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Public education as a situational right, privilege, and entitlement

Adams, Franklin Delano, Ed.D.

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U·M·I
300 N. Zeeb Rd.
Ann Arbor, MI 48106

PUBLIC EDUCATION AS A SITUATIONAL RIGHT, PRIVILEGE, AND ENTITLEMENT

by

FRANKLIN DELANO ADAMS

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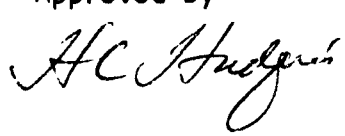

Dissertation Adviser

APPROVAL PAGE

This dissertation has been approved by the following committee of the Faculty of the Graduate School at the University of North Carolina at Greensboro.

Dissertation Adviser W. C. Tinsley Jr.

Committee Members Harold D. Snyder

Edwin D. Bland

E. Lee Spence

May 2, 1988
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This research examined the conditions that contribute to the consideration of education as a right; it also examined the situations/conditions that have established education as an entitlement and a privilege.

Education has an established, historical precedent for being elevated to "fundamental interest" status. It enjoys public, political, and congressional support for consideration of elevation to a fundamental "right" status. Only the United States Supreme Court has failed to recognize education as possessing "fundamental right" status.

Education has been pronounced by the United States Supreme Court in GOSS v. LOPEZ as an entitlement. This pronouncement was based upon the premise that rights, privileges, and entitlements are created outside of the federal areas, more specifically, outside of the federal Constitution.

Education exists as a privilege owing to the broad police powers of the states; these state rights exist from an explicit interpretation of the ninth and tenth amendments to the federal Constitution.

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CHAPTER I

INTRODUCTION

> No nation that was worth perpetuation was ever disarmed by critical and analytic competence within its population; but many civilizations which are extinct might well have been saved by such a population. (1) . . . (T)hose who cannot read, or scarcely so, have little means to learn the history of past mistakes; few such people even know the chronicles of disappointment from one decade past. Lack of information . . . seduces the illiterate to seek liaison with the single group least able to respond. (2) A people that cannot read are without an argument; they are undefended and vulnerable in this world of high technology and rapid information exchange mechanisms. (3)

The words of Jonathan Kozol speak to the heart of the issue, education is a necessary element for one to be able to participate in the society of the United States of America in the twentieth and twenty first centuries. Active participation in this society necessitates an education. The limits of an education are determined by the needs and desires of the individual. In order to participate fully, an individual must first acquire the fundamental skills of reading, writing, critical thinking, and speaking.

Written and oral communication between literate individuals is vital. Communications cannot exist without giving and receipt of information. To be effective both giver and receiver must possess basal skills.

An individual can view his own unique position within society more capably with an education. An individual may choose to participate in society, or choose not; it is an education that helps make this decision possible. An education merely provides tools, skills, or information

that an individual may or may not use; however, it is the individual who must utilize this information to make decisions that affect his future.

The impetus for acquisition of an education originates within the individual. From the requirements and influence of individuals, the state governments responded to a recognized need of its citizenry. Individual states created mechanisms to provide the process of education as well as a bureaucracy to administer it.

Education of the entire population is an ultimate goal of a civilized and highly technically sophisticated government of the twentieth and twenty first centuries. Education at public expense is and has been used for acclimating the population to an exploration and development of literate skills necessary for the perpetuation and development of that government, that civilization. Not to recognize the need and not to perpetuate the mores, knowledge, art, literature, and culture of the society is an admission of a failure of civilization.

In the United States of America, lawgivers and lawmakers demonstrated a clear intent from the onset that remained constant; these ideas are consistent throughout our nation's history. Literate men from the early days of the American colonies to the present day recognized the need that an education could fulfill. Franklin, Emerson, and Dewey are representative voices from different periods of time that speak of the importance that education has had over the past two hundred years.

Benjamin Franklin in 1743 stated:

But as from the extent of the country such persons are widely

> separated, and seldom can see and converse or be acquainted with each other, so that many useful particulars remain uncommunicated, die with the discovery, and are lost to mankind; it is to remedy this inconvenience for the future, proposed. That one society be formed of virtuosi or ingenious men, residing in the several colonies, . . . who are to maintain a constant correspondence. (4)

As Benjamin Franklin spoke for the interests of the intellectual, the aristocracy, the property class, and the landed gentry, Ralph Waldo Emerson spoke from the heart of America, the common man; in the early part of 1841, Emerson wrote:

> . . . I praise New England because it is the country in the world where is the freest expenditure for education. We have already taken, at planting of the Colonies (for aught I know for the first time in the world), the initial step, which for its importance might have been resisted as the most radical of revolutions, thus deciding at the start the destiny of this country, - this, namely, that the poor man, . . . is allowed to put his hand into the pocket of the rich, and say, You shall educate me, not as You will, but as I will: Not alone in the elements, but, by further provision, in the languages, in sciences, in the useful and in elegant arts. The child shall be taken up by the State, and taught, at the public cost, the rudiments of knowledge, and at last, the ripest results of art and science. (5)

John Dewey, a social reformer and an early advocate of a public education for the average citizen, wrote in 1897 that:

> Education is the fundamental method of social progress and reform. . . . The community's duty to education is, therefore, its paramount moral duty. By law and punishment, by social agitation and discussion, society can regulate and form itself in a more or less haphazard and chance way. But through education society can formulate its own purposes, can organize its own means and resources, and thus shape itself with definiteness and economy in the direction in which it wishes to move. (6)

Writers such as John I. Goodlad, Sara Lightfoot, Diane Ravitch, and Johathan Kozol attest to the minor renaissance of education during the period of the 1980s. The Reagan Administration's United States Department of Education through its rhetoric has reaffirmed the existence of such a rebirth of the importance of education; it stated:

> Recent opinion polls confirm that the people know and understand the importance of education to the Nation's material well-being and their own future. They are indeed willing to act on the belief that education belongs at the top of the national agenda. (7)

Although the United States has been involved in many conflicts, three periods of war reflect the activity that demonstrate the difference between political rhetoric and action. Following three wars involving the American people, Americans witnessed the massive infusion of American government money to aid and promote education as a fundamental interest: The American Revolution (1789 - 1800), The Civil War (1865 - 1884), and World War II (1944 - 1955). With the use of federal monies, the federal government has shown its regard for education.

STATEMENT OF THE PROBLEM

This is a study to determine whether public education in the United States of America is a situational right, entitlement, and privilege. The research is concerned with the situations that establish public education in the United States as a fundamental interest to the people. The research reflects the conditions that determine the definition and classification of the right, entitlement, and privilege to a public education; and the possible consequences of the definition and classification.

RESEARCH QUESTIONS TO BE ANSWERED

The study focused on examining education as a situational right, entitlement, and privilege. To facilitate the study, the following questions were explored:

A. Under color of the Constitution, when is education at public expense a "fundamental interest?"

B. When is education at public expense a "right?"

C. When is education at public expense an "entitlement?"

D. When is education at public expense a "privilege?"

E. What situations must exist for education to be considered a right, an entitlement, or a privilege protected by the federal Constitution?

PURPOSE OF THE STUDY

The purpose of this study was an investigation of education as a situational right, entitlement, and privilege. By examining legal, political, historical, and social precedents, this researcher sought to identify in what situations is education at public expense a constitutionally protected right, entitlement, and privilege.

SIGNIFICANCE OF THE STUDY

From a cursory examination, education as a right, an entitlement, and a privilege appeared to be contradictory in theory and practice. It is significant to have a clear understanding of when education is a protected right, an entitlement, and/or a privilege.

Education has variously been perceived as being a fundamental right, an entitlement, and a fundamental privilege; however, none of these perceptions of the role of education are mentioned specifically in the United States Constitution. Yet, education carries over two hundred years of public support unlike other unenumerated rights under the protection of the United States Constitution.

Education as a right was predicated upon the concept that from the definition of a right, people established education on an equal par with

other historical rights. These rights appeared to vary with the group assessing the fundamental nature of the perceived right. However, education appeared to have a common bond that was present in the historical rights mentioned specifically in the Constitution. The States of the Union have included education in the provisions of their individually written constitutions as a protected right. Few state governments of the federal union have found education not possessing the necessary fundamental interest status to be included in their state constitutions.

Education as an entitlement was explored from the point of view that state laws have mandated attendance of "school age children." The population was entitled to a free and public education in that the states have provided the mechanisms and bureaucracy for the public education; once the state has mandated attendance and provided provisions for noncompliance, the population was entitled to participate in a public school education.

Education as a privilege was examined on the basis of legal precedents. Education as a privilege extended to include the premise that a free and public education was provided for the general population of a given state; it was perceived that it was an exercise that could have participation or the population could opt for private or sectarian schooling while maintaining the public school privilege to attend.

The importance of education as a right, entitlement, and privilege is the significance that the judiciary attaches to each classification. Each of the classifications of education carries varying weights of constitutional protection; as the judiciary considers the weight of a right against an entitlement, the protected right has the greater value. As an entitle-

ment is balanced against a privilege, the entitlement has greater weight.

Establishing education as a protected right would require greater weight of responsibilities by the state governments. It is therefore of considerable importance to examine the classifications of education to determine which classification is applicable.

DEFINITION OF TERMS

To permit a consistent and understandable discussion, it is necessary to provide a definition of terms that are used throughout this study. For the purpose of this study, the following selected terms are defined.

ARBITPARY - A performance of an issue in an "arbitrary manner" as something fixed or done capriciously or at pleasure, without adequately determined principle; not funded in the nature of things; not rational; not done or acting according to reason or judgment in law; depending on the will of the individual alone; absolutely in power. (8)

CLASS ACTION - A lawsuit brought by representative members of a large group of individuals on behalf of all the members of the group. (9)

CONCURRING OPINION - An opinion, separated from that which embodies the views and decisions of the majority of the court, prepared and filed by a judge who agrees in the general result of the decision, and which either reinforces the majority opinion by the expression of the particular judge's own views or reasoning, or voices his disapproval of the grounds of the decision or the arguments on which it was based, though approving the final result. (10)

CONTRACT - An agreement between two or more individuals that affects their legal relationships. (11)

DEFENDANT - An individual who is sued and is called upon to make a

satisfaction for a wrong complained of by another. (12)

DICTUM - A statement, remark, or an observation made by a judge in a judicial opinion that is necessary for the resolution of the decision in the case. (13)

DISSENTING OPINION - An opinion disagreeing with that of the majority of the court that is given by one or more members of the court (14)

DUE PROCESS - A law in the regular course of administration through courts of justice, according to those rules and forms that have been established for the protection of private rights. (15)

EDUCATION - It is "the knowledge and development resulting from an educational process;" it implies that a process of instruction is utilized to promote an evolution of latent potential within the individual. (16)

EDUCATIONAL CLASS OF INDIVIDUALS - Children between the ages of 5 and 18 years of age committed to attend an institution of instruction by the state in order for the individual to receive a state-mandated prescribed educational program of instruction.

ENTITLEMENT - A complete right to something once a person shows that he or she meets the legal requirements to get it. (17)

FINDING - A decision of a court on the issues of the facts presented in the case to the respective court.

MINIMAL EDUCATION PROGRAM - A program of instruction that has been developed and financed by the state government and legislature to achieve minimal standards of academic achievement by the Educational Class.

MINIMAL STANDARDS - An acceptable basis for judging the acquisition of skills and information by the Educational Class of individuals.

PRIVILEGE - It is an advantage that is not enjoyed by all, equally.

It is a "basic right that cannot be taken away; it is a special advantage, as opposed to a right;" it may be said to be an exemption from a duty others must perform. (18)

PROCEDURAL DUE PROCESS - Guarantees procedural fairness where the government would deprive one of his property or liberty. This requires that notice and the right to a fair hearing be accorded prior to a deprivation. (19)

PROPRIETARY FUNCTIONS - Those functions that are exercised by a municipality for the improvement of the territory within the corporate limits, or the doing of such things as inure to the benefit, pecuniarily or otherwise, of the municipality. Things not normally required by law or things not governmental in nature. (20)

PUBLIC SCHOOL EDUCATION - A general and uniform system of free public schools provided throughout the state, wherein equal opportunities are provided for all students in accordance with the individual state's constitutional limitations. Tuition shall be free of charge to all children of the state. The individual state prescribes the limits of the school year and of the school day. The state is responsible for certifying the teachers to teach and is responsible for operating and maintaining the schools throughout the state. (21)

RIGHT - Something that is morally, ethically, or legally just in the body of common laws or that has been established by historical precedent. (22)

STRICT - It is something that is exact, precise, or is governed by exact rules. (23)

STRICT CONSTRUCTION - An interpretation by adherence to the literal

meaning. (24)

SUBSTANTIVE DUE PROCESS - The constitutional safeguard that requires that all legislation, state or federal, must be reasonably related for the furtherance of a legitimate governmental objective. (25)

SUMMARY JUDGMENT - A pre-verdict judgment rendered by the court in response to a motion by a plaintiff or defendant, who claims that the absence of factual dispute on one or more issues eliminates the need to send those issues to the jury. (26)

TERM OF COURT - A definite time period prescribed by law for a court to administer its duties. (27)

TRUST - A right of property, real or personal, held by one party for the benefit of another. (28)

VACATE - A decision by the court which render an issue null, having no legal standing, is to set aside. (29)

METHODOLOGY

The researcher used three approaches in the identification of data sources. The first approach concentrated on the identification of data in primary sources relevant to the research topic. Three major primary sources were used for information in the education law section, one for Supreme Court opinions, one for lower, federal and state court opinions, and the other from judicial papers.

First source, Supreme Court opinions were identified through the American Digest System, NOMEX, and a database search using the Western Carolina University's library computer. The Supreme Court opinions examined were up to and including opinions handed down in 1987. From these sources, the researcher compiled a bibliography of case law cita-

tions. Using these citations, the researcher then located these cases in the appropriate volumes of U. S. Reports, and the Lawyer's Edition of the Supreme Court Reporter.

Second source, lower federal and state court opinions were identified through the NOLPE School Law Reporter, the United States Law Week Reporter, LOMEX, and a database search using the University of North Carolina at Asheville's library computer. The lower federal court opinions examined were up to and including opinions handed down in 1987. From these sources, the researcher compiled a bibliography of case law citations. Using these citations, the researcher then located the cases in the appropriate volumes of the National Reporter System: the Federal Reporter, Second Edition; the Southeastern Reporter; the Federal Reporter; the Northeastern Reporter; the Pacific Reporter, Second Edition; and the California Reporter.

Third source, relevant judicial papers were obtained from the published writings and autobiographical works of the present and past justices of the Supreme Court. The writings of the present and past justices of the Supreme Court provided insight to the Supreme Court's decision making process. These sources were located from a computer search of the database of the University of California at Los Angeles's Law School. Law school journal articles on the Constitution and education by justices of the Supreme Court were located using the computer database search at the Wake Forest University library.

The second approach used in the identification of data sources examined applicable secondary sources that provided general information on the research topic. A search for the relevant literature was conducted

using three sources. First, a complete search of Educational Resources Information Center (ERIC) files was conducted at Western Carolina University library; second, legal periodical articles were identified through the Index Guide to Legal Periodicals. Finally, a computer database search was conducted to cross-check the accuracy and completeness of the assembled bibliography from the first two sources; this was accomplished using the Toronto PRO-NET Communications, System One in Toronto, Canada.

The general, philosophical aspects of the research topic were located through ERIC and an examination of Dissertation Abstracts. Relevant, current statistical information was obtained from publications of the National Center for Education Statistics.

The third approach used in the identification of data sources examined secondary sources related to the questions raised by the study. Journal articles related to the research topic were located through the use of the Reader's Guide to Periodical Literature, the Education Index, the Index Guide to Legal Periodicals, and a computer database search using the computer at Western Carolina University library. Books, sections of books, educational newsletters, documents, pamphlets, newspaper articles, broadcasts of television and radio, and cassette tapes were examined.

In order to verify that a complete bibliography of case law had been identified, the researcher cross-checked for accuracy through the Yearbook of School Law and each of its volumes corresponding to the time frame of this study, the NOLPE School Law Reporter was examined for citations of the most recent opinions on the subject, and a database search

was conducted using Western Carolina University's mainframe computer for an examination of the files on the research topic from the U. S. Database Index Files in Los Angeles, California.

DELIMITATIONS

The study examined legal questions involved with the evolution of education as a right, an entitlement, and a privilege from BROWN I (1954) to the present (1988). The study was restricted to an examination of education in the United States of America, the territories, and trusts. Education, a right, an entitlement, and a privilege, was restricted to an exploration of the public realm, kindergarten through secondary school education. An examination of the area of education was limited to a narrow area to facilitate a clear discussion of education as a right, an entitlement, and a privilege.

ORGANIZATION OF THE REMAINDER OF THE STUDY

The balance of the study was divided into four major parts. Chapter Two provided an examination of reserach and literature concerned with the legal evolution of education as a fundamental interest, a right, an entitlement, and a privilege. Chapter Three enlarged upon the legal aspects of the consideration of education as a constitutional, fundamental interest with accompanying rights, entitlements, and privileges. Chapter Four presented an analysis of other pertinent litigation decided in the area of public school education rights, entitlements, and privileges. Chapter Five presented a summary, conclusions, and recommendations drawn from the information advanced from the preceding chapters.

CHAPTER 1

1 Jonathan Kozol, ILLITERATE AMERICA (New York: Doubleday Publishers, 1985), p. 100.

2 Ibid, p. 164.

3 Ibid, p. 178.

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5 Ralph Waldo Emerson, "V. Education," in Robert Ulich, Editor, THREE THOUSAND YEARS OF EDUCATIONAL WISDOM, Second Edition (Cambridge, Massachusetts: Harvard University Press, 1954), p. 578.

6 John Dewey, "My Pedagogic Creed: Article Five - The School and Social Progress," in Robert Ulich, Editor, THREE THOUSAND YEARS OF EDUCATIONAL WISDOM, Second Edition (Cambridge, Massachusetts: Harvard University Press, 1954), p. 617.

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8 Daniel Oran, LAW DICTIONARY FOR NONLAWYERS, Second Edition (New York: West Publishing Company, 1985), p. 26.

9 Steven H. Gifis, LAW DICTIONARY (Woodbury, New York: Barron's Educational Series, Inc., 1975), p. 33.

10 Gifis, op. cit., p. 144.

11 Oran, op. cit., p. 73.

12 Gifis, op. cit., p. 56.

13 Ibid, p. 59.

14 Ibid, p. 144.

15 Ibid, pp. 65 - 66.

16 WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (Springfield, Massachusetts: G. & C. Merriam Company, Publishers, 1970), p. 263.

17 Oran, op. cit., p. 110.

18 Ibid, p. 238.

19 Gifis, op. cit., p. 66.

20 Oran, op. cit., p. 244.

21 PUBLIC SCHOOL LAWS OF NORTH CAROLINA (1983), 115C-1, p. 13.

22 Oran, op. cit., p. 271.

23 Ibid, p. 292.

24 Ibid, p. 293.

25 Gifis, op. cit., p. 66.

26 Ibid, p. 204.

27 Ibid, p. 209.

28 Ibid, pp. 213 - 214.

29 Ibid, p. 218.

CHAPTER TWO

REVIEW OF THE LITERATURE RELATING TO EDUCATION AS A RIGHT, AN ENTITLEMENT, AND PRIVILEGE

INTRODUCTION

Education is a life-long process that commences at birth and continues progressively until death. Education, therefore, is a process of amassing information over a period of time, organizing it, analyzing it, and ultimately understanding it. Learning, discovering, and passing information to future generations is education. The process of education is individually motivated. The reasons for the acquisition of an education may range from the simple, building a better mouse trap, to the more cerebral, discovering the reasons for the existence of man.

> To become educated is:
> . . . (T)o realize our human potential. We alone of all creatures have the ability to break out of the narrow circle of the moment, and until we do, until we reach beyond ourselves, we are limited and immature. "To know nothing of what happened before you were born is to remain forever a child," Cicero wrote. Or as Santayana put it, "When experience is not retained, as among savages, infancy is perpetual." By reaching into the past, we affirm our humanity. And we inevitably come to the essence of it. . . . The past also offers lessons, and although we shall surely dispute what they are, even as we do so we enlarge our perspective on the present. . . A system of education that fails to nurture memory of the past denies its students a great deal: the satisfactions of mature thought, an attachment to abiding concerns, and a perspective on human existence. (1)

> (W)e put our sense of nationhood at risk by failing to familiarize our young people with the story of how the society in which they live come to be. Knowledge of the ideas that have molded us and the ideals that have mattered to us functions as a kind of civic glue.

From 1607 until 1988, education has exerted a tremendous force upon

the early settlers, citizens, and "new citizens," alike. The processes for the acquisition of an education, like the reasons, may range from the simple to the more sophisticated. Education of future generations of this republic is an important key to the perpetuation of democratic ideals and of the republic, itself.

This chapter will contain a discussion of relevant background information and brief history of education, education as a right, an entitlement, and a privilege. The chapter is divided into five major sections. These sections are: (1) A brief history of education in the United States; (2) Legal Evolution of Education; (3) Education as a right; (4) Education as an entitlement; and (5) Education as a privilege.

The first section will trace the general development of education from 1640 to the present; it will concentrate on areas of significant development that lend support to education as a right, an entitlement, and a privilege.

The second section will address the concept of education placed within the framework of the United States Constitution. The section will establish working definitions from which to examine education as a legal issue.

The third section will examine education as a right; the section will concentrate on providing an examination of education as a right using relevant texts. This section will provide criteria to consider when examining education as a legal right.

The fourth section will address education as an entitlement; this section will contain an examination of the available literature and court opinions as they relate to establishing education as an entitlement.

The fifth section will contain an examination of education as a privilege; the section will address education's being a protected privilege.

A BRIEF HISTORY OF PUBLIC EDUCATION

Public education in the United States has undergone many significant changes during the history of our republic. The history of education may be divided into five distinct periods in which the population of the United States has been influenced and affected. These are:

Colonial Beginnings 1600 - 1840

Civil War Period 1840 - 1900

World War II Period 1940 - 1956

Age of the Baby Boomers 1957 - 1980

The 21st Century and Beyond 1960 - 2020

The educational process has had three distinct influences that have had an impact, positive and/or negative, upon the learning process in American schools; they are: (1) religion, (2) science, and (3) technology and computers.

In order to provide a cursory examination of the history of education and its impact on this unique American experience, several initial points of reference must be made. These points provide a guidepost to use in trying to understand the full impact that education has had upon the founding of the republic and of the impact that it has had upon the lives of the average citizen of the United States.

First, the American colonial cultures were comprised primarily of an agrarian society. (3) Second, the United States Constitution was not directed to serve or protect the common man of the American colonies; it was directed to service the needs of the aristocracy who controlled and

operated the American government. (4) Third, education was considered to be a privilege of the wealthy aristocracy and intelligensia. (5) Fourth, education had assumed a more prominent place in the twentieth century society than in the seventeenth century. (6) Fifth, James Madison saw education as a function of the state primarily due to the influence of Thomas Jefferson. (7) Sixth, states were viewed as individual soverign states that guarded their governmental authority jealously. (8) Seventh, education as a political force did not emerge significantly until after the end of World War II. (9) Finally, from the early 1600s, the individual states were foresighted enough to include in their constitutions education as a fundamental right.

COLONIAL BEGINNINGS

Early education history was centered primarily around the towns and villages that grew along the Atlantic seaboard. They were scattered with great distances between; therefore, education was neither well co-ordinated nor consistent. The parents of children joined with the local clergy to provide instruction in reading and arithmetic. The primary intent of the instruction was to enable the children to read the Bible. As early as 1642, Massachusetts required a type of mandatory public school education.

> Our European origins may have provided some of the elements of modern education, but not the foundation of organization or of equality of educational opportunity. It was not until after the Colonial period in America that England began to be interested in the education of the poor. Public funding of education was understandably not a part of an educational system which provided only for the wealthy, the privileged, the aristocratic. (10)

Education throughout the thirteen colonies ranged from the good in the New England area to the non-existent in the southern Georgia area.

The types of school available ranged from informal, small arrangements to quite formal and rigid academies. Instruction and the quality of instruction ranged from very poor to excellent.

> In New England, the Puritans, (Calvinists) established and maintained an educational orientation of lasting influence. They brought with them from England the strong Calvinist theory that piety was based on intelligence. To them, education was an instrument of religious salvation, providing the means by which a person might study the Bible, Calvinist doctrine, and also the general laws of the Commonwealth. It was a rigid system based on their concept of the need for the training of the young, who were believed to be savage creatures, conceived in sin and treated as miniature adults. (11)

From an historical point of view, the American colonies generally viewed education as a luxury item for the families of the wealthy businessmen and the aristocracy.

> The New England attitude was a singular exception, both in this country and even abroad. Education was still generally considered to be a luxury, not a necessity. To be illiterate was no reproach, and it was possible to follow many pursuits successfully with no more education than that of daily work and experience. (12)

> A law was enacted in 1642 which required parents and guardians . . . to attend to their children's ability to read and understand the principles of religion and the laws of the Commonwealth. This law closely followed the English Poor Law of 1601 which required apprenticeship of pauper children. In 1647, the General Court enacted the famous 'Ould deluder, Satan Law' which required every town of 50 or more families to 'appoint one within their towne to teach all such children as shall resort to him to write and reade,' and the law further provided that the teacher's 'wages shall be paid either by ye parents or masters of such children, or by ye inhabitants in general . . . .' (13)

These law makers anticipated the future growth of education in the New England area. It had been suggested that:

> First, the state could compel education. The Law of 1642 provided this precedent, but it did not establish compulsory attendance at a school. Second, the state could require civil units to maintain teachers. This was done in the Law of 1647, but again there was no forced attendance, just 'such children as shall resort to him.' Third, both of these laws provided for the supervision and control

> of education by civil authorities. Fourth, permission was granted, but no order given to use public funds to support education. Fifth, those public funds, if used, could be raised by common taxation of all property. (14)

Although there existed historical precedent for education, it must be held that:

> Two other laws previously passed by the General Court in 1634 and 1638. . . established the principle of common taxation of all property for town and color benefits. (15)

> It must be constantly kept in mind that these schools were created primarily for religious reasons, especially for the ability to read and understand the principles of religion and the capital laws of this country. These schools were indeed a beginning, but were severely restricted in matters of curriculum. (16)

> The history of public education in colonial Massachusetts is essentially the history of education in colonial New England. That commonwealth originally embraced what is now Maine and New Hampshire too, so their systems and practices were used throughout the major part of the section. (17)

> In the South and in the middle Atlantic States, the matter of education was almost strictly private. There was no school system in any colony south of Connecticut before the Revolution. (18)

> The modern belief in education for all, and education's paramount importance is simply not applicable to the period of the American Revolution. The founders of the Republic were educated men . . . They held the subject of education to be still a private matter, generally under the control of the church. (19)

> The end of the war saw a bankrupt government whose major concern was survival. The period from the surrender of Cornwallis at Yorktown in 1781 to the adoption of the Constitution in 1789 was critical. The Constitution itself there is no use of the word 'education' nor is there any reference to the subject. It is interesting to note that so far as there is any record of the subject in the discussions at the constitutional convention, it was a single question relating to the power under the new Constitution to establish a national university. There was no question or discussion about public education. (20)

The first substantial effort to acknowledge the importance of education came in 1783 with the proposal by Colonel Timothy Pickering that was years ahead of its time and had a lasting impression upon the citizens of

the mid-west. This proposal was the Land Ordinance of 1785 that, in part, stated:

> . . . all the surplus lands shall be common property for the State and be disposed of for the common good; as for laying out roads, creating public buildings, establishing schools and academies. (21)

In 1787 came the Northwest Ordinance which declared,

> . . . religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. (22)

The men in Congress understood the value of education well:

> No state was ever admitted to the Union unless it made educational provisions (after 1800). (23)

In 1802 with the passage of the Ohio Enabling Act which required that territory to include an educational system within the provisions of its constitution, Congress acted consistently with each subsequent state admitted to the Union.

