

# Litigation and Organization

## Educational Rights in a Deliberative Democracy.

### A Book Review of *Realizing Educational Rights*

By Anne Newman

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*The American people have always regarded education and the acquisition of knowledge as matters of extreme importance. 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*

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

I HAVE A RIGHT. FROM WHERE DOES THIS RIGHT flow, how is it enforced and by whom, how do you know when the right has been violated, what is the remedy when it has been violated, and who shall effectuate that remedy? How and why do people or groups invoke the language of rights in public matters? These are but a few of the questions that come to mind when an individual asserts a right.

It is a thorny path to follow when identifying and asserting rights. Newman, in her 2013 University of Chicago Press book, *Realizing Educational Rights: Advancing School Reform through Courts and Communities*, picks her way carefully along this path, studying and elucidating the obstacles, while remaining focused on her destination: educational rights. We followed Newman on this path and found our journey with her to be provocative and enlightening.<sup>1</sup>

Stated succinctly, Newman (2013) asserts, “The right to education is a necessary precondition to fair deliberative democracy” (p. 106). She builds her argument “for a right to education as a matter of political equality” (p. 2) and proposes that “deliberative democracy cannot be sustained without a robust right to education” (p. 3). In ways illustrative of the conceptual complexity of the language and logic of rights, her treatment of educational rights is procedural in both personal and political dimensions. The right to education endorses equality among all participants while also suggesting the very preconditions necessary for that participation.



Newman’s (2013) book proceeds in two parts. The first explores political philosophy and historical events to describe the conceptual shape of assertions of the right to education. In the second, through two case studies, she applies dual lenses to empirical findings. She first adopts a legal lens to the right to education by analyzing the Kentucky case *Rose v. Council for Better Education* (1989) as an example of how school finance litigation in a state court is used to assert a right to education. She then concludes with a second lens, highlighting efforts of advocacy conducted by community organizations toward a realized right to education.

#### Part One: Educational Rights in Theory

Deliberative democracy is built upon a foundation of citizens in possession of the ability to deliberate in meaningful ways. In the first half of her book, Newman (2013) posits that deliberative democracy must protect the right to education as a sustaining ideal. Of course, one might imagine that a deliberative body, through democratic processes, could curtail a number of the resources available to disadvantaged citizens. While acknowledging that this exercise of majoritarian politics is certainly possible, deliberative democracies must provide sufficient safeguards to prevent this from happening in relation to certain lynchpin institutions, education being chief among them. Newman observes the precariousness of this protection, writing: “but as I emphasize . . . , democratic bodies are at best unreliable guardians of the rights of all students, and at worst they are the source of grave injustices” (p. 51).

Her preference for equality of access to the political process through recognition of a right to education is evident in her analysis of political theorists such as Gutmann and Thompson. Newman notes, positively, that both authors give attention to the educational implications of their engagement with deliberative theory.

Following Gutmann, Newman (2013) asserts that educational entitlements are hugely vulnerable when structured in absolute deference to the processes of democratic deliberation. Allowing deliberative bodies the “discretion to decide what constitutes an

1 The Education Law Association selected Newman’s book to receive the Steven S. Goldberg Award for Distinguished Scholarship in Education Law.

adequate education . . . provides little protection for the interests of educationally disadvantaged citizens” (p. 15). Therefore, Newman limits democratic authority so as to preserve the essence of deliberative democracy itself. She asserts that “rights claims constrain what democratic bodies may decide” (p. 114). Specifically, the right to education protects an individual’s entitlement to an education from the vicissitudes of (likely, educationally advantaged) democratic majorities.

If education is an issue of right, institutional mechanisms must exist to support that right in the face of challenges. As government is often called to act “to protect our interests or rights from interference from others” (Sullivan, 2005, p. 2), Newman (2013) endorses a recognized U.S. Constitutionally protected right to education. This opportunity to protect the right to education was presented to the Supreme Court in *San Antonio Independent School District v. Rodriguez* (1973) but, to Newman’s disappointment, the Court declined to find that education was a fundamental right deserving of the highest level of judicial scrutiny. “The Court was not convinced that education is the most important social good for realizing citizen’s political liberties” (p. 55).

