The Right to Education: From Rodriguez to Goss

MARTHA M. McCARTHY*

The "silence" of the U.S. Constitution on the topic of education has created many problems that must be resolved by the Supreme Court.

Is education a constitutional right?
The Supreme Court has been in quite a plight.
In 1923 the High Court said
That one has a liberty right to 'ed'.[1]
Then desegregation cases came to rule
Requiring equality in every school.[2]
But in '73 the Court changed its call,
Declaring there's no right to 'ed' at all.[3]
Hark! Another change, and in '75
The right to education is still alive![4]

THE IMPACT of the courts in shaping American public schools cannot be overemphasized. During the past few decades the federal courts have assumed a more prominent role in attempting to protect the individual's constitutional rights and balance them against the interests of the state. Sugarman has noted that the lawsuit is the "major weapon in the arsenal of those who wish to change American public schools."[5]

The entire concept of equal educational opportunities is derived from judicially created law involving interpretation of the fourteenth amendment as it applies to public schools. Justice Warren, delivering the landmark decision in *Brown* v. *Board of Education of Topeka*, stressed that "education is perhaps the most important function of state and local governments."[6] He further emphasized that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[7] The egalitarian revolution[8] coupled with efforts to balance state and individual interests has generated great controversy in the field of education by constitutional adjudication concerning desegregation,[9] separation of church and state,[10] school financing,[11] and special education.[12]

[1] Meyer v. Nebraska, 262 U.S. 390 (1923).

[2] Brown v. Board of Education of Topeka, 347 U.S. 483 (1854).

[3] San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

[4] Goss v. Lopez, 419 U.S. 565 (1975).

[5] S. Sugarman. "Accountability Through the Courts." *School Review* 82 (2): 235; February 1974.

[6] Brown v. Board of Education of Topeka, 347 U.S. 483, 493 (1954).

[7] *Ibid.*

[8] See: P. Kurland. "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined." *University of Chicago Law Review* 35: 583; 1968.

[9] See: Brown, 347 U.S. 483 (1954); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); Milliken v. Bradley, 94 S. Ct. 3112 (1974).

[10] See: School District of Abington Township v. Schempp, 347 U.S. 203 (1963); Lemon v. Kurtzman, 403 U.S. 602 (1971).

[11] See: San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

[12] See: Pennsylvania Association for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1972); Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972).

**Martha M. McCarthy, Assistant Professor of Education, Indiana University, Bloomington*

However, at the height of prospects for massive educational reform initiated through the judiciary, hopes were dampened by the Supreme Court ruling in *San Antonio Independent School District* v. *Rodriguez*. In this case the Court majority concluded that education "is not among the rights afforded explicit protection under the Federal Constitution." [13] Nor did the Court find any grounds for granting implied constitutional protection to education. Thus, by a five to four margin, the Supreme Court held that education is not a fundamental interest which is guaranteed by the equal protection clause of the U.S. Constitution. Still, the Court did not rule out the possibility that failure of a state or school to provide an adequate education for all children could violate the protections of the fourteenth amendment.[14] The decision, therefore, left the constitutional status of education uncertain. As Silard has appropriately stated: "Opponents of public school equalization won a split decision in *Rodriguez*, but they did not deliver a knockout punch." [15]

Education Is a Property Right

Nevertheless, the *Rodriguez* ruling caused many legal scholars to lose enthusiasm in exploring the constitutional basis for attacking inadequacies and inequalities in public schools. In 1975, however, the Supreme Court held that suspended students have a state-created property right to an education. The divided Court ruled in *Goss* v. *Lopez* [16] that students have a legitimate

[13] Rodriguez, 411 U.S. 1, 30-35.

[14] *Ibid.*, pp. 36-37.

[15] J. Silard. "School Finance Equalization: The Beat Goes On." *Journal of Law and Education* 2: 470; 1973.