> To resolve any ambiguities regarding the authority of the federal government regarding education, Presidents Jefferson and Madison supported constitutional amendments enunciating an active federal role at the elementary and secondary levels and providing for a national university. Similarly, in support of a national higher education system, James Monroe called for an amendment to provide 'seminaries for all-important purposes of diffusing knowledge.' Both John Adams and John Quincy Adams also favored the establishment of a national university. (24)

> Of the twenty-three states in the Union by 1820, only thirteen had made any mention of education in their state constitutions. Of these, seven - Connecticut, Maine, Massachusetts, New Hampshire, New York, Ohio, and Vermont - had laws to provide for the implementation of acceptable systems. These were the five Calvinist New England states, plus those most influenced by settlers from New England. (25)

> The common (or public) school movement did not gain hold until the 1830's. The democratic urges spawned by the presidency of Andrew Jackson led to the belief that public education was the foundation of a strong democracy; it would permit citizens to be conversant with the issues facing the new country and to make wise judgments; it would also be a guard against oligarchy and corruption. The South was at least twenty years behind the North and West in devel-

> oping public schools, and restricted educational opportunity only to white children. (26)

THE CIVIL WAR PERIOD

The second period in the history of education was the period of time just prior to the American Civil War to the early period of the 1900s. The Morrill Act of 1862 provided each state with land grants of 20,000 acres per senator and member of Congress, the proceeds from the sale of these lands would be used to erect and support agricultural and mechanical colleges. (27)

The period from 1840 to 1944 produced only modest gains in the area of educational rights. The most significant movement noted during this period was the shift from education as a church responsibility to that of a state responsibility. A long series of wars in Europe during this period produced an almost endless wave of immigrants fleeing the conflicts and the poverty associated with them. With each new wave of immigrants, individual states recognized the limited financial reserves and resources of the local churches and assumed more of the responsibilities for providing educational opportunities. (28)

POST WORLD WAR II

The third period in the history of education was from 1940 - 1956. This period was noted for the growing importance of education. In 1944, Congress passed the Servicemen's Readjustment Act, the G. I. Bill, which provided financial support for the returning veterans who sought to continue their education interrupted by the war.

> In all, 7.8 million World War II veterans made use of the educational benefits of this program. . .They were followed by 2.275 million Korean War veterans. Most important is the precedent that the G. I. Bill set regarding federal support of higher education through the provision of broadbased student aid. Changed by successive Congresses, a descendant version remains as a major source of financial assistance to today's post-secondary students. (29)

> As the nation emerged from the Second World War, its idealism and aspirations raised high, the inequitable features of American Education seemed more unacceptable than at any time in the past, though the problem of unequal opportunity was no worse than before . . . (T)he American crusade against ignorance required that the opportunity for education be made available to all young people, without regard to race, creed, national origin, sex, or family background. . . . Idealism and aspiration alone were not enough to shake loose the shackles of the past; not enough, perhaps, to win the day, but enough to stir the nation's opportunity until the right political and social circumstances made success possible. (30)

> . . .(A)s early as 1946 and 1947, it was clear that the fast-rising birthrate would produce a 'baby boom' that would overwhelm existing classroom capacity. No less important than sheer physical need was awareness, at least among educational leaders, that the nation was entering an age of technological and scientific advance that required rising levels of education in order to maintain economic growth. (31)

> For the first time since the end of World War II, people of all political backgrounds agreed that the national interest depended on improving the quality of America's schools. (32)

AGE OF THE BABY BOOMERS

The fourth period in the history of education was the period of time following the launching of the Russian Sputnik in 1957. It has been termed the period of the "Baby Boomers" or the beginning of the "Space Age." This was a period of great turmoil in the schools and in education in general.

> The Soviet launch of the worlds' first artificial satellite on October 4, 1957 promptly ended the debate that had raged for several years about the quality of American education. (33)

> In popular parlance, Sputnik had happened not because of what the Russians had done but because of what American schools had failed to do. (34)

A crash program was initiated by Congress under the guise of the National Defense Education Act (NDEA) of 1958. Congress used exact language to describe its intent; it stated:

> . . the security of the Nation requires the fullest development of the mental resources and technical skills of its young men and women. The present emergency demands that additional and more educational opportunities be made available. (35)

> In 1963, Francis Keppel, U. S. commissioner of education, observed that in the past decade, 'more time, talent, and money than ever before in history have been invested in pushing outward the frontiers of educational knowledge, and in the next decade or two we may expect even more significant developments.' (36)

In 1964 came the Higher Education Act which stated that:

> . . . (E)very child must be encouraged to get as much education as he has the ability to take. . . . Higher Education is no longer a luxury, but a necessity. (37)

> During the decade after 1965, political pressures converged on schools and universities in ways that undermine their authority to direct their own affairs. . . . In elementary and secondary schools, almost no area of administrative discretion was left uncontested.... (38)

Today, all fifty states of the United States mention education in their constitutions as being a fundamental interest or as a right. (39)

> A general outline of the course which resulted in compulsory, free school education and therefore compulsory taxation can be divided into four phases. First came the permissive legislation which recognized the school district as an administrative unit with taxing powers. In the second phase the state encouraged the formation of school districts by providing financial aid from permanent school funds which existed from the various funding plans . . . . The third phase introduced the factor or compulsion, but was not the last step toward free education. . . . The final phase was the passage of legislation providing for the establishment of compulsory and completely tax supported public education. (40)

THE 21ST CENTURY AND BEYOND

The fifth period in the history of education was the period of time at the close of the 1960s and extends into the 2020s. In 1965, the Elementary and Secondary Education Act provided broad-based federal education aid. It doubled and doubled again the proportion of the lower education dollar coming from the federal government. Title IV of the Civil Rights Act of 1964 required:

> . . . the assignment of students to public schools and within such schools without regard to their race, color, religion or national origin. (41)

According to Notre Dame University President, Fr. Theodore M. Hesburgh, the act, with its:

> . . . built-in sanctions was able to do (in five Years) what a decision of the Supreme Court of the United States was unable to do in ten years. (42)

During the 1970s, a Department of Education was created at the cabinet level owing to the influence of President James Earl Carter.

From 1642 to 1988, education in the United States has undergone giant steps in providing the best access to information for its citizens. It has been one of the most novel experiments in the history of mankind; education was made available to every citizen and non-citizen alike regardless of background, economical resources, abilities, or physical handicap. This experiment has not been attempted by any other nation on this planet on such a major scale. It appears that the experiment has been a tremendous success. It must also be observed that the success has not been achieved without conflict.

From 1642 to 1988, education was witness to a complete change of life styles, values, job opportunities, social skills and language usage, technologies, sciences, the needs, demands, and organization of the various schools and school districts. Education in the American republic has witnessed the technological innovations and progressions from wooden sailing ships to manned space exploration. Education has played a vital role in this movement by providing opportunities to explore and dream the possibilities.

One has only to look back five years to observe the technological demands and changes in information flow to appreciate the scope of change that has occurred in the last three hundred years.

Education is an active participant in the planning and anticipation of the information needs of America's "new" population. The twentieth century has conditioned the present population to anticipate change and how to apply necessary pressure to obtain the new technology for use in the everyday life of the average American citizen. The business and industrial communities are just beginning to experience the new technologies.

Education during the twentieth century may be summarized as an experiment in adjustment to constant change. With changes in language, and terminology, the sciences, as well as the new technology, education has been hard pressed to keep up with the new demands that these changes have required.

An examination of education for the twenty first century is like practicing the art of prognostication. Who really knows what will happen to education in the years following 2001? Marvin Cetron, in his futuristic work, wondered aloud about the future of education during the early part of the 2010s. (43)

Education in the twenty first century will have new demands and new organizations, and new sets of problems. The future, the twenty first century, will see: (1) an Age of Leisure. With the popularity and availability of the personal computer, the American people will have more leisure time; (2) an Information Revolution. With more leisure time, individuals will begin to demand more and more information on an array of topics in various amounts; and (3) an Age of Service Oriented Society. The computer revolution has illustrated clearly that there is less emphasis on heavy industry and a rapidly growing importance of service or-

lented employment in the United States. (44)

The three areas described have direct implication for a reexamination of the educational structure and needs of the American population and the important role that education must play. Education in the twenty first century will be playing a key role in preparing citizens to function in the new society.

LEGAL EVOLUTION OF EDUCATION

In order to examine the concept of legal evolution, it is important to understand what legal means. It is important then to understand what is the "law" in order to discover a beginning and to establish a stopping point. Legal evolution refers to evolution of laws passed by the Congress. It also refers to a body of natural laws that have evolved from the interactions of men living in a community together; some of these natural laws have been taken from England's common laws while others have been educed from the early days of the English colonies in North America.

In the United States of America, the Constitution is the law of the land. It, therefore, is a document that contains this nation's most fundamental law. The Constitution created the institutions of our government and their relationship to each other; it also enumerated the relative powers of each of the institutions and established limits for these powers. The Constitution established the three branches of government and the concept of checks and balances in order to prevent a usurpation of power by any of the three branches.

> The Constitution is, in brief, the instrument by which the consent of the governed - the fundamental requirement of any legitimate government - is transformed into a government complete with 'the powers to act and a structure designed to make it act wisely or responsibly.' Among its various 'internal contrivances' (as James

> Madison called them) we find federalism, separation of powers, bicameralism, representation, an extended commercial republic, an energetic executive, and an independent judiciary. Together, these devices form the machinery of our popular form of government and secure the rights of the people. The Constitution, then, is the Constitution, and as such it is, in its own words, 'the supreme Law of the Land.' (45)

The law of the Constitution, or constitutional law, is a body of law that has resulted from the Supreme Court's adjudications involving disputes over constitutional provisions or doctrines. Constitutional law, then, is what the Supreme Court has interpreted the Constitution to be when evaluating disputes before it.

There are relatively few statutes that apply, interpret, and enforce themselves; these statutes require officials from governmental bureaucracies to interpret, to apply, and to enforce them.
This process of interpretation presents a conflict between the interpretor and the author of the statute.

> The interpretation of statutes is . . . not simply a process of drawing out of the statute what its maker put into it but is also . . . a process of adjusting the statute to the implicit demands and values of the society to which it is to be applied. In this sense it may be said that no enacted law ever comes from its legislator wholly and fully made. . . . When a court is confronted with contradictory statutes emanating from the same lawmaker it becomes impossible to pretend that the judge (or judges) merely draws from the words of the law what the legislator put into them, for in this case what the lawmaker has put into them is an unmanageable jumble of meaning. . . . (T)he judge (or judges) must of necessity take his guidance from some principle not expressed in the statute themselves. (46)

Alexander Hamilton addressing this unique problem of contradictions of the law passed by the legislatures stated:

> As it not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case it is the province of the courts to liquidate and fix their meaning and operation. . . . . It is a rule not enjoined upon the

> courts by legislative provisions, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable that between the interfering acts of an equal authority, that which was the last indication of its will should have the preference. THE FEDERALIST, No. 78. (47)

Fuller stated it another way:

> We have previously pointed out how fallacious it is to suppose that in interpreting a statute the judge simply draws out of its text a meaning that the legislature has put there. . . .(T)he power of the courts to declare statutes unconstitutional . . . is nowhere explicitly conferred on the judiciary by the words of the Constitution. At best it can be seen as an oblique implication of words primarily addressed to other subjects. The most secure foundation for the power does not, however, rest on the text of the Constitution, but lies rather in a necessity implicit in the whole frame of government brought into existence by the Constitution. . . . The power had to be and therefore was. (48)

The constitutional historian, Charles Warren stated that:

> (W)hat's most important to remember is that however the (Supreme) Court may interpret the provisions of the Constitution, it is still the Constitution which is the law, not the decisions of the (Supreme) Court. (49)
>
> . . . (C)onstitutional interpretation is not the business of the (Supreme) Court only, but also, and properly, the business of all branches of government. (50)
>
> The Constitution, the original document of 1787 plus its amendments, is and must be understood to be the standard against which all laws, policies and interpretations must be measured. It is the consent of the governed with which the actions of the governors must be served. (51)

And this also applies to the power of judicial review. For as Justice Felix Frankfurter stated:

> The ultimate touchstone of constitutionality is the Constitution itself not what we (the Supreme Court justices) have said about it. (52)

One of the roles of the United States Supreme Court is to adjudicate state and federal conflicts arising with respect to state rights versus federal rights. Article III of the Constitution, in part, states:

> The judicial power shall extend to all cases, in law and equity,

arising under this Constitution, the laws of the United States . . ; to controversies between two or more states; between a State and citizens of another state . . . , and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

. . .

In all cases . . . in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as the law and fact, with such exceptions, and under such regulations as the Congress shall make. (53)

The Constitution also states:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained to the States respectively, or to the people. (54)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. (55)

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens of any foreigh state. (56)

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (57)

Meese, addressing the role of law applied to the judiciary, stated:

. . .(W)e must understand that the Constitution is, and must be understood to be, superior to ordinary constitutional law. This distinction must be respected. To confuse the Constitution with judicial pronouncements allows no standard by which to critize and to seek the overruling of what University of Chicago Law Professor Phillip Kurland once called the 'derelicts of constitutional law' - such cases as DRED SCOTT and PLESSY v. FERGUSON. To do otherwise, as (Abraham) Lincoln said, is to submit to government by judiciary. But such a state could never be consistent with the principles of our Constitution. . . . (I)t would be utterly inconsistent with the very idea of the rule of law to which we, as a people, have always subscribed. (58)

. . . (T)he rule of law is still the very fundament of our civilization, and the American Constitution remains its crowning glory. (59)

Thomas Paine said:

> But if law is to remain 'king' in America we must insist that every departmnet of our government, every official, and every citizen be bound by the Constitution. That's what it means to be 'a nation of laws, not of men.' (60)

Thomas Jefferson stated that:

> It is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power. . . . In questions of power, then, let no more be heard of confidence in man, but bind him down with mischief by the chains of the Constitution. (61)

EDUCATION AS A RIGHT

The consideration of a right or a non-right for education is premised upon implicit historical evidence similar to that of the judicial right to declare a state constitutional or unconstitutional. Neither of these rights are explicitly mentioned in the United States Constitution. The power of education as a constitutionally protected right is needed; therefore, it must exist. Education occupies a position today during the period of the "Information Explosion" as did the judiciary when it created the right to "judicial review."

In order to prepare individuals for the conduct and performance of a representative form of government, it is necessary to have a literate and competent population from which to draw replacement officials to govern. The presence of an informed and educated population promotes a continuation of government and informed decision making.

The need is present, therefore, the right must exist. The fifty states have established elaborate bureaucracies and enacted statutes for governing the educational processes. Governmental hierarchies are created to educate

future leaders and thereby ensure a future government.

Few issues bring about more accelerated, directional and irrational/rational passions than administrative decisions that affect a child in an educational setting. The 1987 teacher strikes in the Chicago City school system and in Arkansas are examples of passions that education can arouse. Trying to close a small school or closing a school with declining enrollment brings about a state of heightened passions from citizens in the affected areas. Because they touch issues that directly affect the family, a school or educational issue cause parents of the school children to act and react in a state of heightened emotions.

Mortimer J. Adler, citing the words of John Dewey, stated:

> . . . a democratic society must provide equal educational opportunity not only by giving to all its children the same quantity of public education - the same number of years in school - but also by making sure to give to all of them, all with no exceptions, the same quality of education. (62)

Adler stated further that:

> At the beginning of this century, fewer than 10 percent of those of an age eligible for high school entered such schools. Today, almost 100 percent of our children enter . . . . It has taken us the better part of eighty years to go halfway toward the goal our society must achieve if it is to be a true democracy. The halfway mark was reached when we finally managed to provide twelve years of basic public schooling for all our children. At that point, we were closer to the goal that Horace Mann set for us more than a century ago when he said: 'Education is the gateway to equality.' . . . We are politically a classless society. Our citizenry as a whole is our ruling class. We should, therefore, be an educationally classless society. (63)

> In 1817, long before democracy came to full bloom in this country, Thomas Jefferson made a proposal that was radical for his day. He advocated three years of common schooling at the public expense for all the children of Virginia. But he then divided the children into those destined for labor and those destined for learning. Only the latter were to go on further to the local colleges of the time. The rest were to toil on the farms as hired hands or in the shops as apprentices. In the twentieth century, we demand twelve years of

> common schooling at public expense for every child in the country. It is no longer a radical demand. . . . We believe . . . that all children are destined for learning, as most are destined for labor by their need to earn a livelihood. To live well in the fullest human sense involves learning as well as earning. (64)

Education is a right; education is a legal right. It is an argument that has been examined by many scholars from various fields of study. van Geel stated that:

> It is a central and abiding characteristic of American thought to posit the existence of fundamental individual rights and liberties that people simply have as people. These rights and liberties pre-exist the law and are not rooted in or derived from positive law-whether that law be the Constitution, the common law, or federal and state statutes. (65)

> . . . (N)either the traditional version of the doctrine of natural rights nor the U. S. Constitution has much to say regarding the negative rights of children to be free from (1) parental vetos of the choices the child makes and (2) parental intrusions into the child's interest, for instance, mental and physical integrity. Similarly, the natural rights tradition and the U. S. Constitution have little to say regarding a child's affirmative or positive rights to an education vis-a-vis the parents. . . . What we do not find in the judicial opinions is any direct creation of an affirmative constitutional right of children, for example, to an education to be supplied by their parents. The practical value of such a right would, of course, only arise in the unusual circumstance of a state that, under the influence of libertarianism, refused either to compel parents to educate their children, or, if it did compel some degree of formal education, failed to care about the adequacy of the parental educational effort. (66)

> The colony of Massachusetts in 1642 passed the first compulsory education law - a statute that required all parents and masters to provide an education both in a trade and in the elements of reading to all children under their care. Massachusetts was also the site for the first general compulsory attendance law passed in 1852. . . . Today all states have compulsory attendance law in place. (67)

> Though serious and plausible constitutional questions may be raised about particular details of a state's compulsory education policy . . . the courts have left no room to doubt that they will read the Constitution as permitting states to impose legal duties on parent and child alike to see to it that the child attends some minimum amound of formal schooling. (68)

Citing the court in STEPHENS v. BONGART, 15 N. J. Misc. 80, 189 A.

131 (Juv. & Dom. Rel. Ct. 1937), van Geel Stated:

> If it is within the police power of the state to regulate wages, to legislate respecting housing conditions in crowded cities, to prohibit dark rooms in tenement houses, to compel landlords to place windows in their tenements which will enable their tenants to enjoy the sunshine, it is within the police power of the state to compel every resident of New Jersey so to educate his children that the light of American ideals will permeate the life of our future citizens. (69)

In DELCONTE v. NORTH CAROLINA, 308 S.E. 2d 898 at 904 (NC 1983), reversed on other grounds, 329 S.E. 2d 637 (NC 1983), the court stated that:

> . . . the State has no means by which to insure that children who are at home are receiving an education. (70)

In addressing the unique relationship between the federal and state governments, van Geel stated that:

> The judiciary has not stood in the way of increased federal and state control of education, but had instead recognized the constitutional permissibility of involvement, especially federal, in education. . . . Though the federal government is in theory a government of delegated, enumerated, and limited powers, state governmental authority is inherent, not enumerated but plenary, and limited only by such external checks as the civil rights and liberties protected by the U. S. and state constitutions. States derive their authority from the tenth amendment . . . . (71)

Addressing the power of the state to govern the exercise of the process of educating the youth of the state, van Geel made several assumptions of the power of the state to control access to education. He stated that:

> State power over education is part of the states' sovereign police powers that repose in and are exercised by the state legislature. Abundant judicial opinions support the proposition that it is the state legislature that enjoys the preeminent authority to control public elementary, secondary, and higher education in the state by setting up a system of public educational institutions and arranging for its financing and regulation. It is important to stress that while the federal Constitution assumes state authority over education, it does not impose an affirmative obligation on the state to establish a public school system; however, the people of all

> states . . . have, through the states' own constitutions, imposed just such a duty. (72)
>
> . . . (A) RIGHT is ' . . . an interest protected by law.' Courts . . . will protect a 'fundamental interest.' (73)

It has generally been held that a right is an interest that is morally, ethically, and legally just. A duty follows the creation of a right. The right carries with it an obligation to fulfill the intent of the interest. For the purpose of this study, it is asserted that a "right" is equivalent to an "interest." With this is intended the assertion of a fundamental "right," or a "fundamental interest" for an individual citizen.

Roscoe Pound identified three classes of interests which the Supreme Court has held are "legally protected." They are: (1) individual interests; (2) public interests; and (3) social interests. (74)

> All three classes seem to have a place for education; and some courts have held that education is a 'fundamental interest.' A RIGHT is related to an INTEREST as the FORTRESS is to the PROTECTED LAND.' (75)
>
> Rights which are specified in state and federal constitutions are said to be 'constitutionally secure,' and are given added protection by the courts. Interests which are characterized as 'fundamental' are likewise afforded this added protection. (76)

Should not the rights retained by people under the ninth amendment be entitled to the same protection?

> The principal difference therefore between constitutional RIGHT and a 'fundamental interest' is that one is specified in the constitution while the other is not; the preferred treatment afforded both is essentially the same. This led justice Harlan to protest the practice of judges who 'pick out particular human activities, characterize them as fundamental, and then give them added protection under an unusually stringent equal protection test' - even where such activities are not shown to be arbitrary or irrational and where they are 'NOT MENTIONED IN THE FEDERAL CONSTITUTION.' (77)
>
> EDUCATION AS A 'POWER' OF THE STATE OR THE PEOPLE: Those POWERS not delegated to the United States by the Constitution, nor prohibited

> by it to the States, are ' . . . reserved to the States respectively, or to the people. The power over education is not one of the powers delegated by the Constitution to the United States, nor is it prohibited to the States; hence it is one of the powers reserved to the States or to the people.' (78)
>
> RIGHTS retained by the people are enumberated in the Ninth Amendment (to the U. S. Constitution): 'The enumeration in the Constitution of certain rights, shall not be construed to deny or disparange others retained by the people. (79)
>
> 'Obtaining an education' is not among the rights enumerated in the Constitution; hence, it may be one of the OTHER RIGHTS retained by the people . . . under the Ninth Amendment. (80)

Obtaining an education as one of the fundamental rights retained by the people under the language of the ninth amendment to the United States Constitution is not a new nor a recent concept. The following are a sample of individuals and a university law review that have explored this idea: Bertelsman (81), Black (82), Franklin (83), Franklin (84), Kunter (85), Temple University Law Note (86), Patterson (87), and Redlick (88).

In PALMER v. THOMPSON, the court held that:

> Rights, not explicitly mentioned in the Constitution, have at times been deemed so elementary in our way of life that they have been labeled as basic rights . . . . There is of course, not a word in the constitution . . . concerning the right of the people to education or to work or to recreation by swimming or otherwise. Those rights, like the right to pure air and pure water may well be rights ' retained by the people' under the Ninth Amendment. (89)
>
> . . . (T)he Ninth Amendment ' . . . shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments, and an intent that the list of rights included there not be deemed exhaustive.' (90)
>
> The only reported 'case' ever to discuss a claim based solely on the Ninth Amendment was RYAN v. TENNESSEE. (91) However, the complaint failed to present a factual situation to the court or to state a controversy or issue between the parties, and contained as its only prayer for relief a request that the court make an abstract ruling concerning the construction and effect of the Ninth Amendment. The court therefore did not have the opportunity to explain the proper application of the amendment. (92)

The court in RYAN v. TENNESSEE said that:

. . . (I)t cannot be presumed that any clause in the Constitution is intended to be without effect. (93)

In interpreting the Constitution, ". . . real effect should be given to all the words it used." (94)

An examination of the classification of interests proposed by Pound provides an opportunity to discover elements that explain the nature of an interest. It provides insight to what elements must be present in an activity and the compelling nature of the activity to the individual, the public, and the society that compels the Supreme Court to declare the activity to be of "fundamental interest" status, or a protected "right."

Pound held that individual interests, public interests, and social interests were three classifications that the Supreme Court has held as being legally protected.

INDIVIDUAL INTEREST

> . . . (T)he right is the liberty, not the value . . . to anyone of having or exercising that liberty. Thus in the view that rights entail liberties, the most liability rules can secure is a level of welfare equal to the value of the right (or rights) bearer's interest, including even his interest in his autonomy. (95)

What then has convinced the Supreme Court to identify and classify an interest as being fundamental? What is in the nature of the cases that render an interest as being an individual "fundamental interest?" The following represent the thinking and rationale that the Supreme Court at that time used to justify the classification. The question of a "fundamental interest" in: the nature of voting (96); the criminal process (97); the national origin (98);

guaranteed counsel for a prisoner (99); prohibition of comment from the court and prosecution against the accused's use of the fifth amendment (100); access to a counsel by an indigent (101); the explanation of criminal rights (102); the federal court's deciding valid an individual state statute (103); invalidation of a university's special admission program (104); custody of an individual that does not include interrogation (105); the right to have an abortion (106); the declaration that public schools are the most important function of state and local governments (107); and the power of courts to determine functions of state governments (108) is deserving of considerable examination.

From the cited examples, the Supreme Court has not had an opportunity to establish a clear procedure or theory that can be used to identify consistently what is a "fundamental interest" or a "fundamental right," and what is not.

> Perhaps the most striking example of the (Supreme) Court's acknowledgement of its fundamental incapacity to 'resolve' issues or declare rules that can be consistently followed arose recently in GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY (1985). . . . The process of trying to do justice in each case had led to a recognition of the uncertainity principle - THAT NO TEST COULD PRODUCE CONSISTENT, just RESULTS. Moreover, the (Supreme) Court concluded that no other test would produce better results.

Graham and Kravitt attempted to explain the methodology that the Court had used in reaching a decision on classifying a "fundamental interest."

> . . . (A) suspect classification or a fundamental interest . . . is often sufficient to trigger a strict standard of review. The ability of one . . . to compel more stringent review rests upon the . . . importance of an interest. While the (Supreme) Court's treatment suggests distinct dividing lines, in reality there exists continued use of suspectness and fundamentality. (110)

Graham and Kravitt used "fundamentality of an interest" and the

"suspectness of a classification" to define a synergistical function. From a contextual application, the following definitions aid in the discussion of fundamental interest issues.

FUNDAMENTALITY OF AN INTEREST - Is the importance the interest holds for an individual and the value that it holds for the total society in its historical significance.

SUSPECT OF A CLASSIFICATION - Is the stigma that is attached to being placed into a given classification; it is also the resulting majoritarian abuses as a result of this classification.

SYNERGISTICAL FUNCTION - Is both items, fundamentality and suspect, acting in conert to produce a total effect of fundamentality.

> . . . (T)he major rationalla which serve both to justify and to define fundamentality of an interest or the suspectness of a classification function synergistically. (111)

Following the SERRANO decision, a two-tiered test had been evolved by the federal court for measuring legislative classifications against the Supreme Court's interpretation of the language of the fourteenth amendment.

The two-tiered test was:

A LENIENT TEST -

> Under this . . . lenient formula, not only is legislation under review granted a presumption of constitutionality, but classifications drawn by the challenged statute need only bear some rational relation to any imaginable legitimate state purpose. (112)

A STRICT SCRUTINY - Is a standard of active review thereby subjecting such classification to strict scrutiny.

> The state must prove not only that a 'compelling interest' justifies the classification, but that the distinctions drawn are necessary to accomplish the statute's purpose. The state must demonstrate that there are no reasonable alternative means of accomplishing the stated purpose without discriminating, and that the classification

is neither impermissively overbroad nor underinclusive. (113)

> Strict Scrutiny . . . required familiar judicial balancing; the Court must weigh (1) benefits accruing to society if the classification is sustained against (2) importance of the individual or group rights infringed and (3) long term adverse effects on those interests. (114)

The Graham and Kravitt thesis is germane. (115) If strict scrutiny examination is required, what determines:

(1) The benefits accruing to a society? Who is to determine what these benefits are; who is to determine the amount of the benefit and the distinct section of the society to be benefited? If a court is to rely upon an expert testimony, who choses the expert?

(2) Importance of the individual or group rights infringed? The Constitution makes no distinction; the perception of the importance of one right having greater weight in judicial review is a cyclical interpretation. What criteria are to be used to aid a court in determining social points affecting individual rights within and without the framework of the Constitution?

(3) Long term adverse effect on these interests?

> Schools are run for the benefit of children, not the professional staff, and the public has the right to expect that educators will take stern measures to protect children from instructional malpractice. (116)

> The United States Supreme Court has noted that 'the ultimate wisdom . . . of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. (117)

The education of children is of vital importance; children are the future, the hope of the nation.

