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The Justiciability of Economic, Social, and Cultural Rights†

INTRODUCTION AND HISTORICAL CONTEXT

Rights guaranteed in the International Covenant on Economic, Social and Cultural Rights (ICESCR),1 including a focus on the rights to work and to adequate working conditions, adequate living conditions, health, education, social security, and participation in cultural life, are not contained in the United States Constitution. The framers of the Constitution were primarily concerned with guaranteeing freedom from government. Thus, the writ of habeas corpus and the right to a jury trial are among the few individual rights explicitly contained in the original Constitution. These are the so-called negative rights or negative limits on the states’ power to deprive a person of liberty or property; and positive rights, those specific rights that the government should provide, are not included. In 1791, the Constitution was amended by the addition of the first ten amendments, known as the Bill of Rights, including the Due Process Clause of the Fifth Amendment;2 and following the Civil War additional amendments, primarily containing civil and political rights, not economic and social rights, were added. The Equal Protection Clause of the Fourteenth Amendment applies only to the states, but equal protection principles are also applicable to the federal government under the Due Process Clause of the Fifth Amendment.3

In the United States, economic and social rights are not constitutionally protected, as they are not considered fundamental rights. Writing for the U.S. Supreme Court in San Antonio Independent School District v. Rodriguez,4 Justice Thurgood Marshall observed: “The States have no obligation to secure the most critical economic needs of all their citizens. The States may, in their discretion, choose to provide public schools of the highest quality, or instead direct resources to other social and economic programs. They have no constitutional duty to do either.”5

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2. The Due Process Clause of the Fifth Amendment provides that “[no one shall] be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.
3. The Equal Protection Clause of the Fourteenth Amendment provides that: “[no State shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV. The U.S. Supreme Court interpreted the clause to mean at its core that “all persons similarly situated should be treated alike.” City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

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School District v. Rodriguez, Justice Powell wrote that “the key to discovering whether education is ‘fundamental’ . . . lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.” The United States has not ratified the ICESCR, although President Jimmy Carter signed it in October 1977 and submitted it along with three other human rights treaties to the U.S. Senate in 1978 for advice and consent. The treaty was referred to the Senate Committee on Foreign Relations, but no action has ever been taken. Even if it were to be ratified, this treaty, as other human rights treaties, would likely be considered non-self-executing and hence would require congressional implementing legislation in order to be justiciable.

Without constitutional guarantees, ratification of a treaty containing economic, social, and cultural rights, or congressional legislation, the United States does not consider economic and social rights justiciable as such. At the end of the 48th session of the U.N. Human Rights Council on October 13, 2021, the U.S. general statement clearly made this point: “The United States is not a party to the ICESCR, and the rights contained therein are not justiciable as such in U.S. courts.”

Referring to a Human Rights Council resolution, entitled “Question of the Realization in all Countries of Economic, Social and Cultural Rights,” the statement added:

As the ICESCR provides, each State Party undertakes to take the steps set out in Article 2(1) “with a view to achieving progressively the full realization of the rights.” We note that countries have a wide array of policies and actions that may be appropriate in promoting the progressive realization of economic, social, and cultural rights. Therefore, we believe that these resolutions should not try to define the content of those rights.

It should, however, be noted that an unsuccessful effort was made for the enactment of a “Bill of Economic Rights” in the United States in 1944–1945. On January 11, 1944, President Franklin D. Roosevelt (FDR), in his State of the Union message to Congress, proposed a “Second Bill of Rights,” under which, he said, “a new basis of security and prosperity can be established for all regardless of station, race, or creed.” He included economic and social rights, such as the right to a

5. Id. at 33.
8. Id.
useful and remunerative job; the right to adequate food, clothing, and recreation; the right to a decent living, a decent home, adequate medical care, and good health; the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; and the right to a good education.\textsuperscript{10}

The proposal was never enacted, in part because FDR passed away on April 12, 1945, and because, as World War II ended that same year, the U.S. national debt was 113\% of gross domestic product,\textsuperscript{11} which must have accounted for Congress’s unwillingness even to consider enacting positive rights contained in the Economic Bill of Rights. After assuming the presidency, on September 6, 1945, President Harry Truman advocated for enacting FDR’s Economic Bill of Rights, stating: “The objectives for our domestic economy which we seek in our long-range plans were summarized by the late President Franklin D. Roosevelt in the form of an Economic Bill of Rights. Let us make the attainment of those rights the essence of postwar American economic life.”\textsuperscript{12}

Two months later, in November 1945, President Truman reiterated the proposal, saying in his Special Message to the Congress Recommending a Comprehensive Health Program:

\begin{quote}
In the past, the benefits of modern medical science have not been enjoyed by our citizens with any degree of equality. Nor are they today. Nor will they be in the future—unless government is bold enough to do something about it.... Our new Economic Bill of Rights should mean health security for all, regardless of residence, station, or race—everywhere in the United States.

We should resolve now that the health of this Nation is a national concern; that financial barriers in the way of attaining health shall be removed; that the health of all its citizens deserves the help of all the Nation.\textsuperscript{13}
\end{quote}

The Congress took no action.

\textsuperscript{10} Id.


\textsuperscript{12} President Harry S. Truman, Special Message to the Congress Presenting a 21-Point Program for the Reconversion Period (Sept. 6, 1945), www.presidency.ucsb.edu/documents/special-message-the-congress-presenting-21-point-program-for-the-reconversion-period. President Truman further added: “I repeat the statement of President Roosevelt: ‘In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second bill of rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.’” Id.

\textsuperscript{13} President Harry S. Truman, Special Message to the Congress Recommending a Comprehensive Health Program (Nov. 19, 1945), www.trumanlibrary.gov/library/public-papers/192/special-message-congress-recommending-comprehensive-health-program.
A comparison between the rights enumerated in ICESCR and the “Second Bill of Rights” shows a great deal of similarity, and that is no coincidence. Eleanor Roosevelt, FDR’s First Lady, chaired the inaugural U.N. Human Rights Commission and was instrumental in the adoption of the Universal Declaration of Human Rights, which contained economic, social, and cultural rights and clearly reflected the impact of FDR’s proposal. To implement the Declaration, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (ICCPR) were designed to impose legal obligations on the states that ratified these treaties.