[16] 419 U.S. 565, 575 (1975). See also Lau v. Nichols, 414 U.S. 563 (1974) where the Supreme Court ruled that Chinese-speaking children in San Francisco were entitled to special instruction in the English language. Although this case was decided on the grounds that the state action violated the Civil Rights Act of 1964, the Court definitively ruled that requiring students to learn English skills on their own before they can effectively participate in the school program "is to make a mockery of public education." *Ibid.*, p. 566.

claim of entitlement to public education since the state has decided to provide such opportunities and has made schooling mandatory. The implications of the Court's declaration that education is a property right, protected by the fourteenth amendment, may be far reaching indeed. Justice Powell acknowledged this possibility in his vehement dissenting opinion in which he claimed that the Supreme Court majority justified its "unprecedented intrusion" into the domain of public education "by identifying a new constitutional right." [17]

From an analysis of Supreme Court decisions involving education during the past three years it appears that the Court has changed horses in midstream, or perhaps more accurately, the five to four majority has shifted once more. In *Rodriguez* the individual's interest in education was not afforded even implied constitutional protection for equal protection purposes, while in *Goss* the student's property interest in education was guaranteed full protection of due process of law. It is difficult at best for one to reconcile these two decisions and ascertain the perimeters of an individual's constitutional relationship to public education.

Either the rulings are contradictory or it must be concluded that the Court is determining rights in one manner for equal protection review and in another for due process analysis. Such distinctions result in a hierarchy of rights which are afforded varying degrees of judicial protection. According to recent Supreme Court decisions, the right to vote,[18] to associate,[19] and to procreate [20] have been elevated to the status of implied, inherent liberties and thus are sheltered by both the due process and equal protection clauses. In contrast, the rights to education [21] and to welfare benefits [22] are receiving due process protection but have not been designated fundamental liberties for equal protection review.

A case can be made that the preceding distinctions are not grounded in the text of the Constitution. There is no indication that the framers meant to leave the Supreme Court at liberty to develop a scale of constitutional rights which would fluctuate with the changing composition of the Court. Therefore, it can be argued that once a personal interest is proclaimed a right, it should receive full protection under both due process and equal protection guarantees. Since the fate of implied rights presently rests in the hands of the nine members of the Supreme Court, only future decisions will determine what interests will be granted consistent judicial protection.

Although the *Goss* decision certainly has strengthened the constitutional grounds for guaranteeing education, one must be cautious before accepting this ruling as the ultimate law of the land. At best one can review Supreme Court interpretations of the Constitution and analyze protections afforded to the individual citizen at a particular moment in history, with the full realization that a pending decision may cause such an analysis to become outdated. As Shapiro has aptly stated, "once off the printed page and into the actions of men, the Constitution becomes an infinitely complex and subtle system of political behavior." [23] The shifting composition of the Court, the changeable judicial vernacular, and the recent propensity toward five to four splits in reaching decisions lend credence to Justice Powell's remark concerning the "hazard of even informed prophecy as to what are 'unquestioned constitutional rights'." [24] □

[17] 419 U.S. 565, 597 (1975). (J. Powell, dissenting.)

[18] Reynolds v. Sims, 377 U.S. 533 (1964).

[19] NAACP v. Alabama, 357 U.S. 499, 460 (1958).

[20] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[21] Compare the decisions in Rodriguez, 411 U.S. 1 (1973) and Goss v. Lopez, 419 U.S. 565 (1975).

[22] Compare the decisions in Goldberg v. Kelly, 397 U.S. 254 (1970) and Dandridge v. Williams, 397 U.S. 471 (1970). See also: T. Flygare. "Short-Term Student Suspensions and the Requirements of Due Process." *Journal of Law and Education* 3: 529, 542; 1974.

[23] M. Shapiro, editor. *The Constitution of the United States and Related Documents*. New York: Appleton-Century-Crofts, 1966. p. vii.

[24] Wood v. Strickland, 420 U.S. 308, 329 (1975) (J. Powell concurring in part, dissenting in part.)