

THE JUDICIAL GIVE AND TAKE:

*The Right to Equal Educational Opportunity
in California*

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INTRODUCTION

After the U.S. Supreme Court held that education is not a fundamental right under the Equal Protection Clause of the U.S. Constitution in *San Antonio Independent School District v. Rodriguez*,¹ litigants turned to state Equal Protection Clauses to serve as guarantors of educational equality. In subsequent years, some state courts have expanded the content of state-level equal protection doctrine to include students' fundamental right to equal educational opportunity.² Central to this doctrine is that the principle of equal opportunity can and should be applied to areas of life where the state government provides services that are integral to the functioning of a democratic society and the opportunities of its citizens.

The California Supreme Court declared education a fundamental right under the state constitution in its 1976 decision in *Serrano v. Priest*.³ Since then, there has been a surge of state-level education litigation in California, which has shown no signs of slowing. Despite the mounting caselaw, the contours of California students' right to equal education remains unclear. Although the California Constitution creates an enforceable right to "basic educational equality,"⁴ the state courts have not succinctly stated the programs, services, resources, or funding necessary to satisfy this right.

¹ 411 U.S. 1, 33 (1973).

² In a frequently cited article on the use of state constitutions to protect individual rights, Justice Brennan encouraged state courts to provide more expansive protections for substantive individual rights than those provided by the federal constitution. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) ("Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism."); see also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *The Bill of Rights and the States*] (recognizing that state courts have interpreted state constitutional provisions as providing greater protections than similar provisions, including the Equal Protection Clause, found in the federal constitution).

³ 18 Cal.3d 728 (1976) (en banc).

⁴ See *Butt v. State of California*, 4 Cal.4th 668, 681 (1992) ("[T]he state itself has broad responsibility to ensure basic educational equality under the California Constitution.").

California educates a highly diverse population of over 6.2 million students.⁵ In recent years, California students have ranked near the bottom in fourth and eighth grade math and reading scores compared to students in other states.⁶ Eighty-one percent of Californians believe educational quality is a problem in California's K–12 public schools.⁷ Californians are also very concerned about inequities among students based on income, race, and English proficiency.⁸ Given the concerns over the quality and equality of education in California, it is imperative to define the scope of the state's duty to provide an education to students. For almost forty years, students, parents, and advocacy groups have turned to California's courts for guidance on the states' educational obligation, yet the caselaw remains equivocal.⁹

This article reviews the thirty-five year history of California education equal protection litigation in an effort to identify what is contained within and excluded from students' fundamental right. This article seeks to answer the question: What constitutes "basic" educational equality in California's public schools? An in-depth review of the case history reveals that California courts oscillated between granting and taking away benefits which affect students' full enjoyment of their right to a basic education. The vacillation is ongoing. Litigants continue to bring challenges under California's Equal Protection Clause, attempting to push the courts to more concretely define the scope of students' fundamental right to education, with variable success.¹⁰ Many of the recent cases are still at the

⁵ See National Center for Education Statistics, U.S. Department of Education, NAEP State Profiles: Summary of NAEP Results for California 1990–2013 (last visited Nov. 30, 2014), <http://nces.ed.gov/nationsreportcard/states>.

⁶ See *id.*

⁷ See Mark Baldassare, et al., *PPIC Statewide Survey: Californians & Education 20* (2014), available at http://www.ppic.org/content/pubs/survey/S_414MBS.pdf.

⁸ See *id.* at 17 (finding that a majority of Californians are concerned about teacher shortages in low-income areas, that low-income students are less likely to be ready for college, and that English language learners score lower than other students on standardized tests).

⁹ See James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 85 (2006) ("If courts are willing, as they should be, to determine whether state constitutions create a right to equal or adequate educational opportunities, they must be committed to defining the content of those opportunities.").

¹⁰ See *Vergara v. State of California*, No. BC484642 (Cal. Super. Ct. filed May 14, 2012); *Campaign for Quality Educ. v. State of California*, No. RG10524770 (Cal. Super.