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17.245 The Supreme Court, Civil Liberties, and Civil Rights
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Discussion 22: Welfare & Poverty

The United States does not have a tradition of protecting, at the constitutional level, social and economic rights such as the right to health care, education, etc. Our Constitution is a "first-generation" Constitution, and differs in this respect from "third-generation" constitutions such as that of South Africa (early 1990s) which extend constitutional protection to the areas of health care and education.

Second generation Constitutions like Germany's came into being following the 2nd World War. Second generation Constitutions fall somewhere in between first and third generation constitutions in terms of the range of rights and privileges they enumerate.

How does economic inequality relate to the protections provided by the Constitution? How do we decide these issues?

In the United States, most economic debate in the constitutional arena revolves around welfare or entitlement issues, beginning with the New Deal, and developing during Johnson's Great Society in the 1960s.

Discussion of Goldberg vs. Kelly, 1970

Families cut out of welfare sue for a right to a hearing to challenge the city's decision to cut their welfare benefits. The process being challenged did not allow welfare recipients to confront adverse witnesses before aid is cut off, and therefore violates their due process rights to liberty and property, as welfare benefits are construed as being necessary to sustain life and liberty.

The Court describes the procedural context of welfare termination as follows:

"A caseworker who has doubts about the recipient's continued eligibility must first discuss them with the recipient. If the caseworker concludes that the recipient is no longer eligible, he recommends termination [397 U.S. 254, 259] of aid to a unit supervisor. If the latter concurs, he sends the recipient a letter stating the reasons for proposing to terminate aid and notifying him that within seven days he may request that a higher official review the record, and may support the request with a written statement prepared personally or with the aid of an attorney or other person. If the reviewing official affirms the determination of ineligibility, aid is stopped immediately and the recipient is informed by letter of the reasons for the action. Appellees' challenge to this procedure emphasizes the absence of any provisions for the personal appearance of the recipient before the reviewing official, for oral presentation of evidence, and for confrontation and cross-examination of adverse witnesses. [4](#) However, the letter does inform the recipient that he may request a post-termination "fair hearing." [5](#) This is a proceeding before an independent [397 U.S. 254, 260] state hearing officer at which the recipient may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the recipient prevails at the "fair hearing" he is paid all funds erroneously withheld." (Goldberg v. Kelly, www.findlaw.com)

The Court re-affirms the District Court decision, reiterating its rationale:

The court said: "While post-termination review is relevant, there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets. . . . Suffice it to say that to cut off a welfare recipient in the face of . . . `brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations

justify it." Kelly v. Wyman, 294 F. Supp. 893, 899, 900 (1968). The court rejected the argument that the need to protect the public's tax revenues supplied the requisite "overwhelming consideration." "Against the justified desire to protect public funds must be weighed the individual's over-powering need in this unique situation not to be wrongfully deprived of assistance While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process." (Goldberg v. Kelly, www.findlaw.com)

Justice Brennan's decision (majority opinion):

- J. Brennan says that because we have a welfare system, people rely on the state for their liberty and property.
- Brennan finds a violation of procedural due process—the plaintiffs are denied their property (a welfare check) and liberty without a hearing
 - The court is invoking its own understanding of what social justice requires by defining welfare benefits as a form of property (citing a now famous article on "The New Property" by Reich in the *Yale Law Journal*)
 - This could be compared to the logic used in the Lochner decision insofar as it relies on a certain substantive reading of the due process clause linked to notions of property—welfare benefits created by the state become the property of citizens who qualify for them.

Justice Black's decision (dissenting opinion):

- J. Black's legal analysis proceeds from the viewpoint of a Constitutional literalist
 - Black says that welfare is a privilege, not a right, and you only have a right to it if the state says you qualify for it, assuming its denial would not be for an unconstitutional discriminatory reason. Its denial therefore cannot be a due process violation because the state decides who qualifies.
 - Black's opinion implicitly conjures up a society in which a lot of people are cheating the system. He says that if the state doesn't cut people off, they can't expect to recover the money given out to those who are later deemed ineligible after a hearing.
 - Black also argues that if it becomes very hard to get people off of the welfare lists, then they are less likely to put people on, which ultimately means the state will be less able to serve its welfare interest.