The United States decision not to ratify the ICESCR, combined with the U.S. Constitution’s providing no protection to economic, social, and cultural rights, led to federal courts denying a fundamental right to education, food, health care, and housing.

Although these efforts to broadly legislate economic, social, and cultural rights as such never materialized at the federal level, several of these rights have been federally enacted and are also being implemented on the state and local levels in many jurisdictions around the country. However, before examining these developments and the pertinent case law, it seems appropriate to discuss the U.N. review of the United States’ record implementing economic and social rights.

I. Record of U.S. Implementation of Economic and Social Rights Reviewed by the United Nations Human Rights Council

To comply with the Human Rights Council (HRC)’s universal periodic review conducted under the U.N. Charter, the Universal Declaration of Human Rights, human rights treaties, and voluntary statements, which is “based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments,” the United States submitted its reports in 2010, 2015, and 2020. The first of these—the 2010 report—“gives a partial...
snapshot of the current human rights situation in the United States, including some of the areas where problems persist in our society.”21 It covers both civil and political rights and economic, social, and cultural rights, and was produced in consultation with civil society.

On education22 and equality in education23 the 2010 report referred to several statutes, institutions, and policies aimed at ensuring nondiscrimination and providing the needed assistance to ensure equal opportunities for all. It specifically mentioned the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Patsy T. Mink Equal Opportunity in Education Act of 1972 (Title IX), the Rehabilitation Act of 1973, the American Recovery and Reinvestment Act of 2009 (Recovery Act), and the Individuals with Disabilities Education Act, and the role of the Departments of Justice and Education to ensure enforcement of these laws. It also referred to working in close cooperation with civil society groups.

The report on health24 specially focused on the 2010 Affordable Care Act, which “is projected to expand health insurance coverage to 32 million Americans who would otherwise lack health insurance, significantly reduces disparities in accessing high-quality care, and includes substantial new investments in prevention and wellness activities to improve public health.”25 According to the report, the law also “increases access to care for underserved populations” and thus will help in reducing disparities and discrimination in access to care.26

The report on housing27 and equality in housing28 referred to the Fair Housing Act of 1968, which prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, or disability; to the 1974 Equal Credit Opportunity Act; and to the Recovery Act, which ensures the ability to access quality and affordable housing. The report also mentioned several federal programs to address the challenge of homelessness.

The report highlighted the United States’ commitment to “continuing to root out discrimination in the workplace, and . . . to vigorously enforce laws to that end.” It referred to “Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, sex, national origin, religion; the Age Discrimination in Employment Act, which prohibits employment discrimination based on age;” and to the role of the Department of Labor in implementing government policies to ensure equality at work.

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22. Id. ¶ 68.
23. Id. ¶¶ 47–49.
24. Id. ¶¶ 69–73.
25. Id. ¶ 70.
26. Id. ¶ 71.
27. Id. ¶¶ 74–76.
28. Id. ¶¶ 45–46.
Following a review of the U.S. report by the Human Rights Council, the Working Group on the Universal Periodic Review (Working Group) made 228 recommendations to the United States. The reviews are based on national reports, questions, and recommendations from other states, pertinent intergovernmental organizations and treaty bodies, civil society groups, and independent human rights experts appointed pursuant to the special procedures of the Human Rights Council. Under the special procedures, Special Rapporteurs on the rights to education, health, food, and housing, as well as the Independent Expert on Extreme Poverty are established in connection with economic, social, and cultural rights.

Responding to the Working Group report pertaining to economic, social, and cultural rights, the United States supported some recommendations in full and others in part. However, regarding the rights to food and health, it noted that, as the United States is not a party to the ICESCR, it understood these references “as references to rights in other human rights instruments that we have accepted. We also understand that these rights are to be realized progressively.”

The recommendations the United States fully supported were the obligations to “[p]romote equal socio-economic as well as educational opportunities for all both in law and in fact,” to take further measures “in the areas of economic and social rights for women and minorities, including providing equal access to decent work and reducing the number of homeless people,” to “[c]ontinue its efforts in the domain of access to housing . . . in order to meet the needs for adequate housing at an affordable price for all segments of the American society,” and to persevere “in the strengthening of its aid to development, considered as fundamental, in particular the assistance and relief in case of natural disasters.”

The obligations it supported in part were for the effective mitigation of greenhouse gas emissions; for taking “positive steps” in regard

33. 92.113.
34. 92.197.
35. 92.116.
36. 92.51.
to climate change, by assuming the responsibilities arising from capitalism that have generated major natural disasters particularly in the most impoverished countries; and implementing “the necessary reforms to reduce [its] greenhouse gas emissions and cooperate with the international community to mitigate threats against human rights resulting from climate change.” The recommendation the United States did not support was the obligation to “[r]aise the level of official development assistance to achieve the United Nations target of 0.7% of gross domestic product and allow duty free-quota-free access to all products of all least developed countries.”

The second report submitted by the United States in compliance with the Universal Periodic Review mechanism was based on the work of experts from relevant federal agencies in consultation with civil society groups, and was in response to the recommendations the Working Group had made earlier after reviewing the first report of the United States. After noting the United States’ commitment “to protecting all individuals, including members of racial minorities, from workplace discrimination,” the report highlighted the enforcement efforts undertaken by the Equal Employment Opportunity Commission, the Department of Justice, and the Department of Labor, that have produced systematic tangible results.

Adding that the United States has “aggressively pursued remedies for racial discrimination and improved legal protections and policies to prevent such discrimination,” the report gave specific examples of the action taken by the Department of Housing and Urban Development and the Department of Justice. It also noted that a special Financial Fraud Enforcement Task Force was established with state and local partners to investigate discriminatory practices.

On education, the report noted that the United States seeks “to ensure equal educational opportunities for all students by enforcing laws that prohibit discrimination in education, including on the basis of race, color, and national origin.” It gave examples of the actions taken for that purpose. On health, after noting the commitment “to eliminating health disparities and promoting health,” the report gave examples of the United States enforcing civil rights laws “to help ensure that all people have equal access to healthcare and social service programs.”

