Curriculum vs. Congress vs. Courts: Why can't they agree on public education?

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Introduction

Puritans opened the Boston Latin School, the first public school in America, in 1635 in Boston, Massachusetts.¹ The record of proceedings in Congress first mentioned public education in a discussion on the admission of Ohio into the Union in 1803.² The United States Supreme Court first addressed the issue of allotting public lands for construction of public schools in 1815.³

Today, there is an inexcusable discord in the ways that America approaches public education. Currently, the primary view on education curriculum is the Best Practices model, which promotes student-centered learning, cognitive experiences, and social relationships in helping teach children. However, the talk in Congress is constrained to No Child Left Behind and Race To The Top legislation, where policy is concentrating on accountability for local school organizations. On another equally different plane, the Supreme Court has been indecisive in finding any substantive right to education and has only flirted with the possibility of a right to a “minimally adequate education”, although when public education is provided it must be done so with some modicum of equality.

Unfortunately, these approaches to teaching our children are not consistent with each other. What children need is not included in the current policies supported by Congress and when families go to the courts to try to find the answers they are routinely discouraged. The law

² 12 Annals of Cong., 7th Cong., 2nd Sess. at 1329 (Feb 2, 1803) (John Randolph, Jr., Chairman of the Committee).
³ Town of Pawlet v. Clark, 9 Cranch 292 (1815).
is literally standing in the way of successful classrooms. The result is a permanent damper on American efforts to educate our children.

“Best Practices” in the Real World

Today’s state-of-the-art teaching is based on Best Practice. Best Practice is the research-based model of classroom instruction developed by our nation’s professional teaching organizations. Best Practice is comprised of thirteen principles; experts agree that children learn best when these thirteen interlocking principles are utilized in the classroom. These principles are embedded in three clusters: Student-Centered Learning which includes children exploring their interests as part of the curriculum, Cognitive Experiences to help students develop skills such as analytical reasoning, interpretation, and drawing inferences, and Social Relations that promote learning through collaboration and learning to make intelligent choices.

But when it comes to government-imposed expectations for teachers, Best Practice methods are nowhere to be seen. Government funding is tied to standardized-test achievement scores, not whether teachers are able to provide the most effective strategies to help each student master the curriculum. Schools are only expected to show how many students in each school perform at or above a certain level on a multiple-choice test at a certain time and on a certain day.

Truer assessment of student learning would include a variety of testing formats so that all students would be able to demonstrate their understanding of the curriculum. In fact, part of

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4 Steven Zemelman, Harvey Daniels, & Arthur Hyde, *Best Practice: Today’s Standards for Teaching and Learning in America’s Schools* (2005).
Best Practices teaching is authentic assessment, so that students can demonstrate curriculum mastery. Valid evaluations of learning are also nowhere to be seen in education legislation. The actual test items on standardized tests are based on a state’s grade level curriculum standards. Departments of Education have adopted sets of standards for each grade level. The expectation for schools is to show that students have learned the content of those standards by answering questions correctly on a state-mandated standardized test. The expectation for children is test performance in the form of correct answer choice, rather than a true assessment of skills and concept mastery. Correct answer choice is the adopted measure of students’, teachers’, schools’, and school districts’ success, even though it has not been shown to be an accurate indicator of student learning.

Government funding is tied to the number of correct answers on a multiple-choice test. The system for measuring student performance and for rewarding or punishing schools based on those performances is completely disconnected from learning. As this is the process for procuring funding for schools, increasing student learning has no place in this process. Testing that is tied to government funding has not been shown by any empirical evidence to promote or increase student learning.

**Current United States Education Policy and Legislation**

Over the past few years, Americans have been inundated with news on our children falling behind in international evaluations of education. The federal government has responded with two major pieces of legislation: President George W. Bush’s No Child Left Behind

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7 Newmann et al., *supra*, note 4 at 316.
8 Newmann et al., *supra*, note 4 at 9.
(NCLB) and President Barack Obama’s Race To The Top\textsuperscript{11} (RTTP). Both require that by receiving funds schools must meet certain structural and achievement goals.