PUBLIC INTEREST

The Supreme Court has examined such diverse public interests as

telephone, electricity, automobiles, highway access, employment, welfare benefits, mass transportation, libraries, and motion pictures; it has held that they hold an unique public interest. The Supreme Court has held that they occupy an unique position that they may be considered holding special "fundamental interest" status.

There exists a similar argument for public interest as was presented for an individual interest. Pound held that there existed an equity in an examination of individual and public interests. The right to an education at public expense occupies a similar position to that of interstate transportation when considered in relation to the public interest.

SOCIETAL INTEREST

Pound holds that societal interests require special consideration when viewed from the context of constitutional consideration to such a degree that they hold "fundamental interest" status. Societal interests such as those contained in the areas of immunization, immigration, naturalization, desegration, voting, and welfare are viewed by the Supreme Court as occupying special and distinct consideration. They reflect the long term effect that certain individual and public interests have upon the future interests of the greater portion of the American society.

The Supreme Court in AMBACK v. NORWICK (118) held that education was ". . . the primary vehicle for transmitting 'the values on which our society rests.'" In BRANDON v. BOARD OF EDUCATION (119), the Court stated that "Schools instill in kids' an appreciation of critical reasoning, a commitment to democratic institutions, and a dedication to principles of fairness.'" The Supreme Court in GRIFFIN v. COUNTY SCHOOL BOARD (120) held that " Whatever nonracial grounds might support a

state's allowing a county to abandon public schools, the object must be a constitutional one . . ."

Justice Felix Frankfurter summarized the feeling of societal interests in McCOLLUM v. BOARD OF EDUCATION. (121) The Court in ILLINOIS, ex. rel. McCOLLUM v. BOARD OF EDUCATION held that public schools were" . . . the symbol of our democracy and the most pervasive means for promoting our common destiny."

It is valid to examine the case for educational rights or as a concept of "fundamental interest" through the use of the importance that education possesses regarding individual, public, and societal interests.

> The value of education to the individual is almost undeniable. It is potentially an aid to any member of society in his attempt to succeed in a given career and in his development as a mature human being. Its ramifications are economic, social, and cultural. . . . (I)ts immediate impact is often uncertain or even remote (owing to the process). Although it may be concluded that potentially education is the most important civil right, at any given moment one may not feel acutely its presence or absence, or its superiority or inferiority. (122)

Cohen stated that:

> . . . (I)t would seem that as long as education functions to aid some groups in social advancement, and as long as current systems potentially can be restructured to aid more groups, it should not be written off as a tool for (social) reform. There is no overabundance of social mechanisms to replace education as a means of securing social integration and upwardmobility for members of minority groups. (123)

Coons, Clune, and Sugarman stated that:

> . . . education should be found at least as fundamental as the criminal process because children, as a class, are more deserving than criminal defendants . . (They) . . . raise the more rational argument that whatever the status of education as a fundamental interest, or wealth as a suspect category, children, as a class, deserve constitutionally preferred treatment. (The authors) . . . begin with the proposition that as our ethical heritage treats children as being morally equal, each child deserves equal treatment. Turning to precedent, they observe that several lines of cases have seemed to carve out a 'welfare interest' in children which the state may

protect even at the expense of curbing what would be considered important civil liberties to an adult. (124)

Tradition is no more unchanging than the society that generates it. In BROWN, Chief Justice Warren specifically rejected the claim that blacks' rights to equal educational opportunity must be measured in terms of society's conception of the importance of education in 1868. The equal protection clause speaks to the role of education in society today. While one may read DANDRIDGE to say that the Supreme Court will not extend the principle of fundamental interests to include new rights, the very principles its author espouses would seem to imply that the concept both can and should be extended. (125)

DANDRIDGE may thus be distinguished from education cases on the basis of the greater "tradition" of public education. While the notion of a right to education only began to gain popular acceptance in the nineteenth century (and only formally in state constitutions, as opposed to the federal Constitution), the concept of a right to welfare is of even more recent origin. Under Justice Stewart's criteria, therefore, education would possess a superior claim to fundamentality. It is also possible to distinguish education from welfare by arguing that welfare's societal value is less integrative or preservative than that of education and in that sense is less synergistic. (126)

. . . (W)hile there is no controlling precedent, the logic of what precedents exist, with the exception of DANDRIDGE, and the implications of the concept of a fundamental interest necessitate making education an interest equal to that of voting, criminal process, procreation, or travel. . . . (O)ne may not suffer the poignant personal detriment of being denied liberty or the ability to procreate, no doubt many feel a greater personal interest in education than in voting or travel. . . . (T)he preservative and integrative role of education for society has been amply demonstrated. In this societal strand of . . . (demands created by that society) it would seem that only voting has a greater claim to superiority. (127)

Both SERRANO and VAN DUSARTZ, therefore, have legitimately extended the concept of a fundamental interest to include a commodity - education - of increasing importance in society. The inclusion of education in the class of fundamental interests is the most significant addition to date, for while the previously recognized fundamental interests have traditionally been thought of as rights, not commodities, education has often been both conceived of and priced by society as a commodity. If education is a fundamental interest, perhaps other commodities may likewise be elevated to that status. (128)

The CAHILL court citing the California court decision in SERRANO v. PRIEST stated that:

> The term "fundamental right" has not been defined. It is urged that education was so denominated in BROWN v. BOARD OF EDUCATION where the Court said that "Today, education is perhaps the most important function of state and local governments," and that "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (129)

The best argument for the inclusion of education as a "fundamental interest or right" is found in SERRANO v. PRIEST, 487 p. 2d 1241 (1971). The court satisfied that the concept of acquiring an education was possessed of enough merit to be granted "fundamental interest" or "fundamental right" status. The court stated that:

> We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a "fundamental interest." (130)

The SERRANO court gave five valid reasons for this historic classification of education as a fundamental right. They were:

1. Education is essential to maintaining democracy.

> First, education is essential in maintaining what several commentators have termed "free enterprise democracy" - that is, preserving an individual's opportunity to compete successfully in the economic market place, despite a disadvantaged background. Accordingly, the public schools of this state (California) are the bright hope for entry of the poor and the oppressed into the mainstream of American society. (131)

2. Education is relevant.

> Second, education is universally relevant. Not every person finds it necessary to call upon the fire department or even the police in an entire lifetime. Relatively few are on welfare. Every person, however, benefits from education. (132)

3. Education is perpetual.

> Third, public education continues over a lengthy period of life - between 10 and 13 years. Few other government services have such sustained, intensive contact with the recipient. (133)

4. Education molds the next generation.

> Fourth, education is unmatched in the extent to which it molds the

> personality of the youth of society. While police and fire protection, garbage collection and street lights are essentially neutral in their effect on the individual psyche, public education actively attempts to shape a child's personal development in a manner chosen not by the child or his parents but by the state. '(T)he influence of school is not confined to how well it can teach the disadvantaged child; it also has a significant role to play in shaping the student's emotional and psychological make-up." (134)

5. Education has been made compulsory by the states.

> Finally, education is so important that the state has made it compulsory - not only in the requirement of attendance but also by assignment to a particular district and school. (135)

All states of the United States have classified education as a "fundamental right" and a "fundamental interest." The following are the state constitutional provisions that provide for the establishment and maintenance of public schools in the respective states.

ALABAMA, Constitution article 14, section 256 (1819)
ALASKA, Constitution article 7, section 1 (1959)
ARIZONA, Constitution article 11, section 1 (1912)
ARKANSAS, Constitution article 14, section 1 (1836)
CALIFORNIA, Constitution article 9, section 5 (1850)
COLORADO, Constitution article 9, section 2 (1876)
CONNECTICUT, Constitution article 8, section 1 (1788)
DELAWARE, Constitution article 10, section 1 (1787)
FLORIDA, Constitution article 11, section 1 (1845)
GEORGIA, Constitution article 8, section 8 (1788)
HAWAII, Constitution article 9, section 1 (1959)
IDAHO, Constitution article 9, section 1 (1890)
ILLINOIS, Constitution article 8, section 1 (1818)
INDIANA, Constitution article 8, section 1 (1816)
IOWA, Constitution article 9, section 12 (1846)
KANSAS, Constitution article 6, section 1 (1861)
KENTUCKY, Constitution article section 183 (1792)
LOUISIANA, Constitution article 12, section 1 (1812)
MAINE, Constitution article 8, section 1 (1820)
MARYLAND, Constitution article 8, section 1 (1788)
MASSACHUSETTS, Constitution article part 2, chapter 5, section 2 (1788)
MICHIGAN, Constitution article 8, section 2 (1837)
MINNESOTA, Constitution article 8, section 1 (1858)
MISSISSIPPI, Constitution article 8, section 201 (1817)
MISSOURI, Constitution article 9, section 1a (1821)
MONTANA, Constitution article 11, section 1 (1889)
NEBRASKA, Constitution article 7, section 6 (1867)

NEVADA, Constitution article 11, section 1 (1864)
NEW HAMPSHIRE, Constitution article part 11, section 83 (1788)
NEW JERSEY, Constitution article 8, section 4 (1787)
NEW MEXICO, Constitution article 12, section 1 (1912)
NEW YORK, Constitution article 11, section 1 (1788)
NORTH CAROLINA, Constitution article 9, section 2 (1789)
NORTH DAKOTA, Constitution article 8, section 148 (1889)
OHIO, Constitution article 6, section 2 (1803)
OKLAHOMA, Constitution article 13, section 1 (1907)
OREGON, Constitution article 8, section 3 (1859)
PENNSYLVANIA, Constitution article 3, section 14 (1787)
RHODE ISLAND, Constitution article 12, section 1 (1790)
SOUTH CAROLINA, Constitution article 11, section 12 (1788)
SOUTH DAKOTA, Constitution article 8, section 1 (1889)
TENNESSEE, Constitution article 11, section 12 (1796)
TEXAS, Constitution article 7, section 1 (1845)
UTAH, Constitution article 10, section 1 (1896)
VERMONT, Constitution article chapter 2, section 64 (1791)
VIRGINIA, Constitution article 9, section 129 (1788)
WASHINGTON, Constitution article 9, section 2 (1889)
WEST VIRGINIA, Constitution article 12, section 1 (1863)
WISCONSIN, Constitution article 10, section 3 (1848)
WYOMING, Constitution article 7, section 1 (1890) (136)

Education is a "fundamental right" on a par with the rights of voting and procreation. It has been classified by the fifty states of the United States as a "right" so important to have been included as such in the fifty state constitutions. (137)

EDUCATION AS AN ENTITLEMENT

Onan defined the entitlement as a complete right to something once a person had shown that he or she had met the legal requirement to get it. (138) A legal entitlement is predicated on the individual state constitutions that clearly and legally specify the legal and constitutional position that education occupies at the state and local levels. However, on the federal level, the legal entitlement to an education is tenuous at best.

Calabresi and Melamed described a framework from which to explore the method of securing legal entitlements. They discussed three ways of

protecting entitlements: (1) property rules; (2) liability rules: and (3) inalienability rules. (139)

PROPERTY RULES.

> (They) . . . enable the right bearer to enjoin others from reducing the level of protection the entitlement affords him, except as he may be willing to forgo it at a mutually acceptable price. (140)

LIABILITY RULES.

> . . . (A) nonentitled party may reduce the value of the entitlement without regard to the right holder's desires, provided he compensates ex post for the reduction in value. . . . (I)ndividuals who value entitlements more than those without ex ante negotiations. . . . . (T)he entitlement is secured by the party who most values it, thus duplicating the outcome of the Coasean market exchange process. (In this market, the right to use a resource would have been secured ultimately by that party who would have paid the most for it.) (141)

INALIENABILITY RULES.

> When a right is protected by an inalienability rule, transfers of any sort are prohibited. The right to one's freedom from servitude and the right to vote are examples of rights protected by inalienability rules. On first blush, protecting a right by an inalienability rule appears to be a decision foregoing efficiency in favor of promoting some other social good. . . . (A) willingness to exchange a right, like freedom from servitude, for money may indicate a lack either of full information or of rationality. (142)

Coleman and Kraus indicated that courts have used the Calabresi-Melamed framework and SPUR INDUSTRIES, INC. v. WEBB, 108 ARIZ. 178, 494 P. 2d 700 (1972), as methods in establishing and securing legal entitlements. (143)

> A perfectly natural way of characterizing what it means to have a right to a resource or to property is in terms of autonomy or control. Rights . . . demarcate a realm of liberty or control. Rights are secured or protected liberties. (144)

> This is the view . . . of Charles Fried: 'The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights. (145)

> The point of conferring an entitlement arguably is to secure a domain of control, not to guarantee a particular level of welfare or utility. One who conceives of rights as securing a sphere of liberty does not believe that the concept of a right is reducible to or otherwise identifiable with a point on a right bearer's indifference curve. The liberty attendant rights ownership is not equivalent to any particular level of welfare . . . .(146)
>
> If rights entail or secure liberties, then it is hard to see how liability rules protect them. . . . (L)iability rules protect something. Compensation under a liability rule is for harm done and loss suffered. The loss is the diminution in value of one's resources . . . one's property. In this sense the 'objective' value of one's holdings is protected by liability rules; the value of the interest is left intact. But a liability rule confers no liberty or autonomy on an entitled party, and therefore secures no such liberty. . . . (T)he right is the liberty, not the value (i. e. utility) to anyone of having or exercising that liberty. . . . (I)n the view that rights entail liberties, the most liability rules can secure is a level of welfare equal to the value of the right bearer's interest, including even his interest in his autonomy. . . . Rights secure a domain of autonomy. Liability rules permit others to act without regard to the right holder's autonomy over his holdings. . . . (A) right is a domain of protected control, . . . liability rules protect rights. (147)

The Supreme Court, in GOSS v. LOPEZ (148), held that education could be considered as a legal entitlement; the Supreme Court recognized this entitlement to an education at the public's expense owing to the state's creation of an educational right. (149)

EDUCATION AS A LEGAL PRIVILEGE

Education is a privilege. The privilege to obtain an education at public expense is conditioned upon an individual state's constitutional provisions relevant to the fundamental status of a class of individuals. By passage of compulsory attendance laws, forty nine states have created a special educational class; this class is comprised of individuals between the ages of six and eighteen years of age. All fifty states have confirmed the educational privilege upon this class and have enacted appropriate state-level legislation to facilitate the performance and

evaluation of this privilege.

Gifis stated that a privilege was:

> An advantage not enjoyed by all; 'a particular or peculiar benefit enjoyed by a person, company, or class beyond the common advantage of other citizens; an exceptional or extroardinary exemption; or an immunity held beyond the course of the law. And, again, it is defined to be an exemption from some burden or attendance, with which certain persons are indulged, from a supposition of the law that their public duties or services, or the offices in which they are engaged, are such as required all their time and care, and that therefore, without this indulgence, those duties could not be performed to that advantage which the public good demands.' (150)

van Geel has maintained that the federal judiciary at all levels has not impeded the increased federal and state control and involvement in education. He stated that the federal judiciary has " . . . recognized the constitutional permissibility of involvement, especially federal, in education." (151)

Graham and Kravitt stated that:

> If a court now determines that society has begun to recognize that denial of a new interest such as education rivals the personal and societal detriment created by denial of more traditionally recognized rights, it would seem that the court should label such an interest fundamental and treat it as a right. (152)

William van Alstyne provided a description of the privilege concept. He cited Justice Oliver Wendell Holmes' right-privilege distinction to provide an understanding of the privilege concept. He stated that:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. (153)

van Alstyne argued that since Justice Holmes first enumerated the right-privilege distinction in McAULIFFE v. MAYOR OF NEW BEDFORD,

> The Court has been seeking to refute the implication that the government may arbitrarily regulate any interest in which a citizen does not have specifically enumerated rights. He further

reasons that it has been most successful under the rubric of equal protection where it has, in effect, allowed the equal protection clause to swallow all of the old doctrines of substantive due process. Rather, the Court defines sufficiently important private interests, such as voting in REYNOLDS or felony appeals in DOUGLAS, and protects these from arbitrary governmental interference. He concludes that the extension of the private interests that deserve protection is justified by the 'substantial influence which expanded governmental activity gives the government over the private lives of its citizenry.' (154)

van Alstyne further stated that:

As the structure of society has changed, so too have those interests that deserve special protection. (155)

Citing the work of Justice Holmes, van Alstyne stated that:

Justice Holmes, speaking for the Massachusetts Supreme Judicial Court in McAULIFFE v. MAYOR OF NEW BEDFORD, 155 MASS 216, 29 N.E. 517 (1892) . . . dispatched the petition of a policeman who had been fired for violating a regulation which restricted his political activities: ' The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.' (156)

van Alstyne stated that:

. . . Justice Holmes had occasion to confirm this conception of the scope of constitutional protection in upholding the conviction of a preacher who had violated a municipal ordinance in presenting a public address on the Boston Commons without securing a permit from the mayor. Holmes stated: 'For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the Legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes.' (157)

van Alstyne stated:

Thus, it was as though Justice Holmes merely restated his earlier epigram: 'the defendant may have a constitutional right to talk religion, but he has no constitutional right to use the Boston Commons.' (158)

It is this distinction that William van Alstyne holds is important to consider. He stated that:

> This tough-minded distinction between constitutionally protected rights of private citizens and unprotected governmental privileges has been applied to defeat a great variety of claims associated with government employment or other forms of largesse. (159)

Using the epigram of Justice Holmes as a model, van Alstyne cited several examples to mark the clear distinction between a right and a privilege. He stated that:

> An impoverished couple actually domiciled in a state should still have no complaint against a one-year residence required for welfare recipients: one may have a right to equal protection, but he has no right to public welfare. And certainly public university students summarily expelled or suspended should have no constitutional grounds for reinstatement, for it must be equally clear that while petitioners may have a right to procedural due process, they have no right to be educated at public expense. (160)

The state is not bound by the federal Constitution to provide an education to its citizens at the public's expense. In the right-privilege distinction applied to education, van Alstyne argued that the state chose to provide publically funded education to its citizens and did so under the jurisdiction of its own laws not those of the federal government. He provided several examples to consider; they are:

> (Compare HAMILTON v. REGENTS OF UNIVERSITY OF CALIFORNIA, 293 US 245 at 262 (1934) - requirement to take military science course as condition of enrollment upheld, with DIXON v. ALABAMA STATE BOARD OF EDUCATION, 294 F. 2d 150 (5th Cir.), cert. denied, 368 US 930 (1961) - procedural due process required for expulsion of students in good standing at tax-supported college.) (161)

van Alstyne stated that:

> . . . (W)hen the petitioner's primary interest in the public sector could not be characterized as a 'right' entitled to protection on grounds of substantive due process, courts have nonetheless found some other implicated right to sustain the claim. Alternatively, they have granted relief through recourse to constitutional provisions which operate irrespective of whether what is involved is deem a privilege, rather than a right. (162)

van Alstyne stated:

> As an 'exception' to the right-privilege distinction, the doctrine

(of unconstitutional conditions) seems to be a very broad one which is subject only to one major limitation: the petitioner must demonstrate that the condition of which he complains is unreasonable in the special sense that it prohibits or abridges the exercise of a right protected by an explicit provision in the Constitution. (163)

In explaining the differences that he observed, van Alstyne stated that:

There are all sorts of difficulties in trying to make sense of such a distinction, for reasonable persons may surely disagree as to which provisions are 'explicit.' But see UNITED STATES v. LOVETT, 328 US 303 at 321 (1946) (Frankfurter, J., concurring). One might also wonder why the doctrine of unconstitutional conditions should be confined to rights which are more or less explicitly described, and why it does not extend equally to rights worked out by implication from more general provisions such as the ninth amendment and the (substantive) due process clauses of the fifth and fourteenth amendments. The fact remains, however, that the doctrine has seldom been applied other than to explicit rights, notably freedom of speech. (164)

van Alstyne stated that:

Under . . . (the equal protection clause), it seemingly makes no difference that the threatened interest is a privilege rather than a right. Even a privilege, benefit, opportunity, or public advantage may not be granted to some but withheld from others where the basis of classification and difference in treatment is arbitrary. (165)

van Alstyne suggested that:

. . . (T)he private interest may be, as in WIEMAN v. UPDEGRAFF, 344 US 183 (1952), primarily an interest in a public job, or, as in BROWN v. BOARD OF EDUCATION, 347 US 483 (1954), an interest in a public education, or, as in DOUGLAS v. CALIFORNIA, 372 US 333 (1962), an interest in an appeal from a felony conviction - none of which is a 'right' protected under the due process clause. (166)

van Alstyne proposed that:

. . . It might be argued that a meaningful distinction still exists between claims of equal protection and claims of due process, in that the former can be disposed of any time government elects wholly to withdraw a particular privilege, while the rights upon which substantive due process is based cannot similarly be systematically destroyed. However, the likelihood of a state abandoning its system of public education or its appellate procedure, or withdrawing from

> the field of public employment is small. So long as the state continues to operate in the public sector, claims based on the equal protection clause should continue to avoid the right-privilege problem. (167)

Justice Holmes discussing the nature of a legal right suggested that:

> "(F)or legal purposes a right is only the hypostasis of a prophecy-the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it - just as we talk of the force of gravitation accounting for the conduct of bodies in space. One phrase adds no more than the other to what we know without it." (168)

van Alstyne stated that:

> Thus Holmes himself readily admitted that to deny that a person had a 'right' to something was merely to announce the conclusion that a court would not give him any relief; but the denial itself provides no reason whatever why such relief should be denied. (169)

He further added that:

> The protection of an employee's job interest, a student's interest in public education, or a tenant's interest in public housing would thus not depend upon the fortuitous involvement of still other protected rights. These other rights might enhance the individual's claim and they might make it even clearer that the regulation in question is constitutionally unreasonable, but they would not be indispensable to the petitioner's success. (170)

Citing the district court's opinion in KNIGHT v. STATE BOARD OF EDUCATION, 200 F. Supp. 174 at 178 (M.D. TENN. 1961), van Alstyne stated that:

> Whether the interest involved be described as a right or a privilege, the fact remains that it is an interest of almost incalculable value, especially to those students who have already enrolled in the institution and begun the pursuit of their college training. Private interests are to be evaluated under the due process clause of the Fourteenth Amendment, not in terms of labels or fictions, but in terms of their true significance and worth. (171)

The Supreme Court agrees with the KNIGHT decision in its opinion in SLOCHOWER v. BOARD OF HIGHER EDUCATION, 350 US 551 at 555 (1956),

when it stated that:

> To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities. (172)

In the summation to his work, van Alstyne stated that:

> . . . under appropriate circumstances one's interest in his government job, his publicly financed home, his food stamp meals, or his state university educational opportunities may indeed be constitutional rights in the positive-law sense ought no longer be denied. That these interests may be regulated compatibly with other competing interests need not be denied either, any more than it can be denied that interests in private property may be regulated by zoning ordinances, sanitation codes, building permits or antidiscrimination laws. Any per se constitutional distinction which would exclude governmental regulation of status in the public sector from constitutional review would, to steal a phrase from Mr. Justice Holmes, reflect neither logic nor experience in the law. (173)

The process of educating the special class of individuals at public expense is a privilege; this privilege is a special advantage given to the special class of individuals by the state. An advantage granted to any class of individuals may be withheld at the discretion of the state legislatures. The states have this ability under the broad police powers granted to them by the tenth amendment to the United States Constitution.

van Geel stated that:

> State power over education is part of the states' soverign police powers that repose in and are exercised by the state legislature. Abundant judicial opinions support the proposition that it is the state legislature that enjoys the preeminent authority to control public elementary, secondary, and higher education in the state by setting up a system of public educational institutions and arranging for its financing and regulation. It is important to stress that while the federal Constitution assumes state authority over education, it does not impose an affirmative obligation on the states to establish a public school system . . . . (174)

Following the United States Supreme Court decision in RODRIGUEZ,

education was held to be a function of state and local governments. The states have chosen to provide children with an education; however, they can choose to remove this function. It is highly unlikely that individual states will opt to remove the funding of public education, but they do retain this right under the force of the tenth amendment to the United States Constitution.

Relevant to the definition presented, education at public expense is enjoyed by the special education class created by the states. This advantage is confirmed upon this class for the general welfare benefit as the public good demands. As a privilege that the state has bestowed, the state may decide to withhold the privilege if the public good demands such action. The key to education as a privilege resides in the concept that the state created a special advantage for a class of individuals, therefore, the state may remove such an advantage as it deems necessary in service to the best interest of the general population of the individual states.

FOOTNOTES

CHAPTER 2

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CHAPTER THREE

EDUCATION AS A RIGHT, ENTITLEMENT, AND A PRIVILEGE

INTRODUCTION

In the United States, the Constitution is the law of the land. It contains this nation's most fundamental law. The Constitution created the institutions of our government and their relationship to each other, it also enumerated the relative powers of each of the institutions and established limits for these powers. The Constitution established the three branches of government and the concept of checks and balances in order to prevent a surreptitious usurpation of power by any of the three.

Edwin Meese, the current Attorney General, stated that:

> The Constitution is, in brief, the instrument by which the consent of the governed - the fundamental requirement of any legitimate government - is transformed into a government complete with 'the powers to act and a structure designed to make it act wisely or responsibly.' Among its various 'internal contrivances' (as James Madison termed them) we find federalism, separation of powers, bicameralism, republic, an energetic executive, and an independent judiciary. Together, these devices form the machinery of our popular form of government and secure the rights of the people. The Constitution, then, is the Constitution, and as such it is, in its own words, 'the supreme law of the land.' (1)

The Constitution and the Bill of Rights are the definitive declaration, statement of the rights, privileges, and entitlements of every citizen of the United States. But Justice William J. Brennan, Jr. stated, the ambiguity, the vagueness, and the generality of the language of the Constitution opens it to various interpretations by the varied reader. (2)

The Constitution divides powers between the federal government and individual states by assigning to the federal government all powers necessary to enable it to act as a representative for all the states, and by reserving to the individual states all other powers. Among the chief powers reserved to the states is the power to regulate the actions and relationships of people residing within the states' respective borders. (3)

> The reservation by the Constitution to the States of the power to regulate the actions and relationships of the people within their borders promotes good government and preserves liberty. No centralized government far removed from the people can be as sensitive or responsive to their needs as the government close to them. (4)

> In addition to vesting in the States and denying to Congress the power to define the legal rights and responsibilities of men and women residing within their respective borders, the Constitution empowers the courts of the States to determine the validity of their laws on this subject, except in the comparatively rare instances when they violate some of its specific provisions. (5)

The Constitution is not an exact and perfect document for all people for all times. It was never envisioned as being such. With the inclusion of the first ten amendments, credence was given to the original authors' intent for a flexibility of the Constitution. James Madison, with the guidance of Thomas Jefferson, saw the Constitution as a beginning, not an ending point.

The establishment of education as a right, as an entitlement, or as a privilege is predicated on an implicit intent of the words of the United States Constitution. It has been stated that education, as an issue, does not appear in the language of the Constitution. This is factual. Education, as a function of the federal government, is not explicitly mentioned in the words of the United States Constitution. However, the

issue of education, as a "fundamental interest," has been perceived, generally, as being a basic and fundamental part of current American society since the early part of the 1960s. It has become more important as American society has changed over the course of years from 1960 through 1988. In the early part of the 1960s, a new President and a very aggressive attorney general pressed for civil rights reform; this is the primary reason for the selection of the early 1960s as a beginning point.

The United States Supreme Court, in BROWN v. BOARD OF EDUCATION, 347 US 483 (1954), stated that:

> Today, 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. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (6)

An educated population is the mainstay of a democratic form of government. A people committed to maintaining this form of government, a democracy, must ensure that the nation's youth are prepared adequately to participate in this democratic form of government. To ensure the stability and continuity of a democratic, representative government, the youth of the nation must be education. Education occupies a prominent position in the goal to provide for the continuation of this republic.

Education has emerged as a "new right" consideration owing to the

intensified demand for increased and advanced levels of skills from students in the areas of reading, arithmetical manipulation, and writing present in the public school's curriculum; education, the issue, affects every family and household across the expanse of the United States. Education's impact and long term effect is as apparent as an individual reading the morning paper, or the scanning of the label on a box of cornflakes. Education is necessary for mere survival of an individual in this age of information.