37. 92.221.
38. 92.222.
39. 92.216.
42. Id. ¶¶ 30–32.
43. Id. ¶¶ 33–34.
Based on the U.S. 2015 National Report, Summary, and Compilation prepared by the Office of the U.N. High Commissioner for Human Rights (OHCHR), the Working Group made 343 recommendations. In response, the United States supported several recommendations pertaining to economic, social, and cultural rights fully, several in part, and did not support two. One was to “remove the agriculture exemption in the Fair Labour [sic] Standards Act which would raise the age for harvesting and hazardous work for hired children taking care to distinguish between farm owner and farm worker children.” The other was to avoid criminalization of migrants, as the report stated: “Although unlawful presence in the U.S. is not a crime, and the federal government does not support state initiatives intended to criminalize mere status, certain immigration offenses are subject to criminal sanction (e.g., illegal entry).” The report noted that the United States continues to improve its “domestic laws and policies to promote access to housing, food, health and safe drinking water and sanitation, with the aim of decreasing poverty and preventing discrimination.”

Similar to the 2010 and 2015 reports, the United States submitted its 2020 report to the Universal Periodic Review. This was, as in the past, a response to the recommendations the Working Group had made after reviewing its 2015 report. On the recommendation to amend U.S. laws “that criminalize homelessness and which are not in conformity with international human rights instruments,” the report referred to the actions taken by several U.S. agencies and the U.S. Interagency Council on Homelessness “to alleviate the personal and social problems that lead to homelessness,” and noted that homelessness in the U.S. had declined by 11% since 2010.


47. Id. ¶ 19 (responding to recommendation 334).

48. Id. ¶ 12 (responding to several recommendations referring to the rights under the ICESCR). The report’s response was that the United States is not a party to the ICESCR and that it understands that these rights are to be realized progressively.


50. 2015 HRC Recommendations, supra note 45, ¶ 58.

51. Id. recommendation 310.

52. Id. ¶ 60.
On recommendations related to health care and education, the report noted that on health care, considerable debate was taken place in the United States “about the best ways to make quality, affordable health care available to all,” and referred to actions the United States had taken to meet this goal. On education, as in the past, the report referred to several statutes and policies aimed at meeting the nation’s commitment to equal opportunity in education and to help students succeed in school and careers as the federal government works with states and communities. The report also referred to several statutes and policies to ensure “a non-discriminatory, inclusive, and integrated approach to work that ensures that all women and men are treated with human dignity.”

At the end of the 48th Session of the HRC, the United States reiterated its position on the ICESCR as it noted that “countries have a wide array of policies and actions that may be appropriate in promoting the progressive realization of economic, social, and cultural rights. Therefore, we believe that [the HRC] resolution should not try to define the content of those rights.” It also reiterated the point made earlier, that “the United States is not a party to the ICESCR, and the rights contained therein are not justiciable as such in U.S. courts.”

The next Part presents a review of the pertinent case law. That is followed by the measures taken by the United States to achieve the progressive realization of economic, social, and cultural rights at the federal, state, and local levels. The Report then turns to conclusions.

II. Pertinent Case Law

As mentioned above, in 1973 the U.S. Supreme Court held in *San Antonio Independent School District v. Rodriguez*, that education is not constitutionally guaranteed. Parents of children in a Texas public school district brought a class action on behalf of their children against the state, claiming that substantial disparities in school funding had resulted in inequities and their children were deprived of the equal protection guaranteed under the constitution. The claim was based on the argument that a complex school financing system spent USD 356 per student in their district, compared with USD 594 per student in a neighboring affluent district in San Antonio.

Writing for the majority, Justice Powell said at the outset: “We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges...
upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.”

Although he rejected the plaintiffs’ claim, he acknowledged education’s vital role in a free society, as he quoted from *Brown v. Board of Education* that “education is perhaps the most important function of states and local governments,” and that

> [I]t 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. . . a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

However, citing prior cases, Justice Powell identified their lesson in addressing the question before the Court: “It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.” In Justice Powell’s words, “Education, of course, is not among the rights afforded specific protection under our Federal Constitution. Nor do we find it is implicitly so protected.” Responding to the parents’ argument that “education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution,” and more specifically “because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote,” Justice Powell stated:

> We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual’s rights to speak and to vote. Yet we have 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. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from government interference. But they are not values to be implemented by judicial instruction into otherwise legitimate state activities.

But he further added that “[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected

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60. *Id.* at 17.
62. *Id.* at 493.
64. *Id.* at 35.
65. *Id.* at 36.
prerequisite of either right, we have no indication that the present levels of education expenditures in Texas provide an education that falls short." Consequently, the Court declined to subject Texas’s action to strict judicial scrutiny, under which, as Texas admitted, the state financing scheme would have been found in violation of the Equal Protection Clause.

Justice Marshall rejected the majority’s “rigidified approach to equal protection analysis,” under which “equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality.” The Court, he wrote, has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. . . [,] an approach in which “concentration (is) placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.”

Justice Marshall pointed to the right to vote in state elections, which is not protected in the Constitution but recognized by the Court “as a ‘fundamental political right,’ because the Court concluded very early that it is ‘preservative of all rights.’” Consequently, rejecting what he called the majority’s “labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself,” he reiterated what he had argued earlier:

The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the non constitutional interest draws closer, the non constitutional interest becomes more fundamental and the degree of judicial

66. Id. at 36–37.
67. Id. at 98.
68. Id. at 98–99 (citing Dandridge v. Williams, 397 U.S. 471, 520–21 (1970)).
69. Id. at 101 (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).
70. Id. at 99.
scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.\textsuperscript{71}

Justice Marshall also re-emphasized that “the fundamental importance of education is amply indicated by the prior decisions of this court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.”\textsuperscript{72}

Justice Powell had questioned how to distinguish education “from the significant personal interests in the basics of decent food and shelter,” for “the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.”\textsuperscript{73}

In his powerful dissent, Justice Marshall answered by forcefully arguing that the distinction lies in education’s unique status in the country and in the “closeness of the relationship.” He wrote:

There can be no question that, as the majority suggests, constitutional rights may be less meaningful for someone without enough to eat or without decent housing. . . . But the crucial difference lies in the closeness of the relationship. Whatever the severity of the impact of insufficient food or inadequate housing on a person’s life, they have never been considered to bear the same direct and immediate relationship to constitutional concerns for free speech and for our political processes as education has long been recognized to bear. Perhaps, the best evidence of this fact is the unique status which has been accorded public education as the single public service nearly unanimously guaranteed in the constitutions of our States. . . . Education, in terms of constitutional values, is much more analogous in my judgment, to the right to vote in state elections than to public welfare or public housing. Indeed, it is not without significance that we have long recognized education as an essential step in providing the disadvantaged with the tools necessary to achieve economic self-sufficiency.\textsuperscript{74}