The purpose of NCLB is enumerated at the very beginning of the statute:

“The purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”

Achievement of this goal is hinged on flexibility for local schools but also accountability for poor results. Failure to meet achievement goals subjected school districts to intervention from federal regulatory authorities.\textsuperscript{12} In speaking about NCLB, President Bush said, “I firmly believe that thanks to this law, more students are learning, and the achievement gap is closing.”\textsuperscript{13}

RTTP also targets low-achieving school districts. The purpose of RTTP, however, is to provide funding for competitive grants for the function of:

“…achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers.”\textsuperscript{14}

RTTP is designed to reward schools who take accountability for their shortcomings in achievement by instituting broad reforms. When President Obama spoke

\textsuperscript{12} NCLB, supra, note 10.
\textsuperscript{14} ARRA, supra, note 11.
about the bill on January 19, 2010 he emphasized that the hope was to encourage all schools to “raise the bar for all our students.”

Most recently, on May 17, 2010, the anniversary of the Supreme Court decision in *Brown v. Board of Education*, U.S. Secretary of Education Arne Duncan gave the following statement:

“We reaffirm our collective commitment to providing a high quality education to all children regardless of race or background so they can succeed in college and careers and prosper in life. Education is the civil rights issue of our time. President Obama and I remain deeply committed to reforming schools so that all children receive the world-class education they deserve.”

These lofty goals of the United States government are admirable, but 90.9 percent of public elementary and secondary school funding in the 2006 fiscal year came not from the national government, but from state and local governments. $20.5 billion of the $47.5 billion spent by the federal government on education in 2006 was directly allocated for the No Child Left Behind legislation. That means that a portion of that small 9.1 percent came with strings attached that mandated curriculum goals in classrooms that accepted that money.

**The Supreme Court and Public Education**

When families and communities are not receiving a usable public education from existing policy, or more often looking at the community next door and seeing a vastly superior system of

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education, they turn to the courts to find an answer. However, the United States Supreme Court has maintained a hands-off approach to applying due process and equal protection principles to public education except in the most extreme circumstances.

As early as 1899 the Supreme Court was content to find that disparities in funding for public schools did,

“…not violate any of the provisions of [the Fourteenth] amendment. It does not abridge the privileges or immunities of citizens of the United States, nor does it deprive any person of life, liberty, or property without due process of law, nor does it deny to any person within the state the equal protection of its laws.”

This early statement by the court in Cumming v. Board of Education of Richmond County was made in the process of denying blacks access to all-white schools receiving state money, even under the separate-but-equal doctrine approved by Plessy v Ferguson.

The actions of the court in Cumming would be overruled based on the Equal Protection Clause of the Fourteenth Amendment in the landmark decision of Brown v. Board of Education. But, when the time came to protect access to education through adequate and equal funding for schools, the Supreme Court stopped short. In San Antonio Independent School District v. Rodriguez the court found that constitutional review of state-imposed inequalities based on socio-economic status did not require the same strict scrutiny as fundamental rights under the Due Process Clause or inequalities based on race under Brown and the Equal Protection Clause. The bottom line after Rodriguez is that there no federal fundamental right to education in the United States Constitution; it is not expressly written, nor can it be implicitly

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19 Cumming v. Board of Ed. of Richmond County, 175 U.S. 528, 543 (1899).
20 Plessy v Ferguson, 163 U.S. 537 (1896).
found. So any state who chooses to institutionalize an imbalance in public school funding will not offend any fundamental right or suspect class and their actions will be only be minimally scrutinized for rational relationship to a legitimate governmental interest.