OVERVIEW

This chapter will contain a discussion of education as a constitutionally protected right, entitlement, and privilege. The chapter will explore situations that highlight a consideration of education as a right, an entitlement, and a privilege. More specifically, the discussion will address situations or conditions that establish education as a constitutionally protected right, entitlement, and privilege. The chapter will present working definitions of a right, an entitlement, and a privilege to an education.

The chapter is divided into four major divisions to facilitate an understanding of the discussion on education as a situational right, entitlement, and privilege. The divisions are: (1) The Constitution; (2) Education as a Right; (3) Education as an Entitlement; and (4) Education as a Privilege.

The first section of this chapter will present an examination of sections of the federal Constitution that treat the nature of a right, a non-right, and an unenumerated right to an education at public expense. This section will focus upon the position that one of the un-

enumerated rights, a right to an education at public expense, occupies within the framework of the federal Constitution.

The second section of this chapter will explore the nature, a brief history, and the role of the state and federal governments in support of education as a constitutionally protected right. This section will address the nature of a right to an education; it will utilize two judicial decisions to illustrate the diverse and opposing legal points of view. This section will involve a discussion of property, individual, and social interests in an exploration of education as a constitutionally protected right.

The third section of this chapter will examine education as a legally protected entitlement. The discussion in this section will emphasize the United States Supreme Court opinion in GOSS v. LOPEZ. The section will examine the paradigm of Calabesi and Melamed; the three parts of the model will be used to explore the consideration of education as an entitlement.

The fourth section of this chapter will address education as a constitutionally protected privilege. The discussion of education as a privilege will utilize primarily the paradigm provided by William van Alstyne. The prime focus of the discussion will be to present a discussion that will lead to an understanding of the nature of an educational privilege.

THE CONSTITUTION

The Constitution is the Law of the Land; in clear language, the document has stated this. All of the amendments added to the document are legally a part of the Constitution. According to the Constitution, the federal government received its power to exist from the people of the United States. The federal government therefore represents and reflects the interests of the people and states. The state government received its power from the people of the state. The state constitution reflects the organization, function, and power of the representative government of the state; this power is given by the people of the state.

Education is a function of state government; the governor and state legislature act as agents of state government. Fifty states of the United States have classified education as being a "fundamental interest," or as a constitutionally protected right. (7)

STATE CONSTITUTIONS

Law students of the University of Wisconsin in 1971 examined the constitutions of each of the fifty states for educational provisions. Their reserach reported that all held education to be a "fundamental interest," or a right. (8) A follow-up random sampling of the Wisconsin Study by this researcher in 1988 revealed that education has remained a constitutionally protected right in each of the state constitutions examined in the sampling. (9)

Fifty individual state governments have viewed education to be a

"right." This right owes to a basic and fundamentally held commitment to provide for the general welfare of citizens in the state.

Stanley Herr addressed the issue of education as a legally recognized right; he stated that:

> Judicial decision-making is not a comprehensive process . . . . Our children must not be deprived of educational opportunities until federal district courts of the fifty states have each ruled that their education is a present constitutional right. (10)

Herr reflected the attitude that was present in the legal community representing handicapped children across the United States. Education has been recognized as being a natural right by the general population of American society; this idea has been supported by various interest groups. (11)

However, this position is a social phenomenon, not a legally protected one. State governments have made their position clear. All fifty states have included education as one of the protected rights of their citizens.

The Constitution of the State of North Carolina, as an example, provides:

> The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students. (12)
>
> . . . (K)nowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged. (13)

The Constitution of the State of South Carolina, as another example, provides:

> The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize, and support such other public institutions of learning, as may be desirable. (14)

As an example of the importance that the State of North Carolina

has placed upon education, the state government expends between one-third and one-half of the total General Budget funds for education.

> The state commits nearly 80 cents of every tax dollar in its general fund to education, over $2 billion a year, because it believes that education is the foundation for cultural and industrial growth. (15)

This statement indicated, in part, the importance that the State of North Carolina has placed upon the value, the right of an education.

POLICE POWER OF THE STATE

The federal Constitution guarantees the state a constitutional right to govern. (16) Therefore, the state has a right to legislate, to regulate, and to administer the affairs of the state in order to guarantee and maintain conditions that contribute to the general welfare of the citizens of the state. This right is guaranteed by Article IV of the Constitution and amendments ten and eleven. This right of the state was tested as early as 1794 before the United States Supreme Court (17); it ultimately resulted in the eleventh amendment to the Constitution restricting the power of the United States Supreme Court. (18)

The Supreme Court in MEYER v. NEBRASKA gave an interpretation of the state's exercise of police power. The Court stated that:

> Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. (19)

This interpretation by the United States Supreme Court was and is a source of conflict in the South, specifically the Deep South; the southern states hold rigidly to the common law principle of state sovereignty. The states of the Deep South are the most ardent supporters

of this common law principle. (20)

Tyll van Geel presented a discussion of the principle of States' Rights. He held that states maintain the right to legislate, prescribe, and regulate statutes that directly affect public school education; the United States Supreme court has given mixed reactions to this view. (21)

Justice Oliver Wendell Holmes, Jr., commenting on states' sovereignty, stated that:

> I do not think the United States would come to an end if we (the United States Supreme Court) lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views . . . . (22)

The United States Supreme Court in CAREY v. P.S.I. stated that:

> Although 'the Constitution does not explicitly mention any right of privacy.' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.' (23)

The Supreme Court expanded its position in CAREY that it had taken in PIERCE v. SOCIETY OF SISTERS, 268 US 510 (1925). In PIERCE, the Court invalidated the state's compulsory public school attendance law. In 1988, forty-nine of the fifty states have compulsory public school attendance laws; the State of Mississippi is the lone exception. (24)

Several authors have examined education as a property right using the arguments contained in laws for state mandated compulsory public school attendance. (25) A consensus of the writings held that education was a property right. Gifis defined "property" as being:

> 'every species of valuable right for interest that is subject to ownership, has an exchangeable value, or adds to one's wealth or

> estate.' 107 A. 2d 274, 276. 'Property' describes one's exclusive right to possess, use, and dispose of a thing, 202 P. 2d 771, as well as the object, benefit, or prerogative which constitutes the subject matter of that right. 333 US 1 (26)

Gifis defined 'common property' as:

> that which belongs to the citizenry as a whole, 7 P. 2d 868, . . .-or in some jurisdictions where designated by statute . . .. . 3 CAL 83 (27)

Education, a state created right, is a common property right that requires further examination and discussion that is not within the scope of this study. It must be stated that several recent United States Supreme Court opinions have supported the position that education is a state-created property right. (28)

AMENDMENTS TO THE UNITED STATES CONSTITUTION

Several constitutional amendments offered promise for the support of educational rights; they are the ninth amendment, the tenth amendment, the fourteenth amendment, and the fifth amendment.

NINTH AMENDMENT

The ninth amendment states that:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. (29)

Citing the work of McDougal and Leighton, Paust stated that:

> . . . there is . . . an interdependency between universally shared values and our national values . . . . (30)

Paust stated further that:

> . . . If basic human values have not been guaranteed to each member of our society then all of us remain in an uncertain peace and possess tenuous liberties. (31)

Addressing the intent of the ninth amendment, Paust stated that:

> The alternative basis for the protection of fundamental human values is the ninth amendment . . . . Its utility lies . . . in recognizing that basic human rights are already a viable part of the constitutionally guaranteed rights of Americans. . . . (I)t is a true that our courts either have not recognized the existence of such a constitutional protection or have been unwilling to use it . . . . (32)

Referring to the words of Hamlin, Kelsey, and Rogge, Paust stated that:

> It is also a generally accepted truism that, 'It cannot be presumed that any clause in the Constitution is intended to be without effect.' (33)
>
> It seems clear from the language of the Ninth Amendment that certain rights exist even though they are not enumerated in the Constitution, that these rights are retained by the people, and that by express command these unenumerated rights are not to be denied or disparged by any governmental body. (34)

Paust stated that:

> . . . (T)he general boundaries and criteria necessary to discover the content of each type of right become identifiable in different arenas of the legal process, they should be used by the courts to effectuate shared expectations of 'right' and should not simply be ignored. . . . (T)he Declaration of Independence expressed to the world the expectation that all governmental bodies - and thus the members of the judiciary - were to function so as 'to secure these rights' which are fundamental to all. (35)
>
> It is apparent . . . that our forefathers definitely expected that the rights of man would be guaranteed under the Ninth Amendment. . . . (A) more broadly documented enumeration of the rights of man is now available for judicial discovery and use. (36)

Citing the Pennsylvania constitutional declaration of rights in 1776, Paust stated that:

> Government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family or set of men, who are a part only of that community; and that the Community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal. (37)

Paust maintained that from an examination of the framers' scheme of

rights and powers there existed several assumptions. First, the ultimate authority for all power comes from the people. Second, the state retains certain powers not approachable by the federal government. Third, the purpose of all governmental units in the United States is to secure the rights of the population. Fourth, there exists certain fundamental rights that are enumerated in federal and state instruments; however, those not listed are retained by the people and are forbidden to the federal and state governments. (38)

TENTH AMENDMENT

The amendment states that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. (39)

The tenth amendment prevented intrusion of the federal government into the area of States' Rights. It also supported the premise that although education is not explicitly mentioned in the Constitution; it was a right that was reserved to the people of the United States. The people have exercised their prerogative by inclusion of education as a right into the language of state constitutions.

FOURTEENTH AMENDMENT

The amendment states, in part, that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (40)

In the course of this study, the fourteenth amendment has been extensively examined; it is therefore sufficient to state that the amendment offers a methodology for the examination of education at public expense as a right. Since all fifty states have constitutional provisions elevating education to a protected fundamental interest, the fourteenth amendment may hold promise for supporting education as a right.

FIFTH AMENDMENT

The amendment states, in part, that:

> No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation. (41)

The United States Supreme Court, and several federal and state courts, have held that public school students have certain protected rights; these include such various rights as: speech (42), political expression (43), opposition to curricular content (44), religious expression (45), and appearance (46). Education holds an established property and liberty right that is fundamental interest to the individual citizen.

Tyll van Geel maintained that public school employees have been able to secure the guarantee of property rights using the language of the fifth amendment. He stated that:

> Public employees have not only successfully found protection by invoking specific constitutional amendments, but also by claiming that the existence of an implicit constitutional right to privacy protects them . . . . (47)

Educators, teachers and administrators, have been classified by state governments as being public employees. van Geel suggested that legal arguments could be made for certain educational provisions and

rights; also he held that these could be found protected by the fifth, fourteenth, and ninth amendments. (48)

Education is a "fundamental interest" in the language of the constitutions of the fifty states. The elevation of education by the states to a "fundamental interest" status should add strength to the consideration of education as a "fundamental interest" on the federal level. The position of education in the constitutional provisions of the states recognizes the importance of the ninth amendment; education is one of the rights reserved to the states and to the people. If the states have elevated education to a "right" or "fundamnetal interest" status, the federal government must recognize the united leadership and strength of the state governments in their collective effort.

Education must be regarded with special, legal consideration for elevation to the position of "fundamental interest" status equal, not superior, to the other rights that the United States Supreme Court has recognized as having fundamental status; yet, these rights are not contained in the explicit language of the federal Constitution. Fifty states have declared individually and collectively that education is of such priority in importance that it is a "fundamental right" to the states.

EDUCATION AS A RIGHT

Education has been established as a constitutionally protected "right" at the state level (49); however, the United States Supreme Court has held that education, on the federal level, is not one of the rights protected by the federal Constitution. (50)

To be considered as a right protected by the federal Constitution, it must be demonstrated that education exists as a protected "right" from an explicit or implicit interpretation of the federal Constitution. (51)

No mention of education as a protected "fundamental interest" is to be found from an explicit interpretation of the Constitution. Dalton and Coullard have suggested that this action was owing to the conditions that existed at the time of drafting of the federal Constitution; however, it remains as an "historical mystery." (52)

Implicit interpretation of the federal Constitution to establish a protected "right," education at public expense, is a difficult task. Owing to the vague guidelines presently used to elevate an unenumerated right, methodology for the determination of the status of a "right" from an implicit interpretation of the federal Constitution is a matter of individual choice. Tushnet, Cohen, and Michelman have suggested that the judiciary generally has ruled favorably to consider an unenumerated right as a protected "fundamental interest" when:

(1) a deprivation of the "proposed right" would result in a severe impairment to the independent functioning of the individual;

(2) a deprivation of the right would trigger a "Strict Scrutiny" review by the United States Supreme Court;

(3) the exercise of the "proposed right" would result in a significant alteration of the conduct of the individual's life style and the ability to gain meaningful employment; and

(4) the exercise of the "proposed right" contributes to an aberrant conduct in the actions of the state or local government. (53)

In the course of this study, a right and a fundamental interest are considered to be equivalent terms. It is recognized that actual differences exist between the two terms; however, the differences are not of significance to merit a separate consideration in this work.

Michelman and Tushnet, drawing upon the work of Roscoe Pound, have characterized three classes of intersts that the United States Supreme Court has protected as "fundamental interests." The classes hold promise for a discussion of education as a legally protected right or fundamental interest. (54)

A right to an education at the public's expense includes a special educational class of individuals for the exercise of this "right." The special educational class is comprised of children between the ages of six and eighteen. (55) This class has been created by state governments through their individual compulsory public school attendance laws. The state, under its broad police powers, has a constitutionally protected right to create this special class of individuals; this right has been reenforced by the strength of the tenth and eleventh amendments. The fifty states have created a child's constitutionally protected right to an education. (56)

By granting this unique position, individual states have given education the highest political, financial, economic, and social recognition.

This right to an education is a state-created right; however, the federal government has given sufficient financial and legislative support for making education a socially and politically recognized right without making education a legally sanctioned right. (57)

A DEFINITION OF A RIGHT

The framers of the United States Constitution wrote a list of actions considered fundamental to the general welfare of the American citizen; these "rights" were listed in the first eight amendments to the federal Constitution. The ninth amendment was included to provide for any expansion of "New Rights" that the American people would deem worthy.

The rights listed in the Constitution are not the definitive listing of rights that a civilization would require for the survival of a people. The authors of the Constitution never viewed human rights as a time-locked list. A right must then be considered in terms of the greatest social, economic, political, emotional, and philosophical benefit to the people within a specific period of time.

Webster defined a 'right' as "Something to which one has a just claim; as the power or privilege to which one is justly entitled." (58) Daniel Oran defined a 'right' as that which is "Morally, ethically, or legally just." (59)

Hogan stated that " . . . A RIGHT is ' . . . an interest protected by law.' Courts . . . will protect a 'fundamental interest.'" (60)

THREE CLASSES OF INTERESTS

Tushnet, relying upon the work of Michelman and Pound, identified three classes of interests which the Supreme Court has held are "legally

protected." They are: (a) Individual Interests (61); (b) public Interests (62); and (c) social Interests (63).

> All three classes seem to have a place for education; and some courts have held that education is a 'fundamental interest.' A RIGHT is related to an interest as the FORTRESS is to the PROTECTED LAND. (64)

> Rights which are specified in state and federal constitutions are said to be 'constitutionally secure,' and are given added protection by the courts. Interests which are characterized as 'fundamental' are likewise afforded this added protection. The principal difference therefore, between a constitutional RIGHT and a 'fundamental interest' is that one is specified in the Constitution while the other is not; the preferred treatment afforded both is essentially the same. This led Justice Harlan to protest the practice of judges who 'pick out particular human activities, characterize them as 'fundamental,' and then give them added protection under an unusually stringent equal protection test' - even where such activities are not shown to be arbitrary or irrational and where they are 'NOT MENTIONED IN THE FEDERAL CONSTITUTION. (65)

> EDUCATION AS A 'POWER' OF THE STATE OR THE PEOPLE: Those POWERS not delegated to the United States by the Constitution, nor prohibited by it to the States, are ' . . . reserved to the States respectively, or to the people.' The power over education is not one of the powers delegated by the Constitution of the United States, nor is it prohibited to the States; hence, it is one of the powers reserved to the States or to the people. (66)

> RIGHTS retained by the people are enumerated in the Ninth Amendment: 'The enumeration in the Constitution of certain rights, shall not be construed to deny or disparge others retained by the people. (67)

> 'Obtaining an education' is not among the rights enumerated in the Consititution; hence, it may be one of the OTHER RIGHTS retained by the people . . . under the NINTH Amendment. (68)

Citing the United States Supreme Court decision in SHAPIRO v. THOMPSON of 1975, Hogan stated that:

> Rights, not explicitly mentioned in the Constitution, have at times been deemed so elementary in our way of life that they have been labeled as basic rights . . . . There is of course, not a word in the Constitution . . . concerning the right of the people to education or to work or to recreation by swimming or otherwise. Those rights, like the right to pure air and pure water may well be rights 'retained by the people' under the NINTH Amendment. (69)

> . . . (T)he Ninth Amendment ' . . . shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments, and an intent that the list of rights included there not be deemed exhaustive.' (70)

CLASSIFICATION OF FUNDAMENTAL INTERESTS

Using Tushnet and Michelman's classification of interests, it is of immense value to explore these three classifications to obtain a clear understanding of what elements are present in the consideration of a right, or an interest that creates an interest for the United States Supreme Court to have declared an individual activity to be of such compelling value to the individual, the public's activity, or to the present and future societal values that a right or an interest to be of "fundamental interest" or to be an "individual right" when considering the Constitution.

Michelman and Tushnet held that (a) individual interest (71), (b) public interests (72), and (c) social interests (73) were three classifications of interests that the Supreme Court had held to be protected.

INDIVIDUAL INTEREST

> . . .(t)he right is the liberty, not the value . . . to anyone having or exercising that liberty. Thus in the view that rights entail liberties, the most liability rules can secure is a level of welfare equal to the value of the right bearer's interest, including even his interest in his autonomy. (74)

It is instructive to examine the construction of interests that the United States Supreme Court has held to be fundamental. The Court has viewed "fundamental" interests in the nature of voting (75); the rights of the criminal in the criminal process (76); the rights of al-

lens (77); the right of counsel for a prisoner (78); the prohibition of comment from court and prosecution against accused's use of the fifth amendment (79); the right of an indigent to counsel (80); the explanation of criminal rights (81); the right of the Court to order busing to force compliance with another court order (82); the power of the Court to draft a plan to achieve desegration (83); the federal court's power to decide on the validity of an individual state statute (84); the invalidation of a university's special admission program (85); the right of custody of an individual does not include interrogation (86); the right of a woman to have an abortion (87); the declaration that public schools are the most important function of state and local governments (88); and the power of the Court to determine functions of the state governments (89). The previous examples of "fundamental interests" are not contained in the explicit interpretation of the United States Constitution.

An examination of the above fourteen Supreme Court decisions indicated that the Court used implied interests in its interpretation of the Constitution. The Court relied upon a perceived functioning of the individual or of the state in social terms as a prime factor or reasoning in the finding of a fundamental interest in the various issues. An examination of the decisions also revealed the Court's difficulty in establishing clear criteria in determining "fundamental interest." It can be stated that the discovery or failure to establish "fundamental interest" status is arbitrary and lacking in consistent application of procedures.

As the concept of fundamental interest has evolved, its emphasis

> has been primarily on extreme detriment to the individual. However, inclusion of voting within this category appears also to have validated the rationale that if the interest under consideration is of particular value to society as a whole, accruing only secondarily to an individual, it too may qualify as a fundamental interest. If an interest's qualifications rest exclusively upon the severe detriment an individual would incur if he were denied the right, the degree of detriment does not have to be porportionately as great. Where a given interest rests upon both rationales, the combination would appear to be synergistic, for if to protect the individual is also to benefit society, then it becomes all the more desirable to protect the individual. (90)

PUBLIC INTEREST

A public interest relates to a service that promotes and provides for the general welfare in the individual's life, liberty, pursuit of happiness, and acquisition of property. The United States Supreme Court has examined such diverse interests as electricity, banking, automobiles, highway access and safety, interstate transportation, employment, welfare benefits, mass transportation, and libraries as holding "fundamental interest" in the public's interest.

> . . . (E)ducation means careers, . . . it should enable those who partake of it to learn tangible skills and thus procure a better job in the marketplace. . . .(E)ducation is the transmission of civilization and its values. . . . (T)he fundamental significance of education lies in learning how to think. . . . (E)ducation (involves) . . . teaching and inculcating values. . . . 'The key goal of education should be informed decision making . . . . Finally, . . . education . . . means personal development and social exchange with all the inherent complexities involved. (91)

Education operates in the public forum; it reflects the good and the bad elements of public interests. Valdosta, Georgia, and Oxnard, California, are cities that are representative of the diversity that education must address; one stresses athletic prowess and the other holds academic performance to be primary. There are no right or wrong public evaluations. Both cities perceive education from different expectations;

the public's interest is served in both situations.

To test the public's interest in education, one might propose to close or consolidate a public high school or an elementary school. The resulting debate will demonstrate most vividly the impact of education for the public interest.

SOCIETAL INTEREST

Graham, Kravitt, and Tushnet held that societal interests hold special consideration when viewed from the context of constitutional consideration to such a degree that they hold "fundamnetal interest" status. (92) Societal interests such as those contained in the areas of immunization, immigration, naturalization, desegregration, voting, and welfare are viewed by the Supreme court as occupying special and distinct consideration. They reflect the long-term effect that certain individual and public interests have upon the future interests of the greater portion of American society at large.

The United States Supreme Court has consistently ruled favorably for education's having societal interest. The Court held that education was ". . . the primary vehicle for transmitting 'the values on which our society rests.'" (93) The Court in BRANDON v. BOARD OF EDUCATION stated that "schools instill in kids 'an appreciation of critical reasoning, a commitment to democratic institutions, and a dedication to principles of fairness.'" (94) The Court in GRIFFIN v. COUNTY SCHOOL BOARD held that "Whatever nonracial grounds might support a state's allowing a county to abandon public schools, the object must be a constitutional one . . . ." (95) Justice Felix Frankfurter summarized the feeling of the public's societal interests in McCOLLUM v. BOARD OF EDUCATION.

In that decision, the Court held that public schools were " . . . the symbol of our democracy and the most pervasive means for promoting our common destiny." (96)

It is valid to examine the case for educational rights or as a concept of "fundamental interests" through the use of the importance that education possesses regarding individual, public, and societal interests.

> The value of education to the individual is almost undeniable. It is potentially an aid to any member of society in his attempt to succeed in a given career and in his development as a mature human being. Its ramifications are economic, social, and cultural. . . .(I)ts immediate impact is often uncertain or even remove (owing to the process). Although it may be concluded that potentially education is the most important civil right, at any given mement one may not feel acutely its presence or absence, or its superiority or inferiority. (97)

Edwin S. Cohen in an address at the Harvard Center for Educational Policy Reserach on July 22, 1970 stated that:

> . . . (I)t would seem that as long as education functions to aid some groups in social advancement, and as long as current systems potentially can be restructured to aid more groups, it should not be written off as a tool for reform. There is no overabundance of social mechanisms to replace education as a means of securing social integration and upwardmobility for members of minority groups. (98)

Graham and Kravitt gave added strength to the societal value that education possesses argument, they stated that:

> A quality common to all civil rights is that they are so valuable to society in a subjective, qualitative sense, that society will not let them be priced. They are crucial to individuals in a personal sense, and because of their moral and ethical essence, they increase - if only metaphysically - the total amount of the society that permits its denial suffer severe detriments. (99)

In BROWN v. BOARD OF EDUCATION, the United States Supreme Court expressed dual nature of education and its societal value. The Court held:

Today, 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. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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. (100)

Graham and Kravitt in analyzing BROWN and DANDRIDGE stated that:

If a court now determines that society has begun to recognize that denial of a new interest such as education rivals the personal and societal detriment created by denial of more traditionally recognized rights, it would seem that the Court should label such an interest fundamental and treat it as a right. (101)

Tradition is no more unchanging than the society that generates it. In BROWN, Chief Justice Warren specifically rejected the claim that blacks' rights to equal educational opportunity must be measured in terms of society's conception of the importance of education in 1868. The equal protection clause speaks to the role of education in society today. While one may read DANDRIDGE to say that the Supreme Court will not extend the principle of fundamental interests to include new rights, the very principles its author espouses would seem to imply that the concept both can and should be extended. (102)

DANDRIDGE may thus be distinguished from education cases on the basis of the greater 'tradition' of public education. While the notion of a right to education only began to gain popular acceptance in the nineteenth century, the concept of a right to welfare is of even more recent origin. Under Justice Stewart's criteria, therefore, education would possess a superior claim to fundamentality. It is also possible to distinguish education from welfare by arguing that welfare's societal value is less integrative or preservative than that of education and in that sense is less synergistic. (103)

. . . (W)hile there is no controlling precedent, the logic of what precedents exist, with the exception of DANDRIDGE, and the implications of the concept of a fundamental interest necessitate making education an interest equal to that of voting, criminal process, procreation, or travel. . . . (O)ne may not suffer the poignant personal detriment of being denied liberty or the ability to procreate, no doubt many feel a greater personal interest in education than in voting or travel. . . . (T)he preservative and

> Integrative role of education for society has been amply demonstrated. In this societal strand of the . . . (demands created by that society) it would seem that only voting has a greater claim to superiority. (104)

TWO VIEWS OF EDUCATION AS A FUNDAMENTAL INTEREST

SERRANO v. PRIEST (105) and SAN ANTONIO v. RODRIGUEZ (106) are two landmark decisions that have examined education as a "fundamental interest." The decisions examined the right to an education at the public's expense with fundamentally the same facts at hand; however, the two courts reached two different conclusions. While addressing education as a constitutionally protected right, the main issue in both cases was a state's method of financing public education.

SERRANO v. PRIEST

The best argument for the recognition of education as a fundamental right is found in the California supreme court decision, SERRANO v. PRIEST. The California court was convinced that the concept of acquiring an education held enough merit to grant "fundamental interest," or "fundamental right" status to education. The court stated that:

> We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.' (107)

The SERRANO court gave five reasons for the classification of education as a fundamental right. They were:

> First, education is essential in maintaining what several commentators have termed 'free enterprise democracy' - that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background. Accordingly, the public schools of this state (California) are the bright hope for the entry of the poor and the oppressed into the mainstream of American society. (108)

Foshay gave additional support to this idea. In a lecture delivered in Washington, D. C. , on February 13, 1987, he stated that six distinct themes have emerged for the purpose of providing an education for the American population. They were: (a) "To offer 'the best that has been thought and said in the world.'" Citing the work of Matthew Arnold. (109); (b) "To provide citizens for our democracy." Citing the words of Thomas Jefferson. (110); (c) "To provide manpower for the economy." Citing the words of the "man in the street." (111); (d) "To pass on civilization to the young." Citing the work of the Committee of Ten and others. (112); (e) "To serve the State." Citing all dictatorships and absolute monarchies. (113); and finally (f) "To promote self-realization." Citing the work of John Dewey and others. (114)

Foshay further stated that:

> The purpose of education . . . is to assist people in the process of self-realization. To put it differently, the purpose of education is to bring people to a realization of what it is to be a human being. (115)

The SERRANO court stated:

> Second, education is universally relevant. 'Not every person finds it necessary to call upon the fire department or even the police in an entire lifetime. Relatively few are on welfare. Every person, however, benefits from education. (116)

An example of the universal relevancy of education is readily perceived as an individual reads the daily newspaper, the label of food products, or highway direction signs.

> Third, public education continues over a lengthy period of life - between 10 and 13 years. Few other government services have such sustained, intensive contact with the recipient. (117)

> Fourth, education is unmatched in the extent to which it molds the

> personality of the youth of society. While police and fire protection, garbage collection and street lights are essentially neutral in their effect on the individual psyche, public education actively attempts to shape a child's personal development in a manner chosen not by the child or his parents but by the state. 'The influence of school is not confined to how well it can teach the disadvantaged child; it also has a significant role to play in shaping the student's emotional and psychological make-up.' (118)
>
> Finally, education is so important that the state has made it compulsory - not only in the requirement of attendance but also by assignment to a particular district and school. (119)

The SERRANO court reached three historic conclusions in its unanimous decision. The court found that: (1) wealth is a suspect classification; (2) education is a fundamental right; and (3) "fiscal neutrality" is an acceptable method for judging state financing of education.

The California court's decision in SERRANO reflected the three classification of interests proposed by Michelman, Tushnet, and Pound.