Finally, Justice Marshall insisted, referring to\textit{Brown}, that “the opportunity of education ‘where the state has undertaken to provide it, is a right which must be made available to all on equal terms.’”\textsuperscript{75}

In his dissent, Justice Brennan also wrote that “education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First

\textsuperscript{71} Id. at 102.
\textsuperscript{72} Id. at 111.
\textsuperscript{73} Id. at 37.
\textsuperscript{74} Id. at 115 n.74 (Marshall, J., dissenting) (citations omitted).
\textsuperscript{75} Id. at 116.
Amendment.” Thus, in his opinion, “any classification affecting education must be subjected to strict judicial scrutiny, and since even the State concedes that the statutory scheme now before us cannot pass constitutional muster under this stricter standard of review, I can only conclude that the Texas school-financing scheme is constitutionally invalid.”

These forceful dissents notwithstanding, it is the majority’s opinion that sets the precedent. The Supreme Court followed the Rodriguez decision’s interpretation by refusing to treat education as a fundamental right and reaffirming its conclusions on equal protection claims in three cases in the 1980s: Plyler v. Doe, Papasan v. Allain, and Kadamas v. Dickinson Public School. However, the Court often reiterated the vital importance of education.

Plyler was a class action lawsuit on behalf of immigrant Mexican children in the United States illegally, who sought injunctive and declarative relief against exclusion from public schools under a Texas statute and school district policy. The statute denied enrollment in the State’s public schools to these children and authorized school districts to withhold any State funds for their education. The Court decided that excluding children of undocumented immigrants from public schools is unconstitutional.

Writing for the Court, Justice Brennan noted that “education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.” He found the law in violation of the right to equality embodied in the Equal Protection Clause, as he wrote that:

[Although p]ublic education is not a “right” granted to individuals by the Constitution[,] . . . neither is it merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. . . . We have recognized “the public schools as a most vital civic institution for the preservation of a democratic system of government,” . . . and as the primary vehicle for transmitting “the values on which our society rests.” . . . “[A]s . . . pointed out early in our history,. . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom.

76. Id. at 63.
77. Id.
81. Plyler, 457 U.S. at 221.
and independence.” . . In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore 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.82

He further added:

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.83

Justice Brennan did not apply the strict scrutiny test because more is involved in these cases than the abstract question whether [the statute] discriminates against a suspect class, or whether education is a fundamental right. [The statute] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered rational unless it furthers some substantial goal of the State.84

He thus applied a higher standard—intermediate rather than just rational basis—and said in conclusion: “If the State is to deny a discreet group of innocent children the free public education that it offers to other children within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.”85

In Papasan, plaintiffs challenged Mississippi’s unequal distribution of the income it received from its public-school lands and, while the Court held that education is not a fundamental right,86 it noted:

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82. Id. (citations omitted).
83. Id. at 221–22.
84. Id. at 223–24.
85. Id. at 230.
86. Papasan, 478 U.S. at 284.
“As Rodríguez and Plyler indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”87 However, the Court said that it was not necessary in that case to resolve those issues.88

Justice Powell, indeed, seemed to leave the door a little ajar when he said that the Court did not have evidence that under the Texas financing system, students were falling short of being prepared to exercise constitutional rights.89 In two recent lower federal court cases, plaintiffs have attempted to present such evidence. These cases are Gary B. v. Whitmer,90 a Sixth Circuit case decided in April 2020, and a district court case decided in October 2020, A.C. v. Raimondo.91

In Gary B., the Sixth Circuit Court of Appeals held that the plaintiffs have “a fundamental right to a basic minimum education.”92 The facts were that students at some of the lowest performing schools in Detroit brought this action against Michigan governmental officials, invoking the Due Process and Equal Protection Clauses of the Fourteenth Amendment. They sought the court’s recognition of a fundamental right to a basic minimum education, which the court had often discussed but had yet to decide. The students asserted “poor conditions within their classrooms, including missing or unqualified teachers, physically dangerous facilities, and inadequate books and materials,” that taken together, lead to the deprivation of a minimum basic education necessary to provide a chance at foundational literacy.93 The basis of their claim was that defendants discriminated against them by failing to provide the same access to literacy given to other Michigan students.

The case was decided by a three-judge panel in a two-to-one decision. The central issue the panel addressed was whether plaintiffs had a fundamental right to a basic minimal education, specifically one that provides access to literacy. The court responded to Rodríguez’s unanswered question by observing that a certain “quantum” of education is a fundamental right protected by due process guarantees. It began its analysis by observing that the Equal Protection Clause at its core says that “all persons similarly situated should be treated alike.”94 The panel said that the U.S. Constitution protects a basic level of minimum education under which there is access to literacy

87. Id. at 285.
88. Id. at 286.
89. See supra note 66.
92. Gary B., 957 F.3d at 662.
93. Id. at 620–21.
94. Id. at 634 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)).
that enables participation in democratic society. In the panel’s words, “while *Rodriguez* rejected a general right to education on the grounds that no one is guaranteed the *most* effective or intelligent political participation,” plaintiffs’ assertion of the right “in this case is far more fundamental. The degree of education they seek through this lawsuit—namely, access to basic literacy—is necessary for essentially any political participation.”

The panel added:

Effectively every interaction between a citizen and her government depends on literacy. Voting, taxes, the legal system, jury duty—all of these are predicated on the ability to read and comprehend written thoughts. Without literacy, how can someone understand and complete a voter registration form? Comply with a summons sent to them through the mail? Or afford a defendant due process when sitting as a juror in his case, especially if documents are used as evidence against him?

Even things like road signs and other posted rules, backed by the force of law, are inaccessible without a basic level of literacy. In this sense, access to literacy “is required in the performance of our most basic public responsibilities,” *Brown*, 347 U.S. at 493, as our government has placed it “at the center of so many facets of the legal and social order,” *Obergefell*, 135 S. Ct. at 2601; see also Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 Mich. St. L. Rev. 429, 552 (“At a minimum, children must be taught to read so they can read the laws for themselves—a task that many of the Framers would have thought was fundamental.”).