On the flip side, the Supreme Court does not hesitate to sing the praises of educating America’s children whenever they are in a less tenable position than establishing a fundamental right to public education. For example, when education was not provided equally to citizens of different races in *Brown v. Board of Education* the court stated that,

“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…In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”

The court went so far as to discuss the differences in achievement and opportunity caused by the inequalities entrenched in the American system of separate public education – all in the name of the Equal Protection Clause used by *Rodriguez* to uphold policies discriminating based on socio-economic status. Empirical studies since that time have confirmed the action of the Supreme Court to integrate schools positively affected the racial achievement gap in education.

On numerous other occasions the Supreme Court has taken time to describe the benefits of education. In the case of *Abington School District v. Schempp* the court declared that, “we

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have recognized public schools as a most vital civic institution for the preservation of a
democratic system of government.”

In *Ambach v. Norwick* the court echoed their statements in *Schempp* supporting education as, “the primary vehicle for transmitting “the values on which our
society rests.”

The court further praised public schools for, “culculating fundamental values
necessary to the maintenance of a democratic political system.”

The court in *Wisconsin v. Yoder* explained the importance of education to democracy: “as ... 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 and independence.”

The Court also spent time assessing the rights of parents to educate their children under
the Due Process Clause, and in these situations they were equally ready to jump to the protection
of education. The court stated that the liberty guaranteed by the Constitution, “denotes not
merely freedom from bodily restraint but also the right of the individual…to acquire useful
knowledge,” in protecting people from prosecution for teaching the German language to
schoolchildren in *Meyer v. Nebraska.* The court goes on to declare that, “The American people
have always regarded education and the acquisition of knowledge as matters of supreme
importance which should be diligently promoted.”

Education of children is of such importance that parents are given some Constitutional
protection by the Supreme Court to control the education their children receive as part of their
fundamental right to raise their children. This includes the teaching of foreign languages upheld

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27 *Id.* at 77.
30 *Id.*
in Meyer, choosing private education to satisfy compulsory attendance laws\textsuperscript{31}, and withdrawing a child from school to comply with personal religious rights under the First Amendment\textsuperscript{32}.

Despite their distanced approach to truly equalizing education, the Court has had to acknowledge the importance of education to at least a minimal degree. In the case of Plyler v. Doe the court struck down the denial of public education to the children of illegal immigrants declaring that, “today, education is perhaps the most important function of state and local governments.”\textsuperscript{33} They suggested that while education is not a substantive “right”, “neither is it merely some governmental “benefit” indistinguishable from other forms of social welfare legislation.”\textsuperscript{34} The court seems to give some deference to education as an institution that would receive special consideration with regards to the Constitution:

“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.”\textsuperscript{35}

Four years after Plyler, the court introduced the concept of a right to a “minimally adequate education” that may exist for America’s children. The court in Papasan v. Allain criticized the plaintiffs for failing to claim that actions of the state deprived them of a minimally adequate education, but at the same time refused to openly recognize such a right that might garner heightened constitutional review. However, the court did leave the issue open for later discussion.\textsuperscript{36}

\textsuperscript{31} Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).
\textsuperscript{32} Wisconsin v. Yoder, 406 U.S. 205 (1972).
\textsuperscript{34} Id. at 221.
\textsuperscript{35} Id.
At the end of the day, a minimally adequate education is still a far cry from the protection strict scrutiny review provides when the administration of public education violates a fundamental right or offends a suspect class. It certainly looks and sounds much different than the “foundation of citizenship” described in Brown or the education that was to be “diligently protected” in Meyer.\(^3^7\)

The Discord in Providing Public Education

What are we left with when everyone agrees that education is important, but Congress won’t fund it and the Supreme Court won’t require it? No answers are apparent for a child and their parents who are seeking education that will be effective and give that child a meaningful opportunity to achieve their potential. If the subject is looked at logically though, many answers reveal themselves.

