suspect that the movement toward centralization would stop in Austin. If unequal funding violated the Equal Protection Clause when it occurred within a state, might not the same hold true of unequal funding among the states? To Powell, this type of centralized control smacked of communism. Nevertheless, if education were to be recognized as a fundamental interest under the Constitution, then unequal funding would have to be remedied. The choice was obvious. The result, however, was the loss of an important legacy.

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## Notes

1. This quote, from President Clinton's 1994 State of the Union Address, is found in McDonnell (2000, 5).
2. A fifth case, involving segregation in the District of Columbia and federal action, was decided separately. See *Bolling v. Sharpe* (1954).
3. After the Court rendered its decision in *Brown*, it was subject to quite a bit of criticism based on precisely this point. See especially Wechsler (1959).
4. Wilkinson's son, Jay Harvie Wilkinson III, was, at the time, one of Powell's law clerks. After he left Powell's chambers, Wilkinson wrote a law review article critical of the rationale used by Powell in

*Rodriguez* (Wilkinson 1975).

5. Unless otherwise noted, all of the Powell correspondence referred to may be found in the *San Antonio v. Rodriguez* case file, Box 8-folder153, Powell Archives.

6. The report came from another old friend of Powell's, Henry Willet, who had been superintendent of the Richmond Schools when Powell served on the board.

7. This quote is from Justice Douglass' conference notes. These are contained in box 1575 of the William Douglass papers at the Library of Congress.

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