Newman’s (2013) argument for the importance of a “satisfactory minimal education” (p. 55) for all citizens is strong. Citizens who lack education are likely to be marginalized in and through the political process. “Education is intimately connected to individual’s ability to participate in collective decision making as civic equals” (p. 86).

In line with this, Newman (2013) finds that a right to education requires cognitive autonomy as a buffer against political manipulation. “Citizens who are cognitively autonomous have the analytical skills to evaluate the veracity of political rhetoric” (p. 36), and “An education requires critical openness to new evidence and ideas” (p. 38).

Her requirement for intellectual flexibility is reminiscent of the Supreme Court in the classic student armband case, *Tinker v. Des Moines Community School District*, (1969), and she writes, “In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.” (Newman, 2013, p. 506). That is to say, an education for a sufficient degree of autonomy frees individuals to critique the democratic proposal being presented—a point worthy of consideration alongside the concern of the Supreme Court in *Tinker*, in which education just reflects the governmental position.

## Part Two: Educational Rights in Practice

Newman (2013) explores the themes of the second half of her text in two sections: (a) the equity and adequacy legal argument of the *Rose v. Council for Better Education* (1989) case involving the public school finance scheme of Kentucky and (b) the San Francisco community organization Coleman Advocates for Children and Youth. *Rose* casts an adequate education as a legal right enforceable by the power of the courts through review of the public funding scheme that supports the education of the State’s youth. The Coleman Advocates for Children and Youth case study reviews

education as an aspirational right, using hortatory rather than legal power to recognize and enforce the right.

The discussion of the *Rose* (1989) case is an intriguing choice. While lamenting the *San Antonio Independent School District* (1973) decision of the U.S. Supreme Court, Newman (2013) turns to the state courts to find a legal right to an education. *Rose* signals a fundamental shift in the requirement for how a state supports a public education for all of its citizens. Starting with the California Supreme Court case *Serrano v. Priest* (1971), courts judged whether a state meets its educational constitutional obligation to its youth by ascertaining whether the funding scheme is equal across salient differences. *Rose* set a new course by asking whether the Kentucky funding mechanism for public education was adequate to meet the requirements of its constitution. Public funding distributed throughout Kentucky may be equally distributed, but it may also be inadequate in providing the level of education needed to meet constitutional standards for an educated citizenry, the court reasoned. Newman argues that court decisions, like *Rose*, that focus on the adequacy of the education its youth receive, are “a necessary precondition for a just deliberative democracy. Education is intimately connected to individuals’ ability to participate in collective decision making as civic equals” (p. 86). What the U.S. Supreme Court has failed to deliver, the state courts provide by defining the education necessary for all citizens, thereby affirming the importance of education to the political health of the community.

Newman (2013) steers her second case study of advocacy for educational rights through community-based democratic politics. She places two arrows in the quiver of her argument for education as a right for all citizens. The first, as discussed above, is the legal arrow. Her second arrow is the persuasiveness in the political arena. Thus, she advances two separate lines of arguments for realizing a right to education.

Absent a legal anchor for the foundation of a right to education, Newman (2013) stresses that the right to education, while aspirational, is rooted in deservingness. Because of our humanity, education is a right “just by virtue of being people” (p. 94). Equal opportunity to receive resources and access, through education, to full participation in society is a prioritized entitlement that trumps the popular will when it seeks to diminish the individual entitlement. Aspiration confronts majoritarian principles on the conceptual level; thus, the imprimatur of the law may act as a collaborative argument for the aspirational assertion of a right to an education.

Newman (2013) continues the conversation about the place, force, and right of education. She clearly identifies the dynamic tension between the role of an autonomously educated citizen, which both supports deliberative democracy but also provides the counterbalance to the potential excesses of majoritarian rule. In this, her argument is especially well structured.

Newman (2013) has engaged legal scholars, political theorists, and educational philosophers in a meaningful and thoughtful manner about the intersection of the educational autonomy of the individual and the majoritarian principles of deliberative democracy. This is the tension she seeks to define and to resolve. Democracy is dependent upon an educated citizenry, but what are

the boundaries of the democratic processes influence on that education? Toward an answer, Newman cuts a supremely useful and navigable path.

## References

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