First of all, if the federal government is going to base much-needed funds on mandated curriculum goals, they need to provide the funding commensurate with achieving those goals. If a school needs new textbooks to teach the material on a standardized achievement test, then they should be able to procure those funds from the government that mandates their students take such standardized achievement test.

Second, there needs to be a real connection between what legislation mandates and what truly happens in the classroom. Those who are genuinely interested in improving education need to look at the methods that are proven to increase student achievement and recognize the kinds of assessment that indicate students, by experiencing those Best Practices, are achieving mastery of the adopted curriculum goals. Teachers are certainly willing to adopt best practices and their coordinating assessments when they are given the training, time, and support to implement them. Ignoring what teachers need to be able to provide all students with the best teaching methods has

\(^3^7\) Brown, supra note 21 at 493; Meyer supra note 29.
been the norm in federal and state mandates. Schools and teachers simply being punished because children do not perform at some arbitrary satisfactory level on a questionably designed standardized test is not improving education. Schools and teachers need to be given the funding for the materials and teacher training that is necessary to give all children the opportunity to have an education that can be measured with reliability and validity. Only when schools and teachers have what they need to do this should testing be used to measure student academic growth and achievement.

Third, if public education in America truly so vital to the survival of the country and the prosperity of our citizens, then the Supreme Court should treat education as a fundamental right. It defies logic to give parents such broad rights over the education of their children when the children themselves have no right to that education. Neither concept is explicitly stated in the words of the Due Process Clause of the Fourteenth Amendment, yet both are of equal implicit importance. However, even parents cannot challenge the discrimination in funding that puts schools at a distinct disadvantage, despite the fact that funding is clearly associated with student performance. The evidence is so clear that every branch of the federal government has acknowledged the importance of education in helping children grow into contributing members of our society. Education is fundamental, that much is apparent. The current favor of the Supreme Court to restrict previously evolving provisions of the Constitution does not eliminate the need for protection of rights fundamental to the liberty of American citizens.

Fourth, the Supreme Court should recognize that Americans of low socio-economic status are a suspect class in need of heightened protection from discrimination under the Equal

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Protection Clause of the Fourteenth Amendment. Socio-economic status prevents Americans from accessing the channels of political change from the moment they are denied equal and quality education as children. The current state and local tax systems that create grave disparities in public education impose a broad and undifferentiated disability on a single group – a discrete and insular minority. The disqualification from equality is especially poignant for children, who inherit their socio-economic status from their parents; much like race or alienage, children are not in a position to change their status. In Plyler, the court stated that, “legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”

The history of purposeful, unequal treatment of those with low socio-economic status in education funding should not be upheld by the Supreme Court. Even if the states have legitimate interests in providing education funding in a format that is efficient for their system, purposeful discrimination and imposition of an achievement gap is not rationally related to that interest. In fact, consideration of the achievement gap caused by discrimination was sufficient for the court in Brown to strike down institutionalized disparities in public education. It is interesting now to note that studies on NCLB show that it is not improving the achievement gap, despite the efforts of Congress and the Executive. The Supreme Court is in a unique position to change the way the law prevents equality by finding that Americans of low socio-economic status are a suspect class.

Conclusion

39 Plyler, supra, note 33.
40 The analysis of this third point includes language used by the Courts in the following cases: See generally US v. Carolene Products Co. 304 U.S. 144 (1938); Romer v. Evans 517 U.S. 620 (1996); Massachusetts Bd. of Retirement v. Murgia 427 U.S. 307 (1976); Plyler, supra, note 28.
41 Brown, supra, note 21.
The efforts of the American people to achieve the successful education of every child are in jeopardy. Educators do not see support for proven curriculums from Congress, Congress doesn’t provide the resources schools need to implement even basic improvements, and when everyone turns to the Supreme Court for a resolution they are flatly denied on every meaningful argument. The answer may be either more or less intrusion by Congress, a true activist Court, or even a constitutional amendment. However, until everyone agrees on public education, moving together as a country will be impossible.