INDIVIDUAL INTEREST

The United States Supreme Court, lower federal and state courts have held that education was an essential element to the interests of an individual citizen. Education provided the tools necessary to provide an opportunity to reach self-realization. Education demonstrated to the individual what Foshay said was " . . . a realization of what it is to be a human being." (120) The judiciary has clearly recognized the valuable utility of obtaining an education to the individual.

PUBLIC INTEREST

The decision in SERRANO recognized the value of having educated workmen to contribute to the success of American society. The public's interest is best served by an educated work-pool to aid in the manage-

ment and operation of the American economy; the political network, and governmental services. All of these elements are enhanced through education of the membership responsible for their successful performance.

SOCIETAL INTEREST

Societal interests are reflected by the California court's statement that " . . . education is unmatched in the extent to which it molds the personality of the youth of the society." (121) A nation's youth is the future of the society. The public schools of the United States provide an education in the values, the goals, the philosophy, and the past of America. Educating the youth has a direct effect upon shaping the future with the key values of what it means to be an American. There is no greater right or fundamental interest than ensuring that the nation survives with its values and Constitution intact.

The ultimate value of the SERRANO decision rested with the recognition that education was a legal right. The SERRANO court acknowleged and added to the BROWN position on the value of education to the individual and societal interests. The period from 1954 to 1988 has lost none of the power and influence of the United States Supreme Court decision in BROWN v. BOARD OF EDUCATION; the Court in BROWN had stated that education was the most important function of state and local governments. Supreme court decisions since BROWN and numerous lower federal and state courts have ruled favorably on segments of education; the judiciary has recognized the vital part that education has played within American society. The SERRANO court placed each of these parts into proper historical perspective and held that education was/is a funda-

mental right.

The California Supreme Court's decision in SERRANO v. PRIEST ranks on a parity with the United States Supreme Court's decision in BROWN v. BOARD OF EDUCATION. Education from this point in history forward has been given a legal position; education was considered as being a legally protected right.

Paust stated that:

> . . . by failing to effectuate the basic human rights of all members of our society, we lay the ground work for a deprivation which can eventually destroy the very human values that we claim to cherish. (122)
>
> . . . (t)he Declaration of Independence expressed to the world the expectation that all governmental bodies . . . were to function so as 'to secure these rights' which are fundamental to all. (123)

Paust captured the feeling and power of the SERRANO decision when he declared that education was a "fundamental right."

RODRIGUEZ v. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT

The RODRIGUEZ decision by the United States Supreme Court is noteworthy for three points made by the Court. They were: (1) wealth is not a suspect classification; (2) education is not a fundamental right protected by the federal Constitution; and (3) education occupies an important place in American society.

The RODRIGUEZ decision does not easily lend itself to an analysis using Michelman's classification of interest.

INDIVIDUAL INTEREST

The RODRIGUEZ opinion held that education was a state and local issue, not a federal one. The Court held reservations about entering

into an area that it lacked experience; the Court's opinion stated that:

> . . . (T)his case also involves the most persistent and difficult questions of educational policy, another area in which this court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myraid of 'intractable economic, social, and even philosophical problems. (124)

From this position, the RODRIGUEZ Court found that there was not a federal question relating to education having "fundamental interest."

The Court did recognize the singular importance that education holds for American society; it stated that:

> This theme, expressing an abiding respect for the vital role of education in a free society, may be found in numerous opinions of justices of this Court writing both before and after BROWN was decided. . . . Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that 'the grave significance of education both to the individual and to our society' cannot be doubted. (125)

Individual interests, the RODRIGUEZ Court believed, were best served by the actions of state and local governments. The Court held that:

> The merit of local control was recognized (by the Court) . . . . '(D)irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society.' (126)
>
> . . . (T)he importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. (127)

Citing the work of James Coleman, the Court stated:

> 'The history of education since the industrial revolution shows a continual struggle between two forces: the desire by members of society to have educational opportunity for all children, and the desire of each family to provide the best education it can afford for its own children. (128)

PUBLIC INTEREST

The RODRIGUEZ Court held firm to the conviction that education as a public interest was best served by state and local actions.

> The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions. (129)

The RODRIGUEZ Court recognized the value that education held for the public interest; yet the Court held that this was insufficient ground to declare education to be a 'fundamental interest' protected by the United States Constitution. The Court conveyed the idea that the public's interest could be best served by placing the decision-making process affecting education at the state and local levels.

SOCIETAL INTEREST

In addressing the societal interest of education, the RODRIGUEZ Court was most supportive. The Court stated that:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. (130)

> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. . . . (T)he undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. (131)

> No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does, public education. (132)

Justice William Brennan, in a dissenting opinion, stated that:

> . . . '(F)undamentality' is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. Thus, 'as the nexus between the specific constitutional guarantee and the non-constitutional interest draws closer, the nonstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.' . . . Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment. . . . This being so, any classification affecting education must be subjected to strict judicial scrutiny . . . . (133)

The Supreme Court in the RODRIGUEZ opinion made three primary points; they were: (1) education was a state issue, not a federal one; (2) education was not a constitutionally protected right; and (3) wealth was not a classification of "fundamental interest." The RODRIGUEZ opinion has received mixed reactions from legal commentators and writers. (134)

From an educational position, the RODRIGUEZ decision was a signal to state governments to seek resolution of fiscal questions relating to education at the state level. The states have reaffirmed their positions that education is a constitutionally protected right.

Education as a right had elements that satisfied the three interests that Michelman had described as being protected by the United States Supreme Court. Individual, public, and social interests offered support to the position of education being considered as a constitutionally protected right on the federal level. The fifty state constitutions

added additional strength to the debate. The legislative and executive branches, although conceded to be only political rhetoric, offered support to education's being considered as more than a state-only issue.

EDUCATION AS AN ENTITLEMENT

Daniel Oran defined an entitlement as a right to something once a person shows that he or she meets the legal requirement to get it. (135) Following Oran's definition, an entitlement, to an education at public expense, has been based upon individual state constitutions that clearly and legally state that education is a constitutionally protected right. (136) At the federal level, the classification of education as an entitlement is less clear. The United States Supreme Court has offered its definition of an entitlement using three cases: GOSS v. LOPEZ, INGRAHAM v. WRIGHT, and MT. HEALTHY v. DOYLE. GOSS v. LOPEZ offered the first definition of education as an entitlement.

In GOSS v. LOPEZ, the Supreme Court stated that education could be considered as a legal entitlement. (137) The Court stated that:

> The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. . . . (T)he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away. . . without adherence to the minimum procedures required by that Clause. The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirement of the Clause must be satisfied. (138)

Justice Lewis Powell, in a dissenting opinion in GOSS, stated that:

> The Court holds for the first time that the federal courts, rather than education officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline of children and teenagers in the public schools. (139)

The United States Supreme court had based its classification of an entitlement upon a state's law; the Court stated that:

> Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. (140)

The Court placed its classification of education as an entitlement into state constitutional terms; the Court stated that:

> Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not 'shed their constitutional rights' at the schoolhouse door. . . . 'The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures-Boards of Education not excepted.' (141)

Following the Supreme Court opinion, HAZELWOOD SCHOOL DISTRICT v. KUHLMEIER, 56 USLW 4079 (1988), a student has only limited rights while attending a public school.

The Supreme Court, in GOSS, recognized a state's authority to regulate governmental actions within its borders, but the Court cautioned that these actions must be conducted with care. The Court stated that:

> The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad must be exercised consistently with constitutional safeguards. (142)

> Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause . . . (143)

> Thus the very legislation which 'defines' the 'de minimis' of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law. Rather, the right is encompassed in the entire package of statutory provisions governing education in Ohio - of which the power to suspend is one. (144)

A legal entitlement to an education is predicated on individual state constitutions that legally specify the legal and constitutional position that education occupies at the state and local levels. (145)

Calabresi and Melamed, in their work, described a framework from which to explore the method of securing and protecting legal entitlements. They discussed three such ways: (a) property rules; (b) liability rules; and (c) inalienability rules. (146) Each holds promise for protecting educational entitlements.

PROPERTY RULES

> According to Calabresi and Melamed, property rules:
>
> . . .enable the right bearer to enjoin others from reducing the level of protection the entitlement affords him, except as he may be willing to forgo it at a mutually acceptable price. (147)

LIABILITY RULES

> . . . (A) nonentitled party may reduce the value of the entitlement without regard to the right holder's desires, provided he compensates ex post for the reduction in value. . . .(I)ndividuals who value entitlements more than those on whom the rights are initially conferred can secure the entitlements without ex ante negotiations . . . . The entitlement is secured by the party who most values it, thus duplicating the outcome of the Coasean market exchange process. (In this market, the right to use a resource would have been secured ultimately by that party who would have paid the most for it.) (148)

INALIENABILITY RULES

> When a right is protected by an inalienability rule, transfers of any sort are prohibited. The right to one's freedom from servitude and the right to vote are examples of rights protected by inalienability rules. (149)

Coleman and Kraus indicated that courts have used the Calabresi-Melamed framework and SPUR INDUSTRIES, INC. v. WEBB, 108 ARIZ 178, 494 P. 2d 700 (1972), as patterns to follow in establishing and securing entitlements. (150)

> A perfectly natural way of characterizing what it means to have a right to a resource or to property is in terms of autonomy or control. Rights . . . demarcate a realm of liberties. (151)
>
> The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights. (152)
>
> The point of conferring an entitlement arguably is to secure a domain of control, not to guarantee a particular level of welfare or utility. One who conceives of rights as securing a sphere of liberty does not believe that the concept of a right is reducible to or otherwise identifiable with a point on a right bearer's indifference curve. The liberty attendant rights ownership is not equivalent to any particular level of welfare . . . . (153)
>
> If rights entail or secure liberties, then, it is hard to see how liability rules protect them. . . . (L)iability rules protect something. Compensation under a liability rule is for harm done and loss suffered. The loss is the diminution in value of one's resources, . . . one's property. In this sense the 'objective' value of one's holdings is protected by liability rules; the value of the interest is left intact. But a liability rule confers no liberty or autonomy on an entitled party, and therefore secures no such liberty. (154)
>
> (T)he right is the liberty, not the value (i.e. utility) to anyone having or exercising that liberty. . . . (I)n the view that rights entail liberties, the most liability rules can secure is a level of welfare equal to the value of the right bearer's interest, including even his interest in his autonomy. . . . Rights secure a domain of autonomy. (155)
>
> Liability rules permit others to act without regard to the right holder's autonomy over his holdings. . . . (A) right is a domain of protected control, . . . liability rules protect rights. Both claims are plausible, but apprently incompatible. (156)

Coleman and Kraus indicated that:

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An entitlement to education, or a property right, is conferred by the action of state government. Once the state has established a property right to an education, the entitlement to such a right gains legal standing in an examination by the judiciary.

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> Rights . . . demarcate a realm of liberty or control. Rights are secured or protected liberties. (158)

States have established education as a constitutionally protected right. The United States Supreme Court stated that:

> tute for public schools. . . . One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . . This is not the moment in history for a state to experiment with ignorance. When it does, it must expect close scrutiny of the experiment. (164)

Judge Joseph F. Weis, of the Court of Appeals for the Third Circuit, stated that:

> The financial assistance granted to educational institutions by the federal government has led to its (the federal government) ever-increasing influence in a field which in times past was considered the domain of state, local or private activity. (165)

Judge Weis, reviewing "The Equal Educational Opportunities Act," HB 13915, dated February 28, 1972, stated that Section 2, Subsection (a) held that:

> . . .(I)t (the Equal Educational Opportunities Act) holds to be the policy of the United States that all public school children are entitled to equal educational opportunity . . . . Judicial zeal for identity of educational methodology should not lead us to presume that Congress would impose such limitations upon the nationwide teaching community by equivocation or innuendo. (166)

Johns and Morphet addressed the entitlement definition of Oran in their work; they stated that:

> Equality of educational opportunity is an objective to which practically every American citizen has subscribed in theory for many years. Equality of educational opportunity for all does not mean that every student should have the same program of education. Instead, it means that every person should have the opportunity for the kind and quality of education that will best meet his needs as an individual and as a member of the society in which he lives. . . . Many studies have shown, and numerous authorities have commented on, the tragedy inherent in wasted human and natural resources. There can be no doubt that the nation has been seriously handicapped by this neglect or that it cannot be afforded in the future. The maximum development of the human resources of the nation therefore should be the primary concern of all citizens. . . . Adequacy of opportunity is as important as equality, and the two must go hand in hand if civilization is to flourish. (167)

Johns and Morphet stated further that:

> The income of the citizens of a state affects their potential ex-

> penditure for education and other governmental services. The expenditure for education on a state-wide basis seem to bear rather directly on the quality of education provided. . . . With the great mobility of population at the present time, it is evident that inadequate educational opportunities in a state not only handicap the people in that state but constitute a problem for other states to which some of these people migrate. It is evident that under modern conditions, the nation cannot afford the losses resulting from the presence of the substantial members in the total population who have inadequate educational opportunity. (168)

An entitlement is a right to something once a person shows that he meets the legal requirement to get it. (169) Education, as an entitlement, is a protected right on the state level; using the analogy of Judge Weis, education has become more of a federal question because of the large infusion of federal monies. With the acceptance and application of federal monies, there exists enhanced federal involvement and control. From this federal involvement through increased levels of federal spending on education and educational programs, Congress has stated that the " . . . policy of the United States shall be that all public school children are entitled to equal education opportunity . . " (170)

Based on a consideration of the legislative activity and the judicial decisions, an entitlement exists when:

(1) a state declares that it is a constitutionally protected activity;

(2) the Congress states that it is a protected activity; and

(3) the United States Supreme Court declares that it supports the state and federal positions.

EDUCATION AS A PRIVILEGE

A privilege is defined as " . . . an advantage not enjoyed by all." (171) Education is conferred by the states upon a special class of individuals without having a federal mandate to do so. The fifty states have independently chosen to grant the privilege of an education to the special class; the states, having chosen to grant the privilege, may select to terminate this condition. The special class, as created by the fifty states, is children between the ages of six and sixteen years of age. (172) Through the use of compulsory attendance laws, the states have required the special class of individuals to be in attendance.

William W. van Alstyne stated that:

> The (Supreme Court) has been seeking to refute the implication that the government may arbitrarily regulate an interest in which a citizen does not have specifically enumerated rights. (173)

Since the state is not bound by the federal Constitution to provide an education to all of its citizens, the state may choose to provide the educational privilege, or may select not to provide it.

Under its broad and general police powers, a state may create institutions that promote and provide for the general welfare of its citizens. Education at the public's expense is one of these creations; a state has provided the institution outside federal consideration of a constitutional "fundamental interest."

van Alstyne stated that:

> . . . (I)t seemingly makes no difference that the threatened interest is a privilege rather than a right. Even a privilege, benefit, opportunity, or public advantage may not be granted to some but withheld from others where the basis of classification and differences in treatment is arbitrary. (174)

> The Constitution specifies the powers of the federal government, and all of those not explicitly listed are reserved for the states. This great reservoir of power delegated by the federal system of government to the states creates the foundation for state and local governments. Education is one of the powers and responsibilities reserved by implication for state and local governments. (175)

Webster defined a privilege as "A right or immunity granted as a peculiar benefit, advantage, or favor." (176) Oran defined privilege as "A basic right that cannot be taken away; special advantage, as opposed to a right." (177)

Johns and Morphet stated that:

> . . . (T)he 'system' of education developed in the United States does not constitute a 'regular orderly arrangement of parts in a connected and interrelated series of whole' and, therefore, should only be loosely referred to as a system. It was not developed by a national government as in many other countries, nor is it controlled by the federal government except in a few fundamental respects relating especially to the 'equal protection' provisions in the Constitution. Education, therefore, is basically a responsibility of each state . . . .(178)

> Each of the major levels of government in the United States - federal, state, and local - has an interest in the public school, and all are involved in the financing . . . . (179)

> Although education is really a quasi-system nationally, the diversity seems to have contributed substantially to its development over the 200 years of our history. Moreover, all aspects of education have been bonded together by a common belief among the citizens that education is one of the most efficient and effective ways to ensure progress toward the better life. (180)

Steven Gifis stated that a privilege was:

> . . . (A)n advantage not enjoyed by all; 'a particular or peculiar benefit enjoyed by a person, company, or class beyond the common advantages of other citizens; an exceptional or extroardinary exemption; or an immunity held beyond the course of the law. And, again, it is defined to be an exemption from some burden or attendance, with which certain persons are indulged, from a supposition of the law that their public duties or services, or the offices in which they are engaged, are such as required all their time and care, and that therefore, without this indulgence, those duties could not be performed to that advantage which the public good demands. (181)

> If a court now determines that society has begun to recognize that denial of a new interest such as education rivals the personal and societal detriment created by denial of more traditionally recognized rights, it would seem that the court should label such an interest fundamental and treat it as a right. (182)

William W. van Alstyne, in his work, argued that since Justice Oliver Wendell Holmes, Jr. first enumerated the right-privilege distinction in McAULIFFE v. MAYOR OF NEW BEDFORD:

> The Court has been seeking to refute the implication that the government may arbitrarily regulate any interest in which a citizen does not have specifically enumerated right. He further reasons that it has been most successful under the rubric of equal protection where it has, in effect, allowed the equal protection clause to swallow all of the old doctrines of substantive due process. Rather, the Court defines sufficiently imporant private interests, such as voting in REYNOLDS or felony appeals in DOUGLAS, and protects these from arbitrary governmental interference. He concludes that the extension of the private interests that deserve protection is justified by the 'substantial influence which expanded governmental activity gives the government over the private lives of its citizenry.' (183)

van Alstyne further stated that:

> As the structure of society has changed, so too have those interests that deserve special protection. (184)

Education provides a particular benefit, a privilege, enjoyed by those individuals who have attended any of the schools maintained by state or federal governments. American society has long recognized the benefits, immediate, and future considerations, of one's possessing an education. Forty-nine of the fifty states have in place compulsory school attendance laws; possession of these compulsory attendance laws gives clear intentions of the value that each of the states hold with regards to education at the public's expense. Succinctly stated, public education has been created by the fifty states without their having a federal mandate to do so; therefore, states, having created the public service, may remove it. The Supreme Court, lower federal, and state

courts have supported this concept; however, the courts have held that if the state does eliminate public education service, the states must anticipate strict judicial scrutiny. Courts have held that the state demonstrating a "Compelling State Interest" will have little effect upon the "Strict Scrutiny" review. (185)

FOOTNOTES

CHAPTER 3

1 Edwin Meese, "The Law of the Constitution, " a speech delivered at Tulane University in New Orleans, Louisiana on October 21, 1986, p. 5.

2 William J. Brennan, "The Constitution, " LIBERTY (July/August 1986), Volume 81, Number 4, pp. 10-11.

3 Meese, op. cit., p. 12.

4 Ninth Amendment, United States Constitution.

5 Tenth Amendment, United States Constitution.

6 BROWN v. BOARD OF EDUCATION, 347 US 483 (1954) at 493

7 "School Law - The Constitutional Mandate for Free Schools," WISCONSIN LAW REVIEW (1971), Volume 1971, Number 3, p. 973.

8 Ibid.

9 Twenty-five state constitutions were examined for educational provisions. They were: Texas, Georgia, North Carolina, South Carolina, Virginia, Tennessee, Maryland, West Virginia, Pennsylvania, New York, New Jersey, Ohio, California, Colorado, Vermont, New Hampshire, Maine, Rhode Island, Michigan, Connecticut, Massachusetts, Montana, Idaho, Oregon, and Arizona. Although there have been minor changes in the language of the provisions, education was held to be a "protected right."

10 Stanley Herr, "The Children Who Wait," In Michael Kindred, Julius Cohen, David Penrod, and Thomas Shaffer, Editors, THE MENTALLY RETARTED CITIZEN AND THE LAW (New York: The Free Press, 1976), p. 267.

11 Ibid.

12 North Carolina Constitution, Article 9, Section 2.

13 North Carolina Constitution, Article 9, Section 1.

14 South Carolina Constitution, Article 11, Section 3.

15 "Education," In James A. Crutchfield, Editor, THE NORTH CAROLINA ALMANAC AND BOOK OF FACTS (Nashville, Tennessee: Rutledge Hill Press, 1986), p. 83.

16 Ninth Amendment, United States Constitution; Tenth Amendment, United States Constitution; and Eleventh Amendment, United States Constitution.

17 See GEORGIA v. BRAILSFORD, 3 US 1 (3 DALL 1), 1 L. ED. 483 (1794). See also MARTIN v. HUNTER'S LESSEE, 14 US 304 at 304 (1 Wheat), 4 L. ED. 97 (1816). (Justice Story stated for the Court that " . . . the judicial power must, therefore, be vested in some court, by Congress; . . . . ." at 310).

18 Eleventh Amendment, United States Constitution. See generally, Strom Thurman, THE FAITH WE HAVE NOT KEPT (San Diego, California: Viewpoint Books, 1968).

19 MEYER v. NEBRASKA, 262 US 390 (1923) at 399 - 400.

20 See generally, Thruman, op. cit. See also, Merle Curti, THE GROWTH OF AMERICAN THOUGHT, Third Edition (New York: Harper & Row, Publishers, 1964), and Harold U. Faulkner, AMERICAN ECONOMIC HISTORY, Eighth Edition (New York: Harper & Row, Publishers, 1960). See also, "The Civil Rights Movement: 'We Shall Overcome,'" on WUNC PBS-TV, Public Broadcast System, broadcast on March 6 - 9, 1988 on Channel 59. The program gave sufficient background information to make the statement that "States of the Deep South - Alabama, Arkansas, Georgia, Louisiana, and Mississippi - hold tenaciously to the concept of 'State Sovereignty.'" Between 1963 and 1966, no less than ". . . twelve federal court decisions and restraining orders were issued; however, the states (of the Deep South) resisted, stalled, and ignored all judicial efforts. It was not until direct intervention by President Lyndon B. Johnson that the states relented." One premise made by the broadcast was that in the history of the Deep South, the government operated on the assumption that it controlled all aspects of life in the state; Blacks were incapable of self-government therefore needed government to control their lives.

21

van Geel, op. cit., p. 60. See EPPERSON v. ARKSAS, 393 US 97 (1968); WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE, 319 US 624 (1943); WISCONSIN v. YODER, 406 US 205 (1972); WOLMAN v. WALTER, 433 US 229 (1977); WALLACE v. JAFFREE, 472 US 38 (1985); EDWARDS v. AGUILLARD, 55 USLW 4860 (1987); HAZELWOOD SCHOOL DISTRICT v. KUHLMEIER, 56 USLW 409 (1988).

22

Oliver Wendell Holmes, Jr., "Law and the Court," THE COMMON LAW & OTHER WRITINGS (Birmingham, Alabama; Legal Classics Library, 1982), pp. 295 - 296.

23

CAREY v. POPULATION SERVICES INTERNATIONAL (P.S.I.), 431 US 678 (1978) at 689. See also, BELLOTI v. BAIRD, 443 US 622 (1979).

24

A telephone interview with Dr. Tom Saterfiel, the Deputy Superintendent of Education, the State Department of Education in Jackson, Mississippi on July 12, 1987 and on September 14, 1987 confirmed that Mississippi continues to debate the issue of States' Rights and State Sovereignty on public school compulsory attendance laws. This has its roots in the traumatic Civil Rights struggle from the early part of the 1960s. The Commission of Children and Youth are working during the 1987 - 1988 academic school year to enforce the new Mississippi compulsory public school attendance law enacted into law by the 1986 - 1987 Mississippi Legislature. The exact statistics confirming or denying the progress made thus far in the 1987 - 1988 school year are incomplete as of this date. Dr. Richard Boyd, the State Superintendent, suggested that some marginal progress had been made. The new attendance law requires children between the ages of 6 and 13 to attend school; there have been provisions made to raise the upper age limit to 16 years of age by the 1990 - 1991 school year.

25

John C. Hogan, "Obtaining an Education as a Right of the People," NOLPE SCHOOL LAW JOURNAL (1973), pp. 17 - 29. Grover Rees, "The Constitution, the Court, and the President-Elect," NATIONAL REVIEW (December 3, 1980), Volume 32, Number 26, pp. 1596 - 1612. "Project Report: Toward an Activist Role for State Bills of Rights," HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW (1973), Volume 8, pp. 271 -280. Jo Pittenger and P. Kurlloff, "Educating the Handicapped: Reforming a Radical Law," PUBLIC INTEREST (1982), Volume 66, pp. 72 - 96.

26

Steven H. Gifis, LAW DICTIONARY (New York: Barron's Educational Series, Inc., 1976), p. 83.

27

Ibid.

28 See SAN ANTONIO v. RODRIGUEZ (1973); EDWARDS v. AGUILLARD (1987); PLYLER v. DOE (1982); GOSS v. LOPEZ (1975); and PICKERING v. BOARD OF EDUCATION, 391 US 563 (1968).

29 Ninth Amendment, United States Constitution.

30 Jordan J. Paust, "Human Rights and the Ninth Amendment: A New Form of Guarantee," CORNELL LAW REVIEW (1975), Volume 60, p. 234.

31 Ibid.

32 Ibid.

33 Ibid, p. 237.

34 Ibid, p. 235.

35 Ibid.

36 Ibid.

37 Ibid, p. 243

38 Ibid, p. 252.

39 Tenth Amendment, United States Constitution.

40 Fourteenth Amendment, United States Constitution, Section 1.

41 Fifth Amendment, United States Constitution.

42 TINKER v. DES MOINES, 393 US 503 (1969) was the established policy that administrators followed; however, HAZELWOOD SCHOOL DISTRICT v. KUHLMEIER, 795 F. 2d 1368; 56 USLW 4079 (1988) has drastically altered this.

43 TINKER v. DES MOINES (1969); and TRACHTMAN v. ANKER, 563 F. 2d 512 (2nd Cir. 1977).

44 WALLACE v. JAFFREE, 472 US 38 (1985); EDWARDS v. AGUILLARD (1987); MEYER v. NEBRASKA (1923); and HAWKINS COUNTY SCHOOL BOARD v. MOZERT (1987).

45 WISCONSIN v. YODER, 406 US 205 (1972); ABINGTON v. SCHEMPP, 347 US 203 (1963); WEST VIRGINIA v. BARNETTE, 319 US 624 (1943); and MUELLER v. ALLEN (1983).

46 ZORACH v. CLAUSON, 343 US 306 (1952); MASSIE v. HENRY, 455 F. 2d 799 (4th Cir. 1972); and KELLY v. JOHNSON, 425 US 238 (1976).

47 van Geel, op. cit., p. 416.

48 Ibid, pp. 65 -67.

49 See pages 47 and 48 of this work.

50 RODRIGUEZ, op. cit., at 30.

51 See Henry P. Monaghan, "Our Perfect Constitution," NEW YORK UNIVERSITY LAW REVIEW (1981), Volume 56, pp. 353 - 372; Henry P. Monaghan, "The Supreme Court, 1974 Term - FOREWARD: Constitutional Common Law," HARVARD LAW REVIEW (1975), Volume 89, pp. 1 - 39; Frank I. Michelson, "Equal Protection and School Resources," INEQUALITY IN EDUCATION (1969), Volume 2, pp. 1 - 12; Arthur S. Miller, "Some Pervasive Myths About the United States Supreme Court," ST. LOUIS UNIVERSITY LAW JOURNAL (Winter 1965), Volume 10, pp. 610 - 699; James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," HARVARD LAW REVIEW (1893), Volume 7, p. 129; Laurence Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories," YALE LAW JOURNAL (1980), Volume 89, pp. 1063 - 1100; Laurence Tribe, "Seven Pluralist Fallacies: In Defense of the Adversary Process - A Reply to Justice rehnquist," UNIVERSITY OF MIAMI LAW REVIEW (1978), Volume 33, pp. 410 -430; and David Tyack and Aaron Benavot, "Courts and Public Schools: Educational Litigation in Historical Perspective," LAW & SOCIETY REVIEW (1985), Volume 19, Number 3, pp. 339 - 380.

52

See Steve F. Dalton, A STUDY OF SUPERINTENDENT TURNOVER IN NORTH CAROLINA (1980 - 1982), (An unpublished doctoral dissertation, University of North Carolina at Greensboro, 1984), pp. 52 -53; and John B. Coullard, THE LEGAL ASPECTS OF FUNDING PUBLIC EDUCATION THROUGH REAL PROPERTY TAXATION: 1971 SERRANO TO THE PRESENT, (An unpublished doctoral dissertation, University of North Carolina at Greensboro, 1978), pp. 19 - 48.