Discussion of DeShaney v. Winnebago Social Services Department, 1989

A four year old boy was beaten severely by his father. The local hospital reports child abuse to the social services department several times. The DSS investigates but says that there is not enough evidence to take him out of custody. DeShaney was then beaten very severely, and the DSS is forced to step in. DeShaney's mother brings suit against the DSS claiming that DSS's previous knowledge and subsequent inaction resulted in a violation of her son's liberty interest under a substantive reading of the 14th Amendment.

Rehnquist says that the state has no affirmative responsibility to protect an individual from private actors unless the state is directly responsible for the conditions under which that individual is harmed. In cases of incarceration and civil commitment, the Court has ruled that a state must protect the individuals from private actors placed in charge of institutions of confinement.

Brennan dissents, saying that because the state had taken on the responsibility of trying to prevent child abuse, it has a responsibility to protect the rights of the child. DSS was the only agency with any authority to do anything about DeShaney's situation. There appeared

to be an ongoing arrangement with the father that DSS would continue observing the situation and Joshua could remain in custody of his father. DSS participates in legitimizing the abuse by repeatedly returning the child.

Rehnquist essentially admits that DSS may have failed in its duties, but says that failure to enforce laws effectively does not necessitate finding a constitutional violation. Instead, a civil remedy should be available where there is no constitutional remedy. Essentially, the Court rules that there is no affirmative right to government aid. When states don't enforce their own laws to protect citizens effectively, the federal constitution does not create a remedy.

Is there an effective analogy to the prison conditions cases? The state is the only authority with any ability to affect the situation, and so it should arguably have the obligation to protect the child.

Discussion of San Antonio School District v. Rodriguez Discussion, 1973

Background: Residents of a poor Texas school district challenge the system the state uses to fund public education. The system combines a minimum level of state funding necessary to establish public education with the remainder consisting of local funding supported by local taxes. Residents of the poor district allege that this system discriminates against poor communities who simply cannot raise as much in property taxes, thereby giving rise to an equal protection violation.

In a 5-4 decision, the majority (Powell, Stewart, Rehnquist, Blackmun, and Burger) contend that (a) the school funding system does not disadvantage any suspect class, and (b) does not interfere with any fundamental right, and thus must be upheld.

Why was this not addressed under Brown?

In Brown, the deprivation was much more obvious, and the classification criteria were explicitly racial. In this case, the nature of the classification is not obvious. The goal of the state in providing a minimum level of funding necessary to establish education and leaving the rest up to the district is to allow some level of local control of the education system. With local control, citizens can choose what community they live in based on the school system, which should be reflective of how much the community values education.

Washington v. Davis says that for there to be an equal protection violation on the basis of race, there has to be an intent to discriminate on the basis of race. Funding schools through local communities does not appear to classify based on race, even though there might be some racial correlations built into such a system.

There has to be a distinction between absolute vs. relative deprivation. If there is absolute deprivation, it is easy to strike down the system. There will always be some inequalities either within the state, between states, etc. In this case, where deprivation is relative, how do we decide when one group is so disadvantaged as compared to another as to warrant a constitutional violation? How dramatic do the disparities have to be?

The court has ruled that income differences do not implicate a suspect classification. It also has ruled that education is not a fundamental right. Therefore, it is not subject to any heightened scrutiny under equal protection or due process analysis.

Dissenting opinions filed by Marshall, Douglas, and White, joined by Brennan. White contends that the law lacks any rational basis and therefore violates equal protection. Brennan agrees, but

also gives elevated scrutiny to matters of education as involving a fundamental right implicit in the Constitution.