The court stated that the right to an education has been a universal feature in the United States since the adoption of the Fourteenth Amendment, such that “people have come to expect and rely on this education. . . in order to provide the basic skills needed for our children to participate as members of American society and democracy.” The panel found a right to basic minimum education as “implicit in the concept of ordered liberty,” for absent literacy provided by a basic minimum education, “it is impossible to participate in our nation’s democracy.” Thus, the court held that plaintiffs were entitled to a fundamental right to a basic minimum education, “meaning one that can provide them with a foundational level of literacy.”

95. *Gary B.*, 957 F.3d at 652.
96. *Id.* at 652–53.
97. *Id.* at 650.
98. *Id.* at 660.
99. *Id.* at 662.
The Sixth Circuit’s two-to-one decision ordering the case back to the trial court for retrial was entered on April 23, 2020. On May 14, Michigan’s Governor, Gretchen Whitmer, in order to avoid a second trial, offered to settle the case with a payment of at least USD 94.4 million to promote literacy programs in Detroit’s schools and to settle the claims of the plaintiffs. On May 19, the court announced that a member of the full court had requested a poll of the entire court under court rule 35(b), which was held, with a majority of the judges voting to vacate the judgment and to rehear the case en banc. “A decision to grant rehearing en banc vacates the previous opinion and judgment of the court, stays the mandate, and restores the case on the docket as a pending appeal.” Ultimately, however, the court on June 10, 2020, dismissed the appeal as moot because of the settlement of the claims.

In *A.C. v. Raimondo*, a class action lawsuit brought by parents or guardians of Rhode Island public school students, alleged that they were not provided with adequate civics education by the state, in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In addition, they invoked the privileges and immunities clause, Sixth and Seventh Amendments, and Jury Selection and Service Act and Republican Guarantee Clause of Article 14 of the Constitution.

After providing evidence of students’ “depth of ignorance” concerning their civics competence, the plaintiffs argued that they had not been adequately prepared to participate in the civic process. This failure by the state to provide them with necessary education for meaningful civic participation, they alleged, was a violation of all those Constitutional provisions mentioned earlier.

After noting that “Justice Powell was careful to leave the door open, if only a crack, to a future challenge to an education program that was totally inadequate,” the court said:

Whatever merit appellees’ argument might have if a State’s financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels

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100. *Id.* at 616.
are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.105

Because the plaintiffs, as those in Gary B., had invoked substantive due process, Judge Smith cited prior case law,106 especially quoting from Washington v. Glucksberg107: “[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’, . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.”108 Judge Smith added:

Precedent clearly dictates that, while education as a civic ideal is no doubt deeply rooted in our country’s history, there is no right to civics education in the Constitution. . . . To the extent that education generally has been recognized as a “right,” whether constitutional or statutory (as opposed to a civic value), it has been located in state laws or constitutions.109

He concluded his analysis of substantive due process by noting:

If “ordered liberty” means anything, it would seem at least as likely to include informed civic participation (such as voting, political speech and association, running for office, jury service and so forth), as marriage. . . . But in the end, while the Gary B. opinion admirably articulated the theory, this now vacated opinion is too thin a reed to support the even more tenuous argument in favor of finding civics education a liberty both fundamental and traditionally protected. Defendants’ conduct thus solicits only rational basis review which, as explained below, it survives.110

Finally, Judge Smith rejected plaintiffs’ Equal Protection claim, as he found that plaintiffs had failed to adequately define a “suspect class,” without which the court would not apply strict scrutiny. But he commended the plaintiffs for bringing this case, as he said in his conclusion that “[t]he Court cannot provide the remedy Plaintiffs seek, but in denying that relief, the Court adds its voice to Plaintiffs’ in calling attention to their plea. Hopefully, others who have the power to address this need will respond appropriately.”111

105. Id. at 189.
106. Id. at 193–94.
108. Id. at 720–21.
110. Id. at 194 (citations omitted).
111. Id. at 197.
As noted above, the U.S. Constitution does not mention any rights recognized under the ICESCR. Similar to the Court’s constitutional interpretation and treatment regarding education, it has never considered other rights recognized under the ICESCR to trigger heightened scrutiny. Hence, plaintiffs must invoke due process and equal protection to seek relief.

The following three cases, regarding housing, food, and medical care, are illustrative of this approach.

In *Lindsey v. Normet,* tenants, who failed to pay rent, brought a suit seeking a declaratory judgment that the Oregon Forcible Entry and Wrongful Detainer statute was unconstitutional, and an injunction against its continued enforcement. The tenants’ landlord had threatened them with eviction for rent, which the tenants refused to pay until certain improvements they requested were made. The plaintiffs claimed that the statute violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

As the Supreme Court explained the statute’s procedure:

A landlord may bring an action for possession whenever the tenant has failed to pay rent within 10 days of its due date, when the tenant is holding contrary to some other covenant in a lease, and whenever the landlord has terminated the rental arrangement by proper notice and the tenant remains in possession after the expiration date specified in the notice. § 105.115.

After rejecting the plaintiffs’ claims, the Court explained that state-level legislation is responsible for ensuring adequate housing:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.

In *Lyng v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America UAW,* the question was
whether a 1981 amendment to the Food Stamp Act, which precluded households from becoming eligible to participate in the food stamp program when any member of the household was on strike, as well as precluding an increase in allotment of food stamps because the striking member’s income had decreased, was valid under the First and Fifth Amendments.

Unions and union members had brought the suit against the Secretary of Agriculture in a federal district court claiming that the amendment was unconstitutional and requesting declaratory and injunctive relief. The district court granted summary judgment on the plaintiffs’ constitutional claims, finding violation on three different grounds—interference with their First Amendment rights to associate with their families and their unions, and their union’s right to associate with members; interference with strikers’ First Amendment right of expression free of coercion; and, most relevant here, violation of the equal protection component of the Due Process Clause of the Fifth Amendment as it “betray[ed] an animus against an unpopular political minority, irrationally treat[ed] strikers worse than individuals who quit a job, and. . . impermissibly direct[ed] the onus of the striker’s actions against the rest of his family.”116 The Secretary appealed directly to the Supreme Court.