53

Mark Tushnet, "The Newer Property: Suggestion for the Revival of Substantive Due Process," THE SUPREME COURT REVIEW (1975), pp. 267 - 276.

54

See footnotes numbers 20, 21, and 25 of this chapter. See also, Tushnet, op. cit.; Michelman, op. cit.; and Shannon for a discussion of classifications.

55

States have various statute language that enunciate a variable age limit; however, generally the states have used 6 years to 16 years of age as a median age.

56

See GOSS v. LOPEZ, 419 US 565 (1975). When a state creates an institution in constitutional language, it gives an individual citizen an entitlement to enjoy that right.

57

Education has increased and expanded roles of state and federal governments in the control versus regulation of education and educational issues. (See Tyll van Geel, AUTHORITY TO CONTROL THE SCHOOL PROGRAM (Lexington, Massachusetts: D. C. Heath and Company, 1976); David K. Cohen, "Policy and Organization: The Impact of State and Federal Educational Policy on School Goverance," HARVARD EDUCATIONAL REVIEW (1982), Volume 52, pp. 474 - 520; and Joseph M. Cronin, THE CONTROL OF URBAN SCHOOLS (New York: Free Press, 1973).

58

WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (Springfield, Massachusetts: G. & C. Merriam Company, Publishers, 1970), p. 741.

59

Daniel Oran, LAW DICTIONARY FOR NONLAWYERS, Second Edition (New York: West Publishing Company, 1985), p. 271.

60

John C. Hogan, "Obtaining an Education as a Right of the People," NOLPE SCHOOL LAW JOURNAL (1973), p. 17.

61
See SUGARMAN v. DOUGALL, 413 US 634 (1973) at 642 - 643. The Court held that a determination of individual interests was not beyond its power.

62
FUENTES v. SHEVIN, 407 US 67 (1972); GRANT TIMBER & MFG COMPANY v. GRAY, 236 US 133 (1915); BIANCHI v. MORALES, 262 US 170 (1923); and LINDSAY v. NORMET, 405 US 56 (1972).

63
GOLDBERG v. KELLY, 397 US 254 (1970); PENNSYLVANIA COAL COMPANY v. MAHON, 260 US 393 (1922); DEMOREST v. CITY BANK FARMERS TRUST COMPANY, 321 US 36 (1944); INDIANA ex. rel. ANDERSON v. BRAND, 303 US 95 (1938); PHELPS v. BOARD OF EDUCATION, 300 US 319 (1937); DODGE v. BOARD OF EDUCATION, 302 US 74 (1937); and WOLFF v. McDONNELL, 418 US 539 (1974).

64
Hogan, op. cit., p. 17.

65
Ibid, p. 8.

66
Ibid.

67
Ibid, p. 7.

68
Ibid, p. 18.

69
Ibid, See also SHAPIRO v. THOMPSON, 394 US 662 (1975) at 667 - 668.

70
Ibid.

71
See footnote number 61 of this chapter

72
See footnote number 62 of this chapter

73
See footnote number 63 of this chapter.

74
Jules L. Coleman and Jody Kraus, "Rethinking the Theory of Legal Right," YALE LAW JOURNAL (June 1986), p. 1340.

75 REYNOLDS v. SIMMS, 377 US 533 (1964).

76 GRIFFIN v. ILLINOIS, 351 US 12 (1956).

77 KOREMATSU v. UNITED STATES, 323 US 214 (1944).

78 GIDEON v. WAINWRIGHT, 372 US 335 (1963).

79 GRIFFIN v. CALIFORNIA, 380 US 609 (1965).

80 SCOTT v. ILLINOIS, 440 US 367 (1979).

81 MIRANDA v. ARIZONA, 384 US 436 (1966).

82 SWANN v. MECKLENBURG, 402 US 1 (1971).

83 UNITED STATES v. MONTGOMERY COUNTY BOARD OF EDUCATION, 395 US 225 (1969).

84 REITMAN v. MULKEY, 387 US 369 (1967).

85 REGENTS OF UNIVERSITY OF CALIFORNIA v. BAKKE, 438 US 265 (1978).

86 BECKWITH v. UNITED STATES, 425 US 341 (1976).

87 ROE v. WADE, 410 US 113 (1973).

88 PALMER v. THOMPSON, 403 US 217 (1971).

89 SALISBURG v. STATE OF MARYLAND, 346 US 545 (1956).

90 Graham and Kravitt, op. cit., p. 121.

91 William A. Reinsmith, "The True Meaning of Education: A Radical Suggestion," EDUCATIONAL FORUM (Spring 1987), Volume 51, Number 3, p. 251.

92 Graham and Kravitt, loc. cit., and Tushnet, Ibid.

93 AMBACK v. NORWICK, 441 US 68 (1976).

94 BRANDON v. BOARD OF EDUCATION, 454 US 1123 (1981).

95 GRIFFIN v. COUNTY SCHOOL BOARD, 377 US 218 (1964).

96 ILLINOIS, ex. rel. McCOLLUM v. BOARD OF EDUCATION. 333 US 203 (1948).

97 Robert L. Graham and Jason H. Kravitt, "The Evolution of Equal Protection - Education, Municipal Services, and Wealth," HARVARD CIVIL RIGHTS AND CIVIL LIBERTIES LAW REVIEW (January 1972), Volume 7, Number 1, pp. 1 - 199; see p. 123.

98 Ibid.

99 Ibid, p. 126.

100 BROWN v. BOARD OF EDUCATION, 347 US 483 (1954) at 493.

101 Graham and Kravitt, op. cit., p. 128.

102 Ibid.

103 Ibid, pp. 129 - 130.

104 Ibid.

105 SERRANO v. PRIEST, 487 P. 2d 1241 (1971).

106 RODRIGUEZ v. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, 411 US 1 (1973).

107 SERRANO, 487 P. 2d at 1258 (1971).

108 Ibid, at 1258 - 1259.

109 Arthur W. Foshay, "The Curriculum Matrix," EDUCATIONAL FORUM (Summer 1987), Volume 51, Number 4, p. 345.

110 Ibid.

111 Ibid.

112 Ibid.

113 Ibid.

114 Ibid.

115 Ibid, pp. 345 - 346.

116 SERRANO v. PRIEST, 487, P. 2d 1241 (1971) at 1259.

117 Ibid.

118 Ibid.

119 Ibid.

120 Foshay, op. cit., pp. 345 -346.

121 SERRANO, 487 P. 2d (1971) at 1259.

122 Paust, op. cit., p. 234.

123 Ibid, p. 235.

124 SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ, 411 US 1 (1973) at 12.

125 Ibid, at 30.

126 Ibid, at 49.

127 Ibid, at 30.

128 Ibid, at 49.

129 Ibid, at 43.

130 Ibid, at 33 - 34.

131 Ibid, at 35.

132 Ibid, at 50.

133 Ibid, at 62.

134 Various writers have viewed RODRIGUEZ v. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT with mixed feelings; these range from opposition to support. Michael La Morte, Mark Tyack, Anthony Kennedy, Kern Alexander, Arthur Areen, and Raoul Berger present contrasting views of the decision reached by the Supreme Court in RODRIGUEZ.

135 Oran, op. cit., p. 110.

136 The individual state constitutional provisions are listed on pages 47 and 48 of this work.

137 GOSS v. LOPEZ, 419 US 565 (1974) at 573.

138 Ibid, at 572 - 573.

139 Ibid, at 573.

140 Ibid, at 572 - 573.

141 Ibid, at 574.

142 Ibid.

143 Calabresi and Melamed, op. cit., p. 1106.

144 Ibid, pp. 1105 - 1106.

145 As cited on pages 47 and 48 of Chapter II of this work, the state constitutions have listed education as a constitutionally protected right.

146 Arthur L. Calabresi and M. G. Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," HARVARD LAW REVIEW (1972), Volume 85, pp. 1105 - 1115.

147 Ibid.

148 Ibid.

149 Ibid.

150 Ibid.

151 Ibid.

152 Ibid.

153 Ibid.

154 Ibid.

155 Ibid.

156 Ibid.

157 Hogan, op. cit., p. 17 at footnote number 14.

158 Ibid.

159 Ibid.

160 Hogan, op. cit., p. 20 at footnote number 20.

161 Jules L. Coleman and Jody Kraus, "Rethinking the Theory of Legal Rights," YALE LAW JOURNAL (June 1986), p. 1340.

162 Graham and Kravitt, op. cit., pp. 106 - 107.

163 HALL v. ST. HELENA PARISH SCHOOL BOARD, 197 F. Supp. 649 (1961) at 659.

164 Ibid.

165 VORCHHEIMER v. SCHOOL DISTRICT OF PHILADELPHIA, 532, F. 2d 880 (1976) at 883.

166 Ibid, at 883 - 885.

167 Roe L. Johns and Edgar L. Morphet, THE ECONOMICS AND FINANCING OF EDUCATION: A SYSTEM APPROACH, Third Edition (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1975), p. 1.

168 Ibid, pp. 1 - 2.

169 Oran, op. cit., p. 110.

170 VORCHHEIMER, op. cit., at 883.

171 Oran, op. cit., p. 238.

172 It is conceded that actual differences do exist in the age-limit requirements in the various fifty states: these requirements range from six years to sixteen years of age. However, from an average of the compulsory school ages, the special class of individuals consists of students between six and sixteen years of age.

173 van Alstyne, op. cit., p. 1439.

174 Ibid, p. 1454.

175 HALL, op. cit., at 658.

176 Webster, op. cit., p. 277.

177 Oran, op. cit., p. 110.

178 Johns and Morphet, Second Edition, op. cit., pp. 168 - 169.

179 Ibid, p. 407.

180 Ibid, p. 164.

181 Gifis, op. cit., p. 161.

182 Johns and Morphet, Second Edition, op. cit., p. 166.

183 van Alstyne, op. cit., p. 1440.

184 Ibid.

185 See GOSS v. LOPEZ, 419 US 565 (1975); JOHNSON v. NEW YORK STATE EDUCATION DEPARTMENT, 449 F. 2d 871 (2d Cir. 1971); and HALL v. ST. HELENA PARISH SCHOOL BOARD, 197, F. Supp. 649 (1961) at 659.

CHAPTER FOUR

ANALYSIS OF SELECTED MAJOR COURT DECISIONS

INTRODUCTION

Supreme Court decisions delivered during the past sixty years provide a judicial record of the Court's response to questions asked of it. Decisions affecting education were selected as being representative of the different periods of change that the Court has undergone over the past sixty years. This span covered the upheaval and change within American society that has influenced the present function, operation, diversity, and organization of education in the 1980s. The Supreme Court has been in the forefront of change, and the Court's constitutional interpretations were the primary vehicle for changes that have affected present day education. (1)

The late Senator Sam Ervin, in quoting from George Washington's Farewell Address, stated:

> If in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always overbalance in permanent evil any partial or transient benefit which the use can at any time yield. (2)

The challenge by President George Washington was relevant and appropriate to the conditions present during the second Washington administration; it is also appropriate and relevant to the three branches of

government of the Reagan administration, and to the future administrations.

Senator Ervin, an ardent United States Supreme Court watcher and a great lover of the Constitution, summarized the right and the awesome responsibility of the judiciary to interpret the Constitution. He stated:

> The power to interpret the Constitution is an awesome power. This is so because, in truth, constitutional government cannot exist in our land unless this power is exercised aright. Chief Justice Harlan F. Stone (1941 - 1946) had this thought in mind when stating this truth concerning Supreme Court Justices; 'While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our exercise of power is our own sense of self-restraint.' (3)

The power to interpret the Constitution, which has been alloted to the Supreme Court, and the power to amend the Constitution, which is assigned to Congress and the states acting in concert, are quite different. The power to interpret the Constitution is the power to ascertain its meaning, and the power to amend the Constitution is the power to change its meaning. Justice Benjamin N. Cardozo (1932 - 1938) put the distinction between the two powers when he said:

> 'We (the Supreme court justices) are not at liberty to revise while professing to construe.' (4)

Justice George Sutherland (1922-1938) elaborated upon the distinction in another way:

> The judicial function is that of interpretation: it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'supreme law of the land' stands for and to convert what were intended as inescapable and enduring mandates into mere moral reflections. (5)

Since it is a court of law, the Supreme Court acts as the inter-

preter of the Constitution only in a litigated case whose decision of necessity turns on some provision of that instrument. As a consequence, the function of the Court is to ascertain and give effect to the intent of those who framed and ratified the provision in issue. If the provision is plain, the Court must gather the intent solely from its language, but if the provision is ambiguous, the Court must place itself as nearly as possible in that condition of those who framed and ratified it, and in that way determine the intent the language was used to express. For these reasons, the Supreme Court is duty bound to interpret the Constitution. (6)

Justice Robert H. Jackson (1941 - 1954) stated that:

> Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of the justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles. (7)

> The genius of the Constitution is this: The grants of power it makes and the limitations it imposes are inflexible, but the powers it grants extend into the future and are exercisable, with liberality on all occasions by the departments in which they are vested. (8)

Justice Oliver Wendell Holmes (1902 - 1932) stated that:

> We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it. (9)

The Court is the symbol that our society has visualized to follow. The Supreme court has the obligation, the right, and the power to interpret the Constitution; this is established by the Constitution in clear language. What is not clear is the extent to which the limits of these powers extend.

Supreme Court decisions represent a pattern of constitutional law that are guidelines and interpretations for Americans to examine. The Court's opinions provide a legal framework from which to plan and organize educational activities to ensure that the intent of the Constitution is upheld. The past sixty years of judicial activity present an increasing amount of judicial action affecting public education.

OVERVIEW

The selected review of the Supreme Court's opinions has been divided into four periods; each period reflected the influence and leadership of the Chief Justice of the Supreme Court during that period. The selected opinions also reflected the Court's position on education as a right, entitlement, and privilege from four distinct periods: these periods of Supreme Court activity are: Judicial Constraint, Activist Period, Restraint Period, and Retreat Period. (10) From a division of Supreme Court opinions, the researcher had an opportunity to examine developed and emerging patterns of Supreme Court behavior that affect education.

The process of selecting United States Supreme Court opinions and lower federal and state court opinions involved use of the following criteria:

(1) Did the opinion have a significant impact upon education?

(2) What was the vote of the court on the decision?

(3) Which justice wrote the majority opinion? Did he, or she represent the liberal, conservative, or middle section of the Court?

(4) Did the minority opinion make a superior contribution than did the majority opinion?

(5) What were the general comments of legal scholars and journalists?

(6) What was the public reaction to the decision?

(7) What were the reactions of the lower federal and state Courts?

Each of the divisions of Supreme Court activity had several decisions that were representative of the positions that the Court had held; the following decisions are a selected sampling from each of these periods.

The Period of Judicial Constraint (1921 - 1953) was represented by: MEYER v. NEBRASKA, 262 US 390 (1922); and SKINNER v. OKLAHOMA, 316 US 483 (1942).

The Activist Period (1953 - 1968) was represented by: BROWN v. BOARD OF EDUCATION 347 US 483 (1954); and SHAPIRO v. THOMPSON, 394 US 618 (1968).

The Restraint Period (1968 - 1986) was represented by: TINKER v. DES MOINES, 393 US 503 (1969); SAN ANTONIO v. RODRIGUEZ, 410 US 1 (1973); GOSS v. LOPEZ, 419 US 656 (1975); COMMITTEE FOR PUBLIC EDUCATION v. REGAN, 444 US 646 (1980); PLYLER v. DOE, 50 USLW 4655 (1982); and MUELLER v. ALLEN, 463 US 388 (1983)

The Retreat Period (1986 - Present) was represented by: EDWARDS v. AGUILLARD, 55 USLW 4860 (1987).

Several federal and state court decisions have been selected which demonstrate the effect that Supreme Court decisions have had upon the lower courts' decisions as well as the effect that these decisions have had upon the United States Supreme Court. All of the federal and state court decisions have been selected from the Activist Period of the Sup-

reme Court's activity owing to the activity and exchange that had occurred between the United States Supreme court and the lower federal and state courts. The selected federal and state court decisions were:

(a) SERRANO v. PRIEST, 96 CAL R. 601, 487 P. 2d 1241 (1971)

(b) BOARD OF EDUCATION v. OKLAHOMA, 409 F. 2d 665 (1969)

(c) ROBINSON v. CAHILL, 62 N.J. 473, 303 A. 2d 273 (1973)

(d) ZOLL v. ANKER, 414 F. Supp. 1024 (1976) - New York

(e) HORTON v. MESKILL, 172 CONN 615, 376 A. 2d 359 (1977)

THE PERIOD OF JUDICIAL CONSTRAINT - 1921 to 1953

It was a period that was characterized by the leadership and influence of four Chief Justices; they were: William H. Taft (1921 - 1930); Charles Evans Hughes (1930 - 1941); Harlan Fiske Stone (1941 - 1946); and Frederick Moore Vinson (1946 - 1953). This period had been witness to a notable period of judicial restraint and conservative action toward intervention into the area of education. The Court had held a fairly consistent approach towards interpreting the United States Constitution along the dictates of an Originalist's intent.

MEYER v. NEBRASKA, 262 US 390 (1922)

The issue in MEYER v. NEBRASKA was the legitimate teaching of German, a language, to junior high school students. Owing to the conflict in Europe that had been concluded, Nebraska had passed an ordinance forbidding the teaching of any courses of instruction in any language except English. An instructor in Nebraska taught a ten year old student reading in the child's native language, German.

The Supreme court stated that:

> The relation to the common good of a law fixing a minimum of education is readily perceived, but how one fixing a maximum - limiting the field of human knowledge - can serve the public welfare or add substantially to the security of life, liberty, or the pursuit of happiness is inconceivable. (11)

Justice McReynolds writing for the Court stated that:

> The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small. A selection of subjects for its education, therefore, from among the many that be taught is obviously necessary. (12)

The Court saw that the State of Nebraska had a right to regulate the operation of its established schools through passage of statutes.

> The obvious purpose of this statute was that the English language should become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state. (13)

The Court examined the rights of the individual teacher against the "liberty interest" of the Fourteenth Amendment. It stated that:

> While this Court has not attempted to define with exactness the liberty . . . . Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized in common law as essential to the orderly pursuit of happiness by free men. (14)

Addressing directly the important position that education occupied in this nation, the Supreme Court stated that:

> The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, 'Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged.' Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws. (15)

> Practically education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling (to become a teacher) always has been regarded as useful and honorable, essential, indeed, to the public welfare. . . . (The teacher's) . . . right thus to teach and the right of parents to engage him so to instruct their children, we think are within the liberty of the Amendment. (16)

The Supreme Court specifically addressed the role of the State in providing the facilities and policies necessary for education of its citizens. The Court stated:

> That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. (17)
>
> The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. . . . The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports. (18)

The Supreme Court in MEYER, recognizing the rights of the state, foreshadowed the BROWN and SERRANO decisions respecting education as a protected "fundamental interest." The Court established a basis for the consideration of education from the "Liberty Interests" of the fourteenth amendment; yet, the Court in RODRIGUEZ rejected this analysis of the interest and the BROWN argument.

The MEYER court held that "Libety Interests" could be defined as " . . . to acquire useful knowledge . . . " (at 400) and " . . . to enjoy those privileges long recognized in common law as essential to the orderly pursuit of happiness by free men." (at 400)

The key phrase from the MEYER decision is " . . . the means of education shall be forever encouraged." (at 401) When compared to the RODRIGUEZ decision, the distinction between the two opinions of the Court is perceptively apparent when viewed from the two periods of Supreme Court activity. (19)

SKINNER v. OKLAHOMA, 316 US 535 (1942)

The issue in SKINNER v. OKLAHOMA was a statute passed by the State of Oklahoma that provided for the sterilization of habitual criminals. Although the SKINNER decision was not primarily an education, it does offer a clear definition of the rule of "Strict Scrutiny" that the United States Supreme Court had employed under the color of the fourteenth amendment. This rule has been used by courts that followed to make decisions affecting education.

In SKINNER, the Court held that:

> . . . the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. . . . We must remember that the machinery of government would not work if it were not allowed a little play in its joints. . . . For a state is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. Nor is it prevented by the equal protection clause from confining 'its restriction to those classes of cases where the need is deemed to be clearest.' ' . . . (T)he law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. (20)

This is a clear definition of the equal protection clause of the fourteenth amendment.

The Supreme Court identified two "rights" not mentioned in the words of the United States Constitution; it classified them as "fundamental rights." The Court stated that "Marriage and procreation are fund-

amental to the very existence and survival of the race." (21) The Constitution made no mention of these two rights; however, they are viewed by the majority of the population of Americans to be so fundamental that it is not necessary to have them spelled out in the wording of the federal Constitution. (22)

> We advert to them (the police power of the State) merely in emphasis of our view that strict scrutiny of the classification which a state makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws. . . . When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. (23)

Justice Stone, in a concurring opinion, stated that:

> . . . the most elementary notions of due process would seem to require it (the State) to take appropriate steps to safeguard the liberty of the individual by affording him . . . some opportunity to show that he is without such inheritable tendencies. The state is called on to sacrifice no permissible end when it is required to reach its objective by a reasonable and just procedure adequate to safeguard rights of the individual which concededly the Constitution protects. (24)

THE ACTIVIST PERIOD - 1953 to 1968

This particular period of the United States Supreme Court, led by the activist faction of the Court, produced some of the most revolutionary concepts that the Supreme Court had produced to this point in the history of the Court. The rationale that the Court used for its innovations was the Non-Originalist position of interpretation of the United States Constitution. This Non-Originalist interpretation of the federal Constitution began to move the Court toward involvement in more social and political issues.

BROWN v. BOARD OF EDUCATION, 347 US 483 (1954) - BROWN I

No other decision represented this period better than the Court's opinion in BROWN v. BOARD OF EDUCATION; it has commonly been referred to as BORWN I. In BROWN I, the Supreme Court consolidated desegregation cases from the States of Kansas, South Carolina, Virginia, and Delaware.

> In approaching this problem, we cannot turn the clock back to 1868 when the (Fourteenth) Amendment was adopted, or even to 1896 when PLESSY v. FERGUSON, 163 US 537 (1896) was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this wa can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws. (25)

The most often cited passage of BROWN I, as well as the most powerful and far reaching statement, stated that:

> Today, 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. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (26)

These two key quotes point to the recognition of education as a constitutionally protected right; however, they were rejected by the United States Supreme Court during its Restraint Period. The Court stated in RODRIGUEZ v. SAN ANTONIO that:

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is 'fundamental'

> Is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. (27)

SHAPIRO v. THOMPSON, 394 US 618 (1968)

In SHAPIRE v. THOMPSON, THE United States Supreme court gave expression to the influence of the social sciences as it expanded the definitions of "rights" and "privileges." In SHAPIRO, the Court cited the writing in UNITED STATES v. GUEST, 383 US 745 (1966). It stated that:

> . . . (T)he right (to travel from one State to another) finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution. (28)

The Court in SHAPIRO stated that:

> If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional. (29)

Justice Harlan, in a dissenting opinion, stated that:

> . . . Congress has full power to define the relationship between citizens and the federal government. (30)

The Supreme Court decision in SHAPIRO v. THOMPSON is not primarily an educational issue: However, it does point out that although certain rights are not explicitly mentioned in the language of the United States Constitution, there can exist certain conditions that would constitute the rationale for the Supreme Court giving strict consideration to the issue contending for the elevation of a "right." Education holds as much promise for the consideration as a "right" as does travel; both occupy a similar unenumerated rights position. Education does not hold a superior claim of right, it only deserves equal

consideration.

The Activist Period of the Supreme court witnessed several innovative examinations of explosive social and political issues. The decisions from the Activist Period have produced a tremendous amount of academic and scholarly examination. The Supreme Court during this period exercised more of the Non-Originalist Interpretation of the Constitution than any of the Courts to this point in the history of the Court.

THE RESTRAINT PERIOD - 1968 to 1986

Under the leadership of Chief Justice, Warren Burger, the United States Supreme Court began to examine the interpretation of the Constitution from a more restrained, Originalist point of view. This period of Supreme Court activity is a contrast to the previous period. The period is distinguished by two landmark decisions, TINKER and RODRIGUEZ.

TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, 393 US 503 (1969)

TINKER v. DES MOINES was a case involving a student's use of an armband as a form of protest arising from the Viet Nam War. The Court stated that:

> Any word spoken, in class, in the lunchroom, or on the campus, that divlates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . .; and our history says that it is this sort of hazardous freedom - this kind of openness - that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society. (31)

The Court confirmed legal status upon school officials, acting as repre-

sentatives of the state, when it stated that:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its actions was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. (32)

The Supreme Court entered into explicit discussions of educational behavior when it stated that:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect. 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. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. (33)

The Court cited Plato's reference to institutions in MEYER and Justice Brennan's writing in KEYISHIAN v. BOARD OF REGENTS, 385 US 589 (1967) in which Justice Brennan stated that:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools (SHELTON v. TUCKER, 364 US 479 (1960). The Classroom is perculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ' out of a multitude of tongues, rather than through any kind of authoritative selection. ' (34)

The most often cited passage of TINKER stated that:

> The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. (35)

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free Speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised or ordained discussion in a school classroom. (36)

Justice Hugo L. Black in a dissenting opinion in TINKER stated that:

> The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that 'children are to be seen not heard,' but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach. . . . It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity. (37)

Justice Black provided insight when he stated that:

> Change has been said to be truly the law of life but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. (38)

> Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case (TINKER), therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems (Statistical Abstract of the United

> States (1968), Table No. 578, p. 406) in our 50 states. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected officials to surrender control of the American public school system to public school students. (39)

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ, 411 US 1 (1973)

The United States Supreme Court placed education in a new category with its decision in RODRIGUEZ. The Court, led by Chief Justice Burger, placed a wide distance between its decision in RODRIGUEZ and the position of the Warren Court in BROWN I. The influence of the RODRIGUEZ decision lasted almost one year then it was quietly disregarded. (40)

Justice Powell wrote the opinion in RODRIGUEZ for the majority of the Court which was comprised of Justices Powell, Burger, Stewart, Blackmun, and Rehnquist; the dissenting opinions were filed by Justices Brennan, White, Douglas, and Marshall. The Court stated the problem:

> It is this question - whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution - which has so consumed the attention of courts and commentators in recent years. (41)

The Court recognized the efforts of lower federal courts and state courts that had held education to be a constitutionally protected "right." It cited SERRANO v. PRIEST, van DUSARTZ v. HATFIELD, and ROBINSON v. CAHILL lower court decisions.

The United States Supreme Court in RODRIGUEZ, citing BROWN I, stated:

> . . . education is perhaps the most important function of state and local governments . . . .(42)

then stated that:

> . . . expressing an abiding respect for the vital role of education

> a free society, may be found in numerous opinions of justices of this Court writing both before and after BROWN I was decided. (43)

The Supreme Court in RODRIGUEZ gave a reason why education was not, in its opinion, a fundamental constitutional "right" under the language of the fourteenth amendment. It stated that:

> Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that 'the grave significance of education both to the individual and to our society' cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. (44)

The Court cited Justice Harlan in SHAPIRO v. THOMPSON in which he stated that:

> . . . virtually every state statute affects important rights. . . . (I)f the degree of judicial scrutiny of state legislation fluctuated, depending on a majority's view of the importance of the interest affected, we would have gone 'far toward making this Court a SUPER-LEGISLATURE. We would . . . then be assuming a legislative role and one for which the Court lacks both authority and competence.' (45)

Dr. Robert Bennett, the Dean of the Northwestern University Law School, stated that:

> The Court in RODRIGUEZ characterized SHAPIRO and ROE (v. WADE) as recognizing interests 'implicitly' guaranteed by the Constitution. 'Implicit' constitutional protection, however, is always a matter of judgment, and the arguments for implicit protection of travel or abortional privacy seem no stronger than those for education. Against this background the charge become plausible that the Court in RODRIGUEZ used the distinction between implicit constitutional interests and those outside the document's protection as a shield to stave off an assault by the poor on the middle-class prerogative of well-financed public schools. (46)

The logic that the Supreme Court used in RODRIGUEZ to justify its reasoning for its decision is consistent with that used throughout the Period of Restraint.

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. (47)

In a dissenting opinion in RODRIGUEZ, Justice William Brennan rejected the majority opinion. He stated that:

> . . . I also record my disagreement with the Court's rather distressing assertion that a right may be deemed 'fundamental' for the purposes of equal protection analysis only if it is 'explicitly or implicitly guaranteed by the Constitution." . . .(O)ur prior cases stand for the proposition that 'fundamentality' is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. Thus, 'as the nexus between the specific constitutional guarantee and the non-constitutional interest draws closer, the non-constitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.' . . . Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment. . . . This being so, any classification affecting education must be subjected to strict scrutiny. (48)

The decision process used by the United States Supreme Court to admit education at public expense as being a "fundamental right" was difficult for the Court. The majority position was a narrow five to four advantage.

GOSS v. LOPEZ, 419 US 565 (1975)

In GOSS v. LOPEZ, the United States Supreme Court altered its position about education and advocated the point of view that education could be considered an entitlement. The Court, in GOSS, was dealing with an educational administrative decision.

The Court pursued the administrative argument and stated that:

> . . . appellants contend that because there is no constitutional right to an education at public expense, the Due Process Clause does not protect against expulsions from the public school system. This position misconceives the nature of the issue and is refuted by prior decisions. (49)

The Court held that the State of Ohio established education as a fundamental right within the language of the state constitution; therefore,

> . . . on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. (50)
>
> . . .
>
> Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred. (51)

The Court stated that:

> Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not 'shed their constitutional rights' at the schoolhouse door. (52)

The Court defined the fourteenth amendment's limits by citing WEST VIRGINIA BOARD OF EDUCATION v. BARNETTE, 319 US 624 (1943); it stated that:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures - Board of Education not excepted. (53)
>
> The authority possessed by the State to prescribe and enforce standards of conduct in its school although concededly very broad, must be exercised consistently with constitutional safeguards. . . . (T)he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause. The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputa-

> tion, honor, or integrity is at stake because of what the government is doing to him' the minimal requirements of the Clause must be satisfied. (54)

The Court cited two cases as authority: WISCONSIN v. CONSTANTINEAU, 400 US 433 (1971) at 437; and BOARD OF REGENTS v. ROTH, 408 US 564 (1972) at 573.

The Court noted its own admonitions; it stated that:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. (EPPERSON v. ARKANSAS, 393 US 97 (1968) at 104). (55)

The Supreme Court defined the Due Process Clause of the fourteenth amendment to mean that:

> . . . there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case. . . . The fundamental requisite of due process of law is the opportunity to be heard. . . . (A) right that 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest.' (56)

Justice Lewis Powell, in a dissenting opinion in GOSS, stated that:

> No one can foresee the ultimate frontiers of the new 'thicket' the Court now enters. Today's ruling appears to sweep within the protected interest in educational process.
>
> . . .
>
> The decision (in GOSS) unnecessarily opens avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education. The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline of children and teenagers in the public schools. It justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension. The Court's decision rests on the premise that, under Ohio law, education is a property interest protected by the Fourteenth Amendment's

> Due Process Clause and therefore that any suspension requires notice and a hearing. (57)

Justice Lewis Powell stated that:

> Thus the very legislation which 'defines' the 'dimension' of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law. Rather, the right is encompassed in the entire package of statutory provisions governing education in Ohio - of which the power to suspend is one. (58)

Justice William H. Rehnquist, in a dissenting opinion in CLEVELAND BOARD OF EDUCATION v. LaFLEUR, 414 US 632 (1974) at 659, provided some insight on the Supreme Court's examination of rights and non-rights. He stated that:

> . . . the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights . . . . It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. . . . (T)his right to pursue an occupation is presumably on the same lofty footing as the right of choice in matters of family life. . . . . (59)

In GOSS v. LOPEZ, the United States Supreme Court established the concept that education may be considered an entitlement under the language of the state constitution and supported by the federal Constitution. The Court addressed the 'liberty' interest of the first section of the fourteenth amendment.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY v. REGAN, 444 US 646 (1980)

In COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY v. REGAN, the United States Supreme Court addressed the issue of church-state relations in education. The Court stated that:

> . . .any aid to even secular education functions of a sectarian school will be forbidden, and said that its decisions relating to such aid tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes from permissible to impermissible aid to religiously oriented schools. (60)
>
> The Supreme Court has ruled that a state law providing for the issuance of revenue bonds to assist education institutions in the construction, financing, and refinancing of projects did not run afoul of the First Amendment's establishment of religion clause insofar as it benefited a sectarian college. (61)

The Court in REGAN took a moderate approach to the position that religion occupies within the framework of an educational setting. The Court remained consistent in its position that a wall of separation existed between religious activity and governmental actions. The Court supported the best educational benefit for the child position.

PLYLER v. DOE, 50 USLW 4655 (1982)

In PLYLER v. DOE, the United States Supreme Court held that to deny funds to a school district for the purpose of educating "illegal aliens" violated the equal protection clause of the fourteenth amendment. (62) Justice Brennan wrote for the majority of the Court comprised of Justices Brennan, Marshall, Blackmun, Powell, and Stevens; the minority was comprised of Justices Burger, White, Rehnquist, and O'Connor.

From an examination of the PLYLER opinion, the Supreme Court demonstrated a softening of its position towards the constitutional position that education had occupied; previous United States Supreme Court decisions had stated that education was not a constitutionally protected right. The Court stated that:

> Public education is not a 'right' granted to individuals by the Constitution. . . . But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic

> institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The 'American people have always regarded education and the acquisition of knowledge as matters of supreme importance.' . . . We have recognized 'the public school 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.' . . . As noted 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.' . . . And these historic 'perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.' (63)

The last part of Justice Brennan's statement returned to the contributions of the social scientists to the BROWN I decision.

Justice William Brennan presented an argument for the inclusion of education into the "fundamental rights" status. A closer examination of Justice Brennan's writing reveals that he was expanding his argument in his dissenting opinion in RODRIGUEZ.

Justice Brennan stated that:

> In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. 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. (64)

Justice Brennan continued:

> In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored groups of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, 'education prepares individuals to be self-reliant and self-sufficient participants in society. (65)

Justice William Brennan captured the heart of the issue to consider

education as a "fundamental right" when he stated that:

> Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimeable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, makes it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause. What we said 28 years ago in BROWN v. BOARD OF EDUCATION, 247 US 483 (1954), still holds true: 'Today, 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. . . . 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.' (66)
>
> Moreover, the significance of education to our society is not limited to its political and cultural fruits. The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained. . . . (A) state need not justify by compelling necessity every variation in the manner in which education is provided to its population. (67)
>
> Justice Brennan concluded his opinion with:
>
> If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. (68)
>
> Justice Thurgood Marshall, in a concurring opinion, stated that:
>
> I continue to believe that an individual's interest in education is fundamental, and that this view is amply supported ' by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values. . . . It continues to be my view that a class-based denial of public education is utterly incompatible with the Equal Protection Clause of the Fourteenth Amendment. (69)
>
> Justice Harry Blackmun, in a concurring opinion, stated that:
>
> . . . doubts about the judiciary's ability to make fine distinctions in assessing the effects of complex social policies, led the Court in RODRIGUEZ to articulate a firm rule: fundamental rights are those that 'explicitly or implicitly are guaranteed by the

> Constitution.' . . . It therefore squarely rejected the notion that 'an ad hoc determination as to the social or economic importance' of a given interest is relevant to the level of scrutiny accorded classifications involving that interest, . . . and made clear that 'It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. (70)

Justice Blackmun stated that:

> In my view, when the State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with those purposes, . . . of the Equal Protection Clause. Children denied an education are placed at a permanent and insurmountable competitive disadvantage . . . . But the classifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions. . . . (D)enial of an education is the analogue of denial of the right to vote: the latter places him at a permanent political disadvantage and the former relegates the individual to second-class social status. . . . (I)t does not take an advanced degree to predict the effects of a complete denial of education upon those children targeted by the State's classification. (71)

Justice Lewis Powell, in a concurring opinion in PLYLER, clarified the distinction between education for "illegal aliens" and the state's resident children; the justice presented the state's obligation to provide a free public education to all of its citizens. He stated that:

> The classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due to a violation of law by their parents. These children thus have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment. In these unique circumstances, the Court properly may require that the State's interests be substantial and that the means bear a 'fair and substantial relation' to these interests. . . . In my view, the State's denial of education to these children bears no substantial relation to any substantial state interest. (72)

The justice cited the lack of federal guidance and the state's responsibility to education as he stated that:

> By contrast, there is no comparable federal guidance in the area of education. No federal law invites state regulation; no federal regulations identify those aliens who have a right to attend public schools. . . . The State provides free public education to all lawful residents whether they intend to reside permanently in the State or only reside in the State temporarily. . . . Of course a school district may require that illegal alien children, like any other children, actually reside in the school district before admitting them to the schools. A requirement of de facto residency, uniformly applied, would not violate any principle of equal protection. (73)

Chief Justice Warren Burger, in a dissenting opinion in the minority position, stated that:

> Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children - including illegal aliens - of an elementary education. I fully agree that it would be folly - and wrong - to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language. However, the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.' . . . We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policy-making role as the Court does today. The Court makes no attempt to disguise that it is acting to make up for Congress' lack of 'effective leadership' in dealing with the serious national problems caused by the influx of uncountable millions of illegal aliens across our borders. . . . The Court's holding today manifests the justly criticized judicial tendency to attempt speedy and wholesale formulation of 'remedies' for the failures - or simply the laggard pace - of the political processes of our system of government. The Court employs, and in my view abuses, the Fourteenth Amendment in an effort to become an omnipotent and omniscient problem solver. The motives for doing so are noble and compassionate does not alter the fact that the court distorts our constitutional function to make amends for the defaults of others. (74)

Chief Justice Burger restated in PLYLER the position that he had taken in RODRIGUEZ when he stated that:

> In SAN ANTONIO SCHOOL DISTRICT . . . Justice Powell, speaking for the Court, expressly rejected the proposition that state laws dealing with public education are subject to special scrutiny under the Equal Protection Clause. Moreover, the Court points to no

> meaningful way to distinguish between education and other governmental benefits in this context. Is the Court suggesting that education is more 'fundamental' than food, shelter, or medical care? The Equal Protection Clause guarantees similar treatment of similarly situated persons, but it does not mandate a constitutional hierarchy of governmental services. Justice Powell . . . put it well in stating that to the extent this Court raises or lowers the degree of 'judicial scrutiny' in equal protection cases according to a transient Court majority's view of the societal importance of the interest affected, we 'assume a legislative role and one for which the Court lacks both authority and competence.' Yet that is precisely what the Court does today. . . . Modern education, like medical care, is enormously expensive, and there can be no doubt that very large added costs will fall on the State or its local school districts as a result of the inclusion of illegal aliens in the tuition-free public schools. . . . The Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem. . . . Moreover, when this Court rushes in to remedy what it perceives to be the failings of the political processes, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy. Today's cases, I regret to say, present yet another example of unwarranted judicial action which in the long run tends to contribute to the weakening of our political processes. . . . Yet instead of allowing the political processes to run their course - albeit with some delay - the Court seeks to do Congress' job for it, compensating for congressional inaction. It is not unreasonable to think that this encourages the political branches to pass their problems to the judiciary. (75)

The United States Supreme Court, in the PLYLER decision, had placed itself in a position to accept the premise that education is an entitlement. The Supreme court had softened its perception that education was not a right; with the leadership of Justices Brennan and Powell, the Court demonstrated an 'intent' to move away from its position in RODRIGUEZ relating to education.

MUELLER v. ALLEN, 453 US 388 (1983)

In MUELLER v. ALLEN, the United States Supreme Court reinforced its commitment to a "Standard of Neutrality" in this church-state first amendment case. The Court stated its position with regards to the

state's responsibility to education. It stated that:

> A State's decision to defray the cost of educational expenses incurred by parents - regardless of the type of schools their children attend - evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated. . . . 'Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans . . . The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them. (76)

The words of Justice Lewis Powell indicated the softening approach that the United States Supreme court had taken towards education; this was recognizing education to be possessing a more favorable "fundamental" constitutional position. In MUELLER, the Court recognized the importance that education, within the governmental function of the hierarchy of the state, occupied.

Justice Lewis Powell, writing for the majority position in MUELLER, addressed directly the relationship between public and private schools: he stated that:

> Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some states they relieve substantially the tax burden incident to the operation of public schools . . . . (77)

Justice Thurgood Marshall in a dissenting opinion in MUELLER, with Justices Brennan, Blackmun, and Stevens joining, stated that:

> The sole question is whether state aid to these schools (in Minnesota) can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction . . . . The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice,

> and that while some involvement and entanglement are inevitable, lines must be drawn. (78)

From BROWN I to MUELLER, the United States Supreme Court consistently recognized the unique and "fundamental" status that education has occupied and currently occupies at the state level; however, the Court over a period of years began to soften its position on recognition of education as a federal question.

From BROWN I to MUELLER, the United States Supreme Court has stopped just short of acknowledging education as holding "fundamental right" status. The Court, based upon a consideration of prior opinions, has placed itself in a position to elevate education to "fundamental right" status.

RETREAT PERIOD - 1986 to the Present

Little is known about the positions and functioning of the present membership of the Rehnquist Court; however, many analysts have attempted to try to place the Court in the Originalist's interpretation of the Constitution. (79) This would place the Rehnquist Court in the conservative position. Curtis J. Sitomer stated that:

> So far, in 69 opinions, the justices have followed a general trend of economic conservatism and leaned toward affording states maximum autonomy in making choices where the federal interest is now overriding. (80)

> Observers see this court, so far, as following the moderate-to-conservative course established by its predecessor under the leadership of Chief Justice Warren Burger although Chief Justice Rehnquist is ideologically more to the political right than Mr. Burger. Many believe, however, that the Rehnquist court has not yet been fully tested on certain 'litmus' issues. Including those in the church-and-state area. Next term the justices will hear a New Jersey case to determine whether a state-mandated 'moment of silence' in public classrooms violates the First Amendment. (81)

EDWARDS v. AGUILLARD, 55 USLW 4860 (6-16-87)

The United States Supreme Court in EDWARDS, under the leadership of Justice William H. Rehnquist, examined:

> . . . whether Louisiana's 'Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction' Act (Creationism Act) . . . is facially invalid as violative of the Establishment Clause of the First Amendment. (82)

The opinion was written by Justice William Brennan and joined in the majority position by Justices Marshall, Blackmun, Powell, Stevens, O'Connor, and White; the minority position consisted of Justices Scalia and Rehnquist. It was important to note that Chief Justice Rehnquist held the minority position; he wrote the dissenting opinion joined by Justice Scalia.

Justice Brennan, writing for the majority in EDWARDS, cited the Court's previously held positions relative to education. He stated that:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. . . . Furthermore, 'the public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . . .' (83)

Justice William Brennan used GRAND RAPIDS SCHOOL DISTRICT v. BALL, 473 US 373 (1985); WALLACE v. JAFFREE, 472 US 38 (1985); and MEEK v. PETTENGER, 421 US 349 (1975); and ABINGTON SCHOOL DISTRICT v. SCHEMPP, 374 US 203 (1963), to support his point on the importance of education and

necessity for harmony within the classroom setting.

Justice Brennan stated that:

> Such a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted. (WALLACE v. JAFFREE, 472 US 38 (1985) at 80, Justice O'Connor in a concurring opinion.) . . . The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses. 'This distinction warrants a difference in constitutional results.' (84)
>
> We find no merit in the State's argument that the 'legislature may not have used the terms 'academic freedom' in the correct legal sense.' (85)
>
> The Court of Appeals stated that: 'academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment.' (86)
>
> The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science. (87)
>
> . . . (T)he Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creation science . . . . (88)
>
> Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects. . . . The 'overriding fact' that confronted the Court in EPPERSON was 'that Arkansas' law selects from the body of knowledge a particular segment with . . . a particular interpretation of the Book of Genesis by a particular religious group.' (89)
>
> . . . (C)reation science (was defined by certain members of the religious group) as 'origin through abrupt appearance in complex form' and allege that such a viewpoint constitutes a true scientific theory. (90)

Justice Brennan summarized the opinion of the Court; he stated that:

> The Louisiana Creationsim Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety. The Act violates the Establishment Clause of the First Amendment because it seeks to employ

the symbolic and financial support of government to achieve a religious purpose. (91)

Justices Lewis Powell and Sandra Day O'Connor wrote, in a concurring opinion, that:

I write separately to note certain aspects of the legislative history, and to emphasize that nothing in the Court's opinion diminishes the traditionally broad discretion accorded state and local school officials in the selection of the public school curriculum. . . . The starting point in every case involving construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. . . . The 'doctrine or theory of creation' is commonly defined as 'holding that matter, the various forms of life, and the world were created by a transcendent God out of nothing.' WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY - Unabridged 1981, p. 532). 'Evolution' is defined as 'the theory that the various types of animals and plants have their origin in other preexisting types, the distinguishable differences being due to modifications in successive generation.' (WEBSTER'S, p. 789). . . . 'Concepts concerning God or a supreme being of some sort are manifestly religious . . . . These concepts do not shed that religiousity merely because they are presented as a philosophy or as a science.' (Citing MALNAK v. YOGI, 440 F. Supp. 1284 (N.J. 1977) at 1322, aff'd per curiam, 592 F. 2d 197 (CA 3d 1979). . . . The Act contains a statement of purpose: to 'protect academic freedom.' . . . This statement is puzzling. Of course, the 'academic freedom' of teachers to present information in public schools, and students to receive it is broad. But it necessarily is circumscribed by the Establishment Clause. 'Academic Freedom' does not encompass the right of a legislature to structure the public school curriculum in order to advance a particular religious belief. (92)

Justice Lewis Powell stated that:

. . . I adhere to the view 'that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools. (Citing BOARD OF EDUCATION v. PICO, 457 US 853 (1982) at 893 - Justice Powell in dissent.) (93)

In a summary statement, Justice Powell stated that:

Although the discretion of state and local authorities over public school curricula is broad, 'the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma. (94)

Justice Byron White, in a concurring opinion, stated that:

> We usually defer to the Court of Appeals on the meaning of a State statute, especially when the District Court has the same view. . . But if the meaning ascribed to a State Statute by a court of appeals is a rational construction of the statute, we normally accept it. . . . We do so because we believe 'that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective states. (95)

The United States Supreme Court demonstrated in EDWARDS its reliance upon state and local governments to make decisions affecting public education. Justice White's statement that ". . . district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective states . . . "(96) demonstrated that the Supreme Court was not willing to take an active part in the day-to-day regulation of public school affairs. The EDWARDS decision, although not primarily an educational rights issue, permitted the Court to restate its view of the unique position that education occupied. This position supported the continued conservative approach to public education that the Supreme Court has held since RODRIGUEZ in 1973.

The Period of Retreat is the current period of Supreme Court activity; this period will require additional time for scrutinizing decisions of the Court to discover trends or direction. The leadership of Justice William Brennan and the retirement of Justice Lewis Powell are factors that will have an impact on the direction of the Court. Justice Sandra Day O'Connor occupies a position of great influence. With the addition of Anthony Kennedy, the Court will undergo additional changes. The Period of Retreat of the Supreme Court is a period of anticipation and change. (97)

SELECTED LOWER FEDERAL AND STATE COURT OPINIONS

An examination of the opinions of the United States Supreme Court would not be complete without exploring, generally, the impact that Supreme Court decisions have had upon federal and state court opinions. Several random court decisions have been selected which demonstrated this point; the decisions have been selected from the Activist Period of the Supreme Court owing primarily to the tremendous amount of activity and exchange between the United States Supreme Court and the lower federal and state courts.

The following federal and state court decisions reflected the amount of variety that existed at the lower judicial level. The selected decisions were:

(a) SERRANO v. PRIEST, 487 P. 2d 1241, 96 CAL R 601 (1971);

(b) BOARD OF EDUCATION v. OKLAHOMA, 409 F. 2d 665 (1969);

(c) ROBINSON v. CAHILL, 303 A. 2d 273, 62 N. J. 473 (1973);

(d) ZOLL v. ANKER, 414 F. Supp. 1024 (1976) - New York;

(e) NORTON v. MESKILL, 376, A. 2d 359, 172 CONN 615 (1977).

From all of the federal and state court decisions examined from 1971 to 1988, SERRANO I was the most important of the cases; it directly addressed the "fundamental right" issue of education from a state constitutional point of view. It was also a federal court decision which rejected the United States Supreme Court's opinion that education was not a constitutionally protected "right." SERRANO v. PRIEST had been adjudicated on three separate occasions reaching the same conclusions. The Court held that education was a constitutionally protected "right."

SERRANO v. PRIEST, 96 CAL. RPTR 601, 487 P. 2d 1241 (1971), (SERRANO I); 135 CAL RPTR 345, 557 P. 2d 929 (1977), (SERRANO II); and 226 CAL RPTR 584 (CAL. APP. 2 DIST.) (1986), (SERRANO III)

SERRANO I examined three constitutional areas: (a) the California method of financing public education allowed substantial disparities among the various school districts in the amount of revenue available for education, thereby, denying students equal protection of the laws under the color of the United States Constitution and the State of California constitution; (b) wealth was a "suspect classification." Parents were required to pay taxes at a higher rate than taxpayers in other districts in order to provide the same or lesser educational opportunities for their children; (c) the most important element of SERRANO I was its historical proclaimation that education was a "fundamental interest" that was protected under the language of the United States Constitution; but more specifically, it was a "fundamental right" that was protected under the language of the California constitution.

SERRANO II affirmed the trial court's finding in SERRANO I that the California school finance system was unconstitutional. It reaffirmed the original findings of the SERRANO I court: (a) the system of financing of public education in California was unconstitutional, thereby, denying students equal protection of the law under the color of the United States Constitution and the State of California constitution. Under this standard, which the court called "fiscal Neutrality," the quality of a child's education could not be based upon the wealth of the child's local school district, but rather had to be based upon the wealth of the state as a whole. This standard of review provided the

court, as well as other federal courts, with a manageable standard for judicial review; it signaled the states to be more responsible for the management of educational issues within the states.

SERRANO III examined: (a) education as a fundamental interest for purposes of determining proper standards for equal protection review; (b) funding for categorical aid should be excluded from comparing public school funding by district for purposes of determining wealth related disparities; and (c) wealth-related disparities had been reduced to acceptable and justifiable levels by stressing legitimate state interests.

What was noteworthy about SERRANO I, II, and III was that the California courts held that education was a protected "fundamental interest" and an individual "right" on three separate opportunities: 1971, 1977, and 1986.

BOARD OF EDUCATION v. OKLAHOMA, 409 F. 2d 665 (1969)

This case examined similar issues to that of SERRANO. The State of Oklahoma claimed sovereign immunity; therefore, the issues were moot. In OKLAHOMA, the suit had addressed: (a) "wealth" as a "suspect classification;" (b) the system of financing of public education in OKLAHOMA was unconstitutional, thereby, denying students equal protection of the law under the color of the United States Constitution and the State of Oklahoma constitution; and (c) education was a protected "privilege."

ROBINSON v. CAHILL, 303 A. 2d 273, 62 N.J. 473 (1973)

ROBINSON was decided six months after the United States Supreme Court's decision in RODRIGUEZ; the New Jersey court took judicial notice of the RODRIGUEZ decision but did not find the opinion a controlling

precedent. The federal court held that education was a constitutionally protected "fundamental interest." In ROBINSON, the court held that: (a) wealth was a "suspect classification;" and (b) education was a "fundamental interest" in the State of New Jersey and in the language of the state constitution. The federal court stated that the quality of educational opportunity did not depend upon the amount of dollars invested in education. The court in ROBINSON took special note of the United States Supreme Court's decision in RODRIGUEZ. The federal court stated that the "fundamental right" concept discussed by the Supreme Court was not helpful because the Supreme Court had not defined the term, "fundamental right," in sufficiently clear terms and limits to make the term judicially useful.

ZOLL v. ANKER, 414 F. Supp. 1024 (1976)

The New York court in ZOLL examined education as a protected "right or entitlement" under the color of the federal Constitution. The federal court acknowledged the United States Supreme Court's RODRIGUEZ opinion; however, it held that education possessed a unique position that was constitutionally protected as a "fundamental interest." The court stated that:

> Common sense alone indicates that 'the right to enjoy a full education' is defined by contours more broad than the number of minutes in a school day. (98)

HORTON v. MESKILL, 172 CONN 615, 376 A. 2d 359 (1977)

The state court in MESKILL held that the United States Supreme Court decision in RODRIGUEZ was not a controlling precedent. It held that in the State of Connecticut, the right to an education was so

basic and fundamental that any infringement of that right would be strictly scrutinized. The court held that pupils in the public schools were entitled to equal enjoyment of the "right to elementary and secondary education." It held that a system of financing education , which depended on local property tax base without regard to disparity in the financial ability to finance an educational program and with no significant equalizing state support, could not pass the test of "strict judicial scrutiny" as to its constitutionality. Finally, the court held that the state's method of financing educational programs was not "appropriate legislation" to be in agreement with the state's constitutional requirement for a free and appropriate education.

The decisions from the lower federal and state courts reflected the importance and position that the states had placed upon education. One United States Supreme Court opinion, BROWN I, was significant and was present by its controlling influence in a majority of the lower federal court opinions. It stated that:

> Such an opportunity of education, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (99)

Lower federal and state courts reenforced the meaning of these words. The state courts of Arizona (100), Arkansas (101), California (102), Connecticut (103), Maryland (104), Washington (105), Alaska (106), Massachusetts (107), Illinois (108), and Pennsylvania (109) have held that education was a "fundamental right" under the color of the state constitution and the federal Constitution.

From 1985 to 1988, there have been four lower court decisions that have addressed the "fundamental right" to an education. These

cases are:

1. RIDGEWAY v. MONTANA HIGH SCHOOL ASSOCIATION (D. MONTANA 1986), 633 F. Supp. 1564 (1986). The court held that there was no constitutional requirement that schools provide students with extracurricular activities.

2. BENNETT v. CITY SCHOOL DISTRICT OF NEW ROCHELLE (D. NEW YORK 1985), 497 N.Y.S. 2d 72, 114 A.D. 2d 58 (1985). The court held that the right to free, public education was not classified as a "fundamental constitutional right" that was entitled to special protection. The lower court relied almost entirely upon the RODRIGUEZ decision.

3. DISTRICT 27 COMMUNITY SCHOOL BOARD by GRANIERER v. BOARD OF EDUCATION OF CITY OF NEW YORK (D. NEW YORK 1986), 502 N.Y.S. 2d 325 (1986). The court held that a public education was not a "fundamental right" granted to individuals by the United States Constitution. The court relied completely upon the RODRIGUEZ decision.

4. CRAIG v. BUNCOMBE COUNTY BOARD OF EDUCATION (NORTH CAROLINA A. 1986), 343 S. E. 2d 322, 80 NC APP 683 (1986), review denied, appeal dismissed, 348 S. E. 2d 138, 318 NC 281 (1986). The court held that the county board of education's ban on the use and possession of tobacco products by students in the county schools did not deprive the students who smoke of "fundamental rights" to an education. The court had cited U.S.C.A. Constitutional Amendment I and the State of North Carolina General Statutes, Section 115 c - 391 (c).

FOOTNOTES

CHAPTER 4

1

A general survey of the works by social historians, legal historians, and writers on general topics indicated that the U.S. Supreme Court was primarily responsible for providing legal precedents for educational change during the 1950s, 1960s, and 1970s; however, the change was initiated by state and local governments. The works of Luskey, McCloskey, Curtl, Wall, Morison, Toynbee, Miller, Randall, Donald, Moynihan, Tribe, Bickel, Pound, Emerson, Hatch, and Patterson are representative.

2

Sam J. Ervin, Jr., PRESERVING THE CONSTITUTION: THE AUTOBIOGRAPHY OF SENATOR SAM J. ERVIN (Charlottesville, Virginia: The Michie Company, 1984), p. 114.

3

UNITED STATES v. BULTER, 297 US 1 (1936) at 78 - 79.

4

SUN PRINTING AND PUBLISHING ASSOCIATION v. REMINGTON PAPER AND POWER COMPANY, 235 N.Y. 338, 139 N.E. 470 (1933) at 475.