After rejecting the First Amendment claim, the Court explained regarding the Fifth Amendment due process claim: “Because the Statute challenged here has no substantial impact on any fundamental interest and does not ‘affect with particularity any protected class,’ we confine our consideration to whether the statutory classification ‘is rationally related to a legitimate government interest.’”117 Thus the Court denied any constitutional right to food.118

In *Maher v. Roe*,119 indigent women challenged a Connecticut regulation which prohibited the funding of abortions that were not medically necessary. After the district court held that the regulation denied equal protection, the Connecticut Commissioner of Social Services appealed. The regulation in question was a Connecticut Welfare Department regulation limiting state Medicaid benefits for first trimester abortions to when “medically necessary.” According to the district court, the Fourteenth Amendment forbade the exclusion of nontherapeutic abortions from a state welfare program that generally subsidized the medical expenses related to pregnancy and childbirth.

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116. *Id.* at 363–64.
117. *Id.* at 368.
The Supreme Court observed that the Constitution “imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents.” \textsuperscript{120} It noted that previously it had invalidated under the Due Process Clause ‘certain state procedures for the commencement of litigation, including requirements for payment of court fees and costs for service of process,’ restricting the ability of indigent persons to bring an action for divorce.” \textsuperscript{121} The Court further stated, quoting \textit{Rodriguez}:

We must decide, first, whether (state legislation) operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. \ldots If not, the (legislative) scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination. \ldots\textsuperscript{122}

The Court then applied the \textit{Rodriguez} analysis to conclude that “we think the District Court erred in holding that the Connecticut regulation violated the Equal Protection Clause of the Fourteenth Amendment.” \textsuperscript{123}

Here, again, the Court rejected the constitutional protection to health.

\textit{III. Measures Taken by the United States to Achieve Progressive Realization of Economic And Social Rights at the Federal, State, and Local Levels}

The role of the federal government varies with each of these rights. For example, it plays a minor role in education but a primary role in public health. State and local governments actively participate in achieving the realization of these rights.

Twenty-five state constitutions have provisions that reference and address poverty, public health, and welfare (Alabama, Alaska, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, New
York, Nevada, North Carolina, New Mexico, Oklahoma, Rhode Island, South Carolina, Texas, West Virginia, and Wyoming). 124

Rhode Island, Illinois, and Connecticut have passed Homeless Bill of Rights laws. 125 For example, Illinois’s Bill of Rights for the Homeless Act provides that: “It is the long-standing policy of this State that no person should suffer unnecessarily from cold or hunger, be deprived of shelter or the basic rights incident to shelter, or be subject to unfair discrimination based on his or her homeless status.” 126

A brief review of how federal, state, and local entities promote and protect education, housing, and health follows.

A. Education

1. Federal Responsibilities

The Tenth Amendment to the Constitution limits the powers of the federal government only to those specifically granted under the Constitution, as it provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people;” and because none of these rights is mentioned in the Constitution, they are reserved to the states. Thus, the primary responsibility for education in the United States lies with state and local governments, and state governments usually delegate their authority to state departments of education and local school districts, which run most of the day-to-day operations.

Most federal legislation on education is enacted under the “spending clause” of the Constitution, which empowers Congress to tax and spend for the general welfare. The Supreme Court’s 1954 Brown v. Board of Education 127 decision held the segregation of public schools


Ala. Const. art. IV, § 88: “It [is] the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor.”

Ind. Const. art. IX, § 3: county boards are authorized to establish farms to house those who “have claims upon the...aid of society.”

Kan. Const. art. VII, § 4: “The...counties of the state shall provide...for those inhabitants who, by reason of age, infirmity, or other misfortune, may have claims upon the aid of society.”

Okla. Const. art. XXVII, § 3: “The several counties of the State shall provide...for those inhabitants who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of the county.”

Miss. Const. art. XIV, § 262: “The board of supervisors shall have power to provide homes or farms as asylums for those persons who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of society; and the Legislature shall enact suitable laws to prevent abuses by those having the care of such persons.”


unconstitutional, and this gave the Executive Branch the authority to enforce equal access to education. Although the federal government funds only about ten percent of government-run schools, it has the leverage of imposing rules and regulations as a condition for receiving federal education grants. Consequently, school districts follow federal guidelines to enable them to receive federal education funding.

To illustrate, Congress passed the No Child Left Behind Act (NCLB) in 2001, pursuant to which government schools were required to test K-12 students annually in core subjects, and to meet provisions regarding accountability and parental choice. In 2015, the Every Student Succeeds Act (ESSA) replaced NCLB, giving primary authority to the states. These acts are reauthorizations of the Elementary and Secondary Education Act (ESEA) of 1965, which established the framework of the federal government’s role in education, and which has not changed. Under that framework, there is no direct federal oversight of schools; instead, the government offers funding for education to the states upon their meeting certain conditions.

The U.S. Department of Education, established in 1979, administers most federal education assistance, collects data on government run schools, evaluates their performance, measures outcomes, and suggests policy changes.

Title I of the ESEA (as amended by the ESSA), which is administered by the Department of Education, provides financial assistance to local education agencies and schools with high numbers or high percentage of children from low-income families to ensure that all children meet challenging state academic standards. Funds are allocated according to statutory formulas.

The federal government has enacted several laws on educational assistance. For example, in 1975, Congress passed the Education for All Handicapped Children Act (now Individuals with Disabilities Education Act, IDEA), which provides for appropriate public education to eligible children with disabilities, ensuring special education and related services to those children to meet their needs. The bulk of federal funding goes to Title I and IDEA. Among other acts are the Serviceman’s Readjustment Act of 1944, commonly known as the “GI Bill,” providing benefits for World War II veterans, including specific allocations of funding for tuition payments, and the Higher Education Act of 1965, allocating additional federal funding

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for higher education and providing additional low-interest loans to students.

The federal government also administers other programs related to educational assistance, including the National School Lunch Program, which provides nutritionally balanced, low-cost or no-cost lunches to children each school day. This program has been of significant assistance during the COVID-19 pandemic, as it has allowed free school meals for children at a time of food insecurity for many families across the country. The Head Start program, a program of the U.S. Department of Health and Human Services, provides comprehensive early childhood education, health, nutrition, and parent involvement services to low-income children and families.

2. State and Local Responsibilities

Each state’s constitution requires the state to provide a school system where children may receive an education. For example, article VIII, section IV, paragraph 2, of the New Jersey Constitution requires the legislature to “provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State.” These constitutional educational provisions vary among states with some states providing specific details, such as provisions regarding educational curricula and even selecting textbooks and educational materials, while others leave these details to the legislature. A fifty-state review indicates the variety of approaches. States usually delegate much of their authority to school districts. The following section explores an example from one state.

California provides an illustration of education being a fundamental right under the state Constitution. Under article I, section 7(a) and article IV, section 16(a), the state is barred from denying to students the basic educational necessities provided to other students. This principle is embodied in California Education Code section 220, which provides that “no person shall be subjected to discrimination on the basis of disability, gender, nationality, race or ethnicity, religion, sexual orientation. . . in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.” Another provision of article IX of the Constitution, in section 5, requires that California “provide for a system of common schools by which a free school shall be kept up and supported in each district.”

Further, the state has undertaken to ensure that, “[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people the Legislature shall
encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement,” as stated in California Constitution article IX, section 1.

Given these commitments, in the 1992 case of Butt v. California, the California Supreme Court said that “California has assumed specific responsibility for a statewide public education system open on equal terms to all.” It further noted that

[T]he California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students. The State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity.135

Unlike Rodriguez, many state courts have found education as a fundamental right or interest, guaranteed under their constitutions, and held claims based upon denial of this right to be justiciable. For illustrative purposes, a few select cases are discussed here.

In 1977, the Connecticut Supreme Court held in Horton v. Meskill that the right to education is fundamental under the Connecticut Constitution and that any infringement of that right must be subject to strict scrutiny. The court did not find

the Rodriguez test for the fundamentality of the right to an education [to be] of particular help although under that test it cannot be questioned but that in the light of the Connecticut Constitutional recognition of the right to education (article eighth, s 1) it is, in Connecticut, a ‘fundamental’ right.136

The court agreed with Justice Marshall’s dissent in Rodriguez, as it quoted him:

This Court has never suggested that because some “adequate” level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that “all persons similarly circumstanced shall be treated alike.”137

The court found that:

135. Id. at 685.
137. Id. at 372–73.
138. Id. at 373.
The wide disparities that exist in the amount spent on education by the various towns result primarily from the wide disparities that exist in the taxable wealth of the various towns; the present system of financing education in Connecticut ensures that, regardless of the educational needs or wants of children, more educational dollars will be allotted to children who live in property-rich towns than to children who live in property-poor towns.  

The court emphasized that “Connecticut has for centuries recognized it as her right and duty to provide for the proper education of the young.” . . . [e]ducation is so important that the state has made it compulsory through a requirement of attendance.”

Agreeing with the decision of the New Jersey Supreme Court in *Robinson v. Cahill*, and the California Supreme Court in *Serrano v. Priest (Serrano II)*, the court said that whether it applied the “fundamentality” test adopted by *Rodriguez* or the pre-*Rodriguez* test under [Connecticut’s] state constitution (as the California Supreme Court did in *Serrano II*), or the “arbitrary” test applied by the New Jersey Supreme Court in *Robinson v. Cahill* . . ., [it] must conclude that in Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized.

The court held that, because elementary and secondary education is a fundamental right in Connecticut, “pupils in the public schools are entitled to the equal enjoyment of that right, and that the state system of financing public elementary and secondary education as it presently exists and operates cannot pass the test of ‘strict judicial scrutiny’ as to its constitutionality.”

In *Robinson v. Cahill*, mentioned in *Horton*, the New Jersey Supreme Court noted that the state’s education financing system relied heavily on local taxation for more than two-thirds of public-school costs and thus led to great disparity in dollar input per pupil. The court asked “whether the State has fulfilled its obligation to afford all pupils that level of instructional opportunity which is comprehended by a thorough and efficient system of education for students between the ages of 5 and 18.” It agreed with the trial court’s finding that “the constitutional demand had not been met and did so on the basis

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139. *Id.* at 367–68.
140. *Id.* at 373–74.
143. *Horton*, 376 A.2d at 373.
144. *Id.* at 374.
of discrepancies in dollar input per pupil.” 146 The court reached that conclusion after a detailed review of Rodriguez. The pertinent New Jersey Constitutional provision reads: “The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years.” 147

In Serrano II, 148 students and parents brought suit against state and county officials, alleging that California’s school financing system was unconstitutional. The California Supreme Court found that substantial disparities existed among individual school districts in the amount of revenue available per pupil for the districts’ educational grants and held that, because the financing system depended heavily on local property taxes, it invidiously discriminated against the poor and hence violated the Equal Protection Clause of the Fourteenth Amendment.

The court referred to its earlier decision in 1971 in Serrano v. Priest (Serrano I), 149 where it had stated that the California Constitution’s equal protection provisions were “substantially the equivalent” of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and had determined “based upon its analysis of plaintiffs’ federal equal protection contention, that it was also applicable to their claim under these state constitutional provisions.” 150

After the legislature modified the system, the plaintiffs again brought this action, alleging that the state public school financing system still denied equal protection and was invalid as it violated the state’s constitutional provisions that guaranteed equal protection of the law.

The court noted that “decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but ought to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.” 151 The court concluded that

The state public school financing system here under review, because it establishes and perpetuates a classification based upon district wealth which affects the fundamental interest of education, must be subjected to strict judicial scrutiny in determining whether it complies with our state equal protection provisions. 152

146. Id.
147. N.J. Const. art. VIII, § 4, cl. 1.
150. Serrano II, 557 P.2d at 949 (citing Serrano I, 487 P.2d 1241 at 1258). The court in Serrano I found the analogy between voting, considered by the U.S. Supreme Court as a fundamental right, and education as “much more direct.” Id.
151. Serrano II, 557 P.2d at 950 (citing People v. Longwill, 538 P.2d 753, 758 (Cal. 1975)).
152. Serrano II, 557 P.2d at 952.
Then, basing its determination upon factual findings of the trial court, which it considered were amply supported, the court held “without hesitation that the trial court properly determined that the state failed to bear this burden.” 153

Many other states have also held education as a constitutional right.154

B. Housing

As declared by the United States Supreme Court in the 1972 case *Lindsey v. Normet*,155 housing is not a constitutional right in the United States. Nor is a right to housing legally enforceable because the country is not a party to the ICESCR, and Congress has not enacted a right to housing. Thus, as no federal law or court decision recognizes a right to housing, several individual federal laws are aimed at addressing housing challenges and problems such as homelessness, discrimination in housing, landlord-tenant issues, and eviction. However, notwithstanding these efforts, the United States faces a persistent affordable housing crisis, with a shortage of more than seven million affordable housing units, further aggravated by the COVID-19 pandemic and growing economic disparities.156

The ongoing scourge of homelessness, rising at an alarming rate, poses another major challenge. The U.S. Department of Housing and Urban Development (HUD) reported 580,466 people were homeless in 2020, an increase of 12,751 people or 2.2% from 2019.157 HUD’s mission is to create affordable homes for all, but it has miserably failed to do so.

Two U.S. statutes are especially noteworthy: the 1995 National Housing Act, which was aimed at constructing public housing to raise the standard of living for Americans,158 and the Fair Housing Act, Title 153. *Id.* at 953.


VIII of the Civil Rights Act of 1968 (Fair Housing Act), as amended, which “prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, because of race, color, religion, sex, familial status, national origin, and disability. It also requires that all federal programs relating to housing and urban development be administered in a manner that affirmatively furthers fair housing.”

As Lindsey had explained, “[a]bsent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.” So it is state-level legislation that has addressed adequate housing and landlord–tenant issues. State and local laws regulate landlord-tenant relationships, and state and federal agencies enforce fair housing laws.

C. Health Care

Health care is not mentioned in the U.S. Constitution, and thus a right to health care is not explicitly addressed there. However, it can be persuasively argued that an individual’s right to access health care at one’s own expense from medical providers is implicitly provided. Unlike in education and housing, the federal government plays a large role in the public health system.

[It] surveys the population’s health status and health needs, sets policies and standards, passes laws and regulations, supports biomedical and health services research, helps finance and sometimes delivers personal health services, provides technical assistance and resources to state and local health systems, provides protection against international health threats, and supports international efforts toward global health.

160. Id. § 3604.
164. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (holding the right to choose whether or not to terminate a pregnancy to be constitutionally protected. What is involved here is a right to bodily integrity which can be viewed as ensuring a right to seek health care services at one’s own expense.).
The main federal agency responsible for public health is the Department of Health and Human Services (HHS). The federal government bases its regulatory authority on its powers to regulate interstate commerce and to tax and spend for the general welfare. States are primarily responsible for protecting the public’s health, carried out through state health agencies. Direct delivery of public health services is done through local health departments.

The major federal health care programs are the Medicare and Medicaid programs. The 1965 Medicare program (Title XVIII of the Social Security Act), is a federal health insurance program for a special class of people—those aged sixty-five and older, persons with disabilities, and persons living with end-stage renal disease. The Medicaid program, also enacted in 1965, is a need-based program under which broad coverage for medical services is provided to low income persons and administered by states, with assistance from counties. It includes long-term care insurance and provides health insurance. It is jointly financed by federal, state, and local governments, including counties. The Children’s Health Insurance Program is another federal matching block grant program under which uninsured children who don’t have access to Medicaid are provided health care services.

The Health Insurance Portability and Accountability Act of 1996 was enacted to improve the efficiency and effectiveness of the nation’s health care system. And in 2010, the Patient Protection and Affordable Care Act (ACA) restructured the private health insurance market under section 1501 of Title I with the aim of providing significant national reforms to the existing system under which most individuals are required to have health insurance. The Act mandated that non-exempt individuals who failed to purchase and maintain a minimum level of health insurance must pay a tax penalty. It also expanded Medicaid and required states to accept the expansion in order to receive federal funds for Medicaid. It also mandated employers to obtain health coverage for employees.

Several state constitutions specifically refer to health. For example, the Wyoming Constitution provides: “As the health and morality of the people are essential to their well-being, . . . it shall be the duty of the legislature to protect and promote these vital interests.” Alaska’s Constitution states that: “[t]he legislature shall provide for

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167. Id., §§ 1396ff.
the promotion and protection of public health.” Under Hawaii’s Constitution, “The State shall have the power to provide financial assistance, medical assistance and social services for persons who are found to be in need of and are eligible for such assistance and services as provided by law.” Arkansas’s Constitution requires the legislature to provide for the treatment of the insane. And Mississippi’s Constitution authorizes laws for the care of the indigent sick in state hospitals.

Several other states’ constitutions also authorize but do not require the provision of health care services. These include, among others, the New York Constitution, which states that “[t]he protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by each of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.”

A fierce national debate over health care reform is ongoing in the United States. In 2012, in *NFIB v. Sibelius*, the Supreme Court addressed the challenge to the ACA brought by twenty-six states, the National Federation of Independent Business (NFIB), and individual plaintiffs. The plaintiffs alleged that both the mandates, as well as the medical expansions were unconstitutional. The majority upheld the ACA, ruling that the Individual Mandate penalty was valid under the Constitution’s taxing and spending clause and a valid exercise of Congressional authority. Part of the Medicaid expansion provision was also held as a valid exercise of Congress’ power under the spending clause.

D. Right to Water

A few states recognize a right to clean water either in their constitutions or through legislation. Massachusetts, Pennsylvania, and New York guarantee the right to clean water in their state constitutions, while Hawaii’s Constitution obligates the state government to “protect, control and regulate the use of Hawaii’s resources for the benefit of its people.” Massachusetts’s Constitution states, “the people have the right to clean air and water.” Pennsylvania’s states, “the people have the right to clean air, pure water.” And on November 2, 2021, voters approved an amendment to the New York state constitution

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175. *Miss. Const.* art. IV, § 86.
176. *N.Y. Const.* art. 17, § 3.
178. *Mass. Const.* art. XLIX.
that adds, “Each person shall have a right to clean air and water, and a healthful environment.”  

With the passage of Assembly Bill (AB) 685 on September 25, 2012, California became the first state to legislatively recognize the human right to water. In section 106.3 of the Water Code, the state statutorily recognizes that “every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.” On February 23, 2021, Virginia passed House Joint Resolution No. 538, recognizing “that access to clean, potable, and affordable water is a necessary human right.”

Some municipal codes and ordinances also include the right to clean water.

CONCLUSION

The lack of constitutional protections of these rights in the United States, combined with inaction by Congress to codify in general the rights enshrined in the International Covenant on Economic, Social, and Cultural Rights, has led to a hotchpotch of state laws and court decisions—both federal and state—that provide some protection under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. However, that is no substitute for the U.S. Supreme Court interpreting the U.S. Constitution as providing implicit protection of these rights.

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