5

WEST COAST HOTEL COMPANY v. PARRISH, 300 US 379 (1930) at 404.

6

Sam J. Ervin, Jr., "In Support of Judicial Restraint," In Robert E. Di Clerico and Allan S. Hammock, Editors, POINTS OF VIEW: READINGS IN AMERICAN GOVERNMENT AND POLITICS, Third Edition (New York: Random House, Publishers, 1986), pp. 262 - 263.

7

BROWN v. ALLEN, 334 US 443 (1954) at 535.

8

"In Support of Judicial Restraint," op. cit., p. 265.

9

Oliver Wendell Holmes, "John Marshall," A speech given to commemorate John Marshall's appointment as Chief Justice on February 4, 1801, first published in SPEECHES (Boston: Little, Brown, and Company, 1913), in COLLECTED LEGAL PAPERS (New York: Harcourt, Brace, and Company, 1920), p. 220.

10

Halpern and Lamb used a division of Supreme Court activity as Judicial Activism and Judicial Restraint in their work, SUPREME COURT ACTIVISM AND RESTRAINT (1982).

11 MEYER v. NEBRASKA, 262 US 390 (1922) at 392.

12 Ibid, at 398.

13 Ibid.

14 Ibid, at 399.

15 Ibid, at 400.

16 Ibid.

17 Ibid, at 401.

18 Ibid, at 402.

19 See footnote number 22 of this chapter.

20 SKINNER v. OKLAHOMA, 316 US 535 (1942) at 540.

21 Ibid, at 541.

22 See Paul Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship," YALE LAW JOURNAL (April 1981), Volume 90, Number 5, pp. 1063 - 1109; see p. 1075. Walter F. Murphy, "An Ordering of Constitutional Values," SOUTHERN CALIFORNIA LAW REVIEW (1980), Volume 53, pp. 703 - 760; see p. 731. ("As far as I can determine, the (Supreme) Court has never explicitly held that a right to trade is fundamental, but such a right forms a critical base for the right to travel." at fn. 129). Ira C. Lupu, "Untangling the Strands of the Fourteenth Amendment," MICHIGAN LAW REVIEW (April 1979), Volume 77, Number 4, pp. 981 - 1002. See Specifically Lupu's comparison of ROE and RODRIGUEZ at pp. 997 - 999. The inclusion of GRISWOLD into the discussion is particularly poignant and enlightening at pp. 998 - 1000. See also "Entitlement, Enjoyment, and Due Process of Law," DUKE LAW JOURNAL (March 1974), Volume 1974, Number 1, pp. 89 - 122. See specifically, p. 107. (" . . . rigid application . . . would . . . read the due process clause out of the Constitution . . ."). See generally, Edward A. Purcell, Jr., "Alexander M. Bickel and Post-

Realist Constitution," HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW (Summer 1976), Volume 11, Number 3, pp. 521 - 564; at p. 528.

23 SKINNER, op. cit., at 545.

24 Ibid.

25 BROWN v. BOARD OF EDUCATION, 347 US 483 (1954) at 492 - 493.

26 Ibid, at 493.

27 SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ, 411 US 1 (1973) at 33 - 34.

28 SHAPIRO v. THOMPSON, 394 US 618 (1968) at 617 - 618.

29 Ibid, at 618.

30 Ibid, at 668.

31 TINKER v. DES MOINES, 393 US 503 (1969) at 508 - 509.

32 Ibid, at 509.

33 Ibid, at 511.

34 Ibid at 512.

35 Ibid.

36 Ibid, at 513.

37 Ibid, at 522 - 523.

38 Ibid, at 524.

39 Ibid, at 524 - 525.

40 Thomas A. Shannon, "RODRIGUEZ: A Dream Shattered or A Call for Finance Reform" PHI DELTA KAPPAN (May 1973), Volume 54, Number 9, pp. 587 - 612. Betsy Levin, "Foreward," LAW AND CONTEMPORARY PROBLEMS (Winter/Spring 1974), Volume 38, Number 3, pp. 293 - 298; see p. 297. John E. Coons, "Introduction: 'Fiscal Neutrality' after RODRIGUEZ," LAW AND CONTEMPORARY PROBLEMS (Winter/Spring 1974), Volume 38, Number 3, pp. 299 - 308; see p. 308. Hershel Shanks, "Equal Education and the Law," THE AMERICAN SCHOLAR (Spring 1970), Volume 39, pp. 255 - 269. Hershel Shanks, "Educational Financing and Equal Protection: Will the California Supreme court's Breakthrough Become the Law of the Land," JOURNAL OF LAW AND EDUCATION (1972), Volume 85, Number 1, pp. 73 - 95.

41 SAN ANTONIO v. RODRIGUEZ, 411 US 1 (1973) at 29.

42 Ibid.

43 Ibid, at 30.

44 Ibid.

45 Ibid, at 31.

46 Vicent Blasi, Editor, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (New Haven, Connecticut: Yale University Press, 1983), p. 54.

47 RODRIGUEZ, op. cit., at 33 - 34.

48 Ibid, at 62 - 63

49 GOSS v. LOPEZ, 419 US 565 (1975) at 572.

50 Ibid, at 573.

51 Ibid, at 574.

52 Ibid.

53 Ibid.

54 Ibid.

55 Ibid, at 578.

56 Ibid, at 579.

57 Ibid, at 585.

58 Ibid.

59 CLEVELAND BOARD OF EDUCATION v. LaFLEUR, 414 US 632 (1974) at 659.

60 COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY v. REGAN, 63 L. ED. 2d 804 (1980) at 811.

61 Ibid.

62 PLYLER v. DOE, 50 USLW 4650 (1982) at 4650.

63 Ibid, at 4655.

64 Ibid.

65 Ibid.

66 Ibid.

67 Ibid, at footnote number 20.

68 PLYLER, op. cit., at 4657.

69 Ibid.

70 Ibid.

71 Ibid. at 4658 - 4659.

72 Ibid. at 4660.

73 Ibid, at 4660, footnote number 4.

74 PLYLER, op. cit., at 4661.

75 Ibd, at 4663 - 4664.

76 MUELLER v. ALLEN, 463 US 388 (1983) at 395.

77 Ibid, at 402.

78 Ibid, at 416.

79 Rowland Evans, Robert Novaks, Mortimer J. Adler, Gunther F. Gearhardt, Walter Dellinger, Douglass Cater, and U. S. Court of Appeals Judge, Jon Newman in various forums have indicated that the Rehnquist Court is searching for its own identity. Generally, these individuals have indicated that the United States Supreme Court is currently undergoing major positional changes. These individuals have indicated that the Supreme Court cannot be accurately categorized in any true position as yet. The Court has drifted in various directions owing to the justice securing the plurality of the other justices for a particular cause.

80 Curtis J. Sitomer, "High Court's Term Climaxing," THE CHRISTIAN SCIENCE MONITOR (May 15, 1987), p. 6.

81 Ibid.

82 EDWARDS v. AGUILLARD, 55 USLW 4860 (6-16-87) at 4850.

83 Ibid, at 4861.

84 Ibid, at footnote numbers 4 and 5.

85 EDWARDS, op. cit., at 4862.

86 Ibid, at footnote number 6.

87 EDWARDS, op. cit., at 4862.

88 Ibid, at 4862 - 4863.

89 Ibid, at 4864.

90 Ibid.

91 Ibid, at 4865.

92 Ibid.

93 Ibid, at 4867.

94 Ibid, at 4868.

95 Ibid.

96 Ibid.

97 An examination of 50 United States Supreme Court opinions from January 1987 to February 1988 revealed that Chief Justice William H. Rehnquist and Justice Antonin Scalia were in the minority opinion in 43 of the

decisions. From an examination of the same opinions, Justice William Brennan was in the majority position in 45 of the decisions. From this limited and narrow sampling of the Supreme Court decisions, there is beginning to emerge a trend; Justice William Brennan reflected the majoritarian position more often than any of the other Supreme Court Justices.

98 ZOLL v. ANKER, 414 F. Supp. 1024 (1976) at 1028.

99 BROWN v. BOARD OF EDUCATION, op. cit., at 493.

100 SHOFSTALL v. HOLLINS, 515 P. 2d 590 (1973).

101 ALMA SCHOOL DISTRICT NUMBER 30 OF CRAWFORD COUNTY, et. al. v. DUPREE, et. al, (No. 77 - 406) (CTR CT OF PULASKI CITY, ARKANSAS, October 26, 1981).

102 SERRANO I, II, and III.

103 HORTON v. MESKILL, 376 A 2d 359 (1976).

104 SOMERSET COUNTY BOARD OF EDUCATION, et. al. v. HORNBECK, et. al. (No. A-58438) (CIR CT, BALTIMORE, MARYLAND, May 19, 1981).

105 SEATTLE SCHOOL DISTRICT NUMBER I OF KING COUNTY v. WASHINGTON STATE, (No. 81-2-1713-1) SR CT, THURSTON CITY, Washington, 1981).

106 HESS v. MULLANEY, (9th Cir), 15 ALASKA 40, 213 F. 2d 635 (1954).

107 DOE v. ANRIG, (D. MASS 1983), 561 F. Supp. 121 (1983).

108 COOK v. EDWARDS, 341 F. Supp. 307 (1972).

109 FREDRICK L. v. THOMAS, (ED PA, 1976), 419 F. Supp. 960 (1976).

CHAPTER FIVE

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

INTRODUCTION

> . . . (H)istorically there have been clear connections between our democratic society and the U. S. education, a condition which gave schools a sense of purpose and identity. (1)

Education, the process and the service, is an integral part of the American society. To perpetuate the principles of this representative democracy, education is the key element; education concentrates upon the preparation of present and future leaders of this republic.

Hatch and Conrath, citing the work of Thomas Jefferson, stated that:

> The people themselves therefore, are (the government's) only safe depositories. And to render even them safe, their minds must be improved to a certain degree. (2)

Education, therefore, is the process of one generation of people assuming responsibility for the preparation of future generations.

> Implementing education aims for a democracy . . . is not an easy task and results might not be evident immediately. It is important to note that the human processes involved in establishing aims that bring meaning . . .have value in and of themselves. Working toward aims that connect society and schools can regenerate a sense of integrity among educators and refocus the . . . identity of our schools. (3)

Society is bound together with common goals and values; promoting the good of the nation or the American society, as a whole, is one of the aims of education - the vehicle is the public school. The process of education is a learning process, a training process, and a practice session for the young mind. Education offers an opportunity. (4)

Education exists as a service to the future generations of a nation; more specifically it provides the general tools to aid inquiry and critical thinking for the nation's school-age children. Education offers opportunity, it does not guarantee a successful career, professional development, or intellectual prowess. Education offers an opportunity for the individual to acquire general skills, to practice, and to hone these skills.

Education, issue and process, involves the three branches of government directly. The executive, legislative, and judiciary of the federal government actively contribute to the operation of the educational process. State and local governments offer major support for education as a "fundamental interest."

The executive branch can offer administrative leadership in support for education and educational issues. The quality of this leadership exists in intensity and substance from the dynamic and personal charisma of the President of the United States. Presidents Roosevelt, Truman, Eisenhower, Kennedy, and L. B. Johnson represent the high points in dynamic styles of leadership in support of education.

The legislative branch has reacted to aggressive leadership from the executive branch; it has responded positively and negatively to active leadership in support of education and educational issues. Congress in "The Equal Educational Opportunities Act," stated that:

> . . . (I)t is the policy of the United States that all public school children are entitled to equal educational opportunity without regard to race, color, sex, or national origin. (5)

The key elemont that Congress presents is fiscal support to present and ongoing educational programs.

The judicial branch of the federal government presents the most unknown and confusing quality of the three branches. The United States Supreme Court has waivered from a positive support in 1954 to a denial of "fundamental" status in 1973. Yet, throughout the four periods of U.S. Supreme Court activity over the past sixty years, the Court has consistently maintained that education is one of the most important functions of state and local governments. The following United States Supreme Court opinions offer examples of the social and political importance of education that the Court has maintained.

The United States Supreme Court in EDWARDS v. AGUILLARD in 1987 stated that:

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. (6)

However, the U.S. Supreme Court in SAN ANTONIO v. RODRIGUEZ in 1973 stated that:

> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. . . . (T)he undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. (7)

The U. S. Supreme court in BROWN v. BOARD OF EDUCATION in 1954 stated that:

> Today, 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. (8)

The U. S. Supreme Court in TINKER v. DES MOINES in 1969 stated that:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental

rights which the State must respect. (9)

The U. S. Supreme Court in PLYLER v. DOE in 1982 stated that:

> Public education is not a 'right' granted to individuals by the Constitution. . . . But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The 'American people have always regarded education and the acquisition of knowledge as matters of supreme importance.' . . . We have recognized 'the public school as a most vital civic institution for the preservation of a dmeocratic system of government,' . . . and as the primary vehicle for transmitting 'the values on which our society rests.' . . . As noted 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.' . . . And these historic 'perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. (10)

Justice Potter Stewart, in a concurring opinion, in ROE v. WADE in 1982 stated that:

> . . . (T)he 'liberty' protected by the Due Protection Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights . . . . (11)

Justice Thurgood Marshall, in a concurring opinion, in PLYLER v. DOE in 1982 stated that:

> I continue to believe that an individual's interest in education is fundamental, and that this view is amply supported 'by the unique status accorded public education by our scoiety, and by the close relationship between education and some of our most basic constitutional values. . . . It continues to be my view that a class-based denial of public education is utterly incompatible with the Equal Protection Clause of the Fourteenth Amendment. (12)

Justice Harry Blackmun, in a concurring opinion, in PLYLER v. DOE in 1982 stated that:

> . . . (D)enial of an education is the analogue of denial of the right to vote: the latter places him at a permanent political disadvantage and the former relegates the individual to a second-

> class social status. . . . (I)t does not take an advanced degree to predict the effects of a complete denial of education upon those children targeted by the State's classification. (13)

Justice Lewis Powell, in a concurring opinion, in PLYLER v. DOE in 1982 stated that:

> . . . (T)here is no comparable federal guidance in the area of education. No federal law invites state regulation (of alien children); no federal regulations identify those aliens who have a right to attend public schools. . . . The State provides free public education to all lawful residents whether they intend to reside permanently in the State or only reside in the State temporarily. (14)

Justice Lewis Powell, in a dissenting opinion, in BOARD OF EDUCATION v. PICO in 1982 stated that:

> . . . (T)he States and locally elected school boards should have the responsibility for determining the educational policy of the public schools. (15)

The judicial support for education as a constitutionally protected "right' from the United States Supreme Court is an unknown quality.

The lower federal and state courts present a different and known quantity for support of education as a constitutionally protected "right."

The United States Court of Appeals in JOHNSON v. NEW YORK STATE EDUCATION DEPARTMENT in 1972 stated that:

> In New York State, as elsewhere in the United States and in most other developed countries, the government has arrogated to itself responsibility for administering and enforcing a formal and public system of education. It has done so both by the requirement of law that all children receive schooling until they reach a specified age and by providing schools, free to their users, supported by tax revenues. Courts have been alert to the potential for unwarranted incursions by the states into constitutionally protected spheres of individual liberty - which are nothing less than rights to self-education and self-direction - inherent in compulsory and public education. (16)

Joseph F. Weis, Jr., Judge, United States Court of Appeals, Third Circuit, in a majority opinion, in VORCHHEIMER v. SCHOOL DISTRICT OF

PHILADELPHIA In 1976 stated that:

> Children receive schooling until they reach a specified age and by providing schools, free to their users, supported by tax revenues. Courts have been alert to the potential for unwarranted incursions by the states into constitutionally protected spheres of individual liberty - which are nothing less than rights to self-education and self-direction - inherent in compulsory and public education. (17)

The California Supreme Court in SERRANO v. PRIEST In 1971 stated that:

> We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.' (18)

Joseph F. Weis, Jr., Judge, U.S. Court of Appeals, Third Circuit, In a majority opinion, in VORCHHEIMER v. SCHOOL DISTRICT OF PHILADELPHIA In 1976 stated that:

> The financial assistance granted to educational institutions by the federal government has led to its ever-increasing influence in a field which in times past was considered the domain of state, local or private activity. (19)

The United States District Court, Eastern District in Louisiana, In HALL v. ST. HELENA PARISH SCHOOL BOARD In a unanimous decision in 1961 stated that:

> Grants-in-aid, no matter how generous, are not an adequate substitute for public schools. . . . "One's right to life, liberty, and property . . . and other fundamental rights, may not be submitted to vote; they depend on the outcome of no elections.' . . . This is not the moment in history for a state to experiment with ignorance. When it does, it must expect close scrutiny of the experiment. (20)

Frank W. Wilson, Chief Judge, United States Court of Appeals, Sixth Circuit, In a majority opinion, in MAPP v. BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA In 1973 stated that:

> We do not read (the Supreme Court's holding) . . . that the Constitution requires that, black and white, a school child must now be denied the right to attend the school of his choice . . . .(21)

Alfred T. Goodwin, Circuit Judge, United States Court of Appeals, Ninth Circuit, in a majority opinion, in BERKELMAN v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT in 1974 stated that:

> Congress recognized that, because education provides access to jobs, sex discrimination in education is potentially destructive to the disfavored sex. . . . Lowell High, as a conduit to better university education and hence to better jobs, is exactly that type of educational program with regard to which Congress intended to eliminate sex discrimination when it passed Title IX. (22)

J. Skelly Wright, Circuit Judge, United States District Court, District of Columbia, in HOBSON v. HANSEN in 1971 stated that:

> . . .(T)he court has concluded that both lower class size and greater teacher experience . . . contribute to the quality of a child's education. (23)
>
> . . . (T)he court's duty to scrutinize alleged discrimination against a racial minority is especially high when the right of the minority affected is the right to equal educational opportunity. (24)

Harold D. Decker, Circuit Judge, United States District court, Northern District of Illinois, in a majority opinion, in McINNIS v. SHAPIRO in 1968 stated that:

> Even if there were some guidelines available to the judiciary, the courts simply cannot provide the empirical research and consultation necessary for intelligent educational planning. (25)
>
> Illinois' General Assembly has already recognized the need for additional educational funds to provide all students a good education. . . . If other changes are needed in the present system, they should be sought in the legislature and not in the courts. (26)

The lower federal and state courts have presented a positive support for education as a constitutionally protected "right." The lower courts have maintained that education is the province of state governments; however, many lower courts have held that education holds "fundamental interest" status under color of the federal Constitution. (27)

The state governments have given education a protected 'right'

status through explicit language in the state constitutions. (28) This legal recognition of education as a "fundamental right" emphasizes the importance that state governments have placed upon it.

Education is an issue that has occupied the interest, anguish, and monies of the federal, state, and local governments over the span of years from 1642 to 1988. The ebb and flow of emotions and activity surrounding education speaks to the elevated position that various levels of government hold for education.

Consideration of education as a constitutionally protected right, entitlement, and privilege requires an examination of the historical, social, economical, intellectual, and political impact and importance that education holds for the individual citizen.

Educational specialists and authors, legal scholars and writers, and judicial members have wrestled with the legal position that education should and does occupy. Although a great diversity and intensity exists, education and legal communities generally recognize the vital link between a basic education and successful employment opportunities.

With a modest beginning at the end of World War II and reaching fruition in the 1980s, the Japanese experiment has demonstrated that economic and financial success are closely linked to high levels of educational achievement by a majority of the population. (29)

Adler stated that:

> . . . (A) poorly schooled population will not be able to put to good use the opportunities afforded by the achievement of the general welfare. Those who are not schooled to enjoy the blessings of a good society can only despoil its institutions and corrupt themselves. (30)

OVERVIEW

This study focused on an examination of education as a constitutionally protected right, entitlement, and privilege; it included an exploration of the conditions that education as a right, entitlement, and privilege could be considered to exist. The researcher examined United States Supreme Court decisions that addressed education as being equal to other unenumerated rights under the Constitution of the United States. In addition to United States Supreme Court decisions, lower federal and state court opinions were examined to determine the causal relationships between the three judicial systems; this examination was limited to the area of education as a situational right, entitlement, and privilege.

In Chapter 1, a narrow scope for the examination was detailed. This design also included several questions to be answered in the course of the research. A survey of pertinent literature was discussed in Chapter 2. An exploration was conducted of the historical place that education had occupied during the history of the republic. Chapter 3 focused upon a discussion of education as a right, entitlement, and a privilege. Chapter 4 examined relevant United States Supreme Court decisions as they applied to education. The chapter included several lower federal and state court opinions that support education as a constitutionally protected "fundamental interest."

Chapter 5 contains four distinct sections. They are: introduction to chapter; a summary of the findings to the study; using the questions proposed in Chapter 1, conclusions to the study; and suggestions for

further research.

SUMMARY OF FINDINGS

Education is a right, an entitlement, and a privilege. It is an issue that may be analyzed from many perspectives. Interpretation and implementation create complicated roles for both state and federal governments; interpretation that originates with the bureaucracies and implementation being assigned to state and local units create a dilemma in understanding clear lines of responsibility and governing statutes of each government. The federal and state governments have overlapping responsibilities that make clear delineation of responsibility difficult. The infusion of federal monies to special programs obscures an already complicated arrangement affecting performance and accountability.

Education is an issue that has the attention of federal, state, and local governments.

> The 1980s have been characterized as a decade of platforms for educational change. (31)

Kurth-Schai suggested five reports released in 1983 by national task forces and commissions drawn from a wide spectrum of interests that reflected these changes and acknowledged the importance of education. (32) These reports addressed concerns and drew attention to the importance of education from segments of the population that cut across wide diversities of American society. Education is an issue whose time has arrived.

The summary of findings is arranged around five topics. They are: a selected history of education, the federal Constitution, education as a right, education as an entitlement, and education as a privilege. The

topics represent a synthesis of information and ideas explored in previous chapters of this work.

A SELECTED HISTORY OF EDUCATION. In 1642, education began a novel experiment. As the young colonies grew to a period of independence, the needs, demands, and goals for the new nation drew upon European educated intellectuals to guide the transformation process - from colonies to nation. The public school movement begun in the colonial period, in diverse parts of the colonies, did not reach fruition until the 1830s. (33)

From the 1830s to the 1860s, the public schools were primarily a local concern; as a result of this, schools were as good as the interest and monies invested in them from local resources.

During the 1860s, the importance of education was primarily concentrated on trying to acclimate the waves of immigrants entering the United States from Europe. (34)

From the 1870s to the 1930s, public schools were considered local concerns with modest state support. State governments during this time assumed more responsibility for education.

The years following the end of World War II brought massive amounts of federal monies to provide educational opportunities to millions of former servicemen and women and their children. (35)

From the 1940s to the 1960s, state governments had assumed primary responsibility for the function of public schools.

In 1957, the Space Age began; with it, the nation committed more federal dollars to public schools and colleges. The 1960s witnessed

the emergence of a vital and fundamental role for education; education was important in keeping the United States scientifically, technologically, and economically competitive with the rest of the world. (36) The launch of the Soviet space satellites, Sputnik I and II, signaled the joint state and federal responsibility for education; this position was similar to earlier efforts in the history of education when state and local school boards shared power over education.

President Lyndon B. Johnson in support of the Higher Education Act of 1964 stated that:

> Every child must be encouraged to get as much education as he has the ability to take . . . . (E)ducation is no longer a luxury, but a necessity. (37)

This is an accurate analysis of the spirit that existed during the 1960s and 1970s toward education. Education was viewed as the path to success for anyone with the desire.

The 1970s saw the impact of the Civil Rights Act of 1964. It saw implementation of Title II, Title III, and Title IV of the Civil Rights Act as well as the Elementary-Secondary Education Act (ESEA). (38) With each congressional action, the issue of acquiring an education moved from local concern to state level concern to national concern. The evolution of education, recognized as being necessary to the future of the nation begun in the 1960s, arrived to a "fundamental interest" in the 1970s. (39) The scientific and technological advances made during the 1970s recognized the need for education. Public schools were acknowledged as "pools of talent."

Owing to the "new demands" of the Age of Technology of the 1980s and 1990s, education has arrived at "fundamental rights" status.

Survival of the national competitive edge in the world markets during this period will dictate greater amounts and qualities of an educated population at all levels of American society. (40) Cetron held that education was one of the keys to successful American competition in the world markets.

From 1642 to 1988, education has moved in giant steps from isolated, one-room schools to large consolidated schools educating and informing generations of Americans. Education in the United States has been one of the most novel experiments in the history of mankind; education was made available to every citizen and non-citizen regardless of background, economical resources, abilities, or handicaps in a public school setting. This experiment has not been attempted by any other nation on this planet on such a major scale as the American experiment. This experiment has been successful despite the difficulties encountered in its establishment phase and in its present continuation phase.

THE FEDERAL CONSTITUTION. The Constitution of the United States in its own words states that it is the "Law of the Land." Education as a "fundamental interest" is not contained in the language of the federal Constitution. Voting (41), abortion (42), individual privacy (43), criminal rights (44), intrastate transportation (45), and free counsel for indigent prisoners (46) are not found in the words of the federal Constitution; however, these issues have been elevated to "fundamental interest" status by the United States Supreme Court. The United States Supreme Court has held in its explicit interpretation of the federal Constitution that education is not a fundamental, protected "right;" the Court

also held that it could find no "fundamental interest" through an implicit interpretation.

The omission of education as a protected "right" in explicit language from the federal Constitution lends itself to being interpreted as a type of historical, purposeful error, or mystery. (47) Bolmeier suggested that during the period of the Constitutional Conventions in 1787 -1789 few educational theories were developed, education was a controversial issue, and the framer's own private educational biases considered education a private issue. (48)

A number of writers have written that the fifth, ninth, tenth, and fourteenth amendments hold promise for education being elevated to a fundamental interest status; the keys to this movement rest with which branch of the federal government interprets the Constitution and its amendments, which method will be employed - explicit or implicit, and what aspects of common law or historical precedents will be held by the federal government.

I. UNDER COLOR OF THE CONSTITUTION, WHEN IS EDUCATION AT PUBLIC EXPENSE A "FUNDAMENTAL INTEREST?"

The Constitution, in its own language, is the supreme "Law of the Land." The three branches of the federal government have an opportunity to arrive at a meaning of the document. To arrive at this point requires that these branches of government interpret the federal Constitution from their own unique positions, power bases, and information backgrounds. The process of interpreting the Constitution employs the use of two methods of examination, explicit and implicit.

An "interest" may be generally defined as a broad term for any

right in property. (49) "Fundamental" may be defined as a basic need, or requirement. (50) A "fundamental interest" therefore may be defined as any basic need, or requirement for any right in property. Holmes defined a "right" as the permission to exercise certain natural powers. (51)

The establishment of a "fundamental interest" resides in the interpretation derived from an implicit and/or explicit examination of the wording of the federal Constitution.

Explicit meaning of the Constitution exists in an exact language which spells out the presence of the "fundamental interest." The first amendment stated, in part, that:

> Congress shall make no law . . . abridging the freedom of speech . . . . . (52)

Freedom of speech is a protected "fundamental interest" owing to the explicit language of the Constitution. The language of the document addressed directly the existence of the protected "interest;" therefore, the "fundamental interest" in freedom of speech is determined by an explicit interpretation of the federal Constitution.

Implicit meaning exists in an implied intent of the language which is open to varied meanings of the words of the federal Constitution. The issue, education at public expense, is a protected "fundamental interest" by an implicit interpretation of the Constitution. The issue assumes support from a consideration of its common law usage.

The issue, education at public expense, has been established in an extended common law usage. First, the issue has a long history of accepted practice to firmly establish it as an acceptable common property

Interest" this interest has existed from 1642 to 1988.

Second, the issue has existed in various forms in a majority of the geographical sections from the early days of the young republic to the present 1980s. Although there have been periods of intermittent service, basically education has managed to continue to provide a service relatively uninterrupted. This also recognizes the existence of poor and intermittent educational services from 1642 to 1960. (53)

Third, the issue has received recognition as a "fundamental interest" from the states in two separate areas; the state constitutions have cited the issue as a protected "right," (54) and the population of the states have imposed the use of tax revenues to support its operations. (55)

Fourth, the issue, on a grassroots level, provides a stronger common law practice than it does on a state or federal level. The issue existed without formal state or federal fiscal support as well as any formal or legal recognition for existence until the early part of the 1800s. (56)

Fifth, state governments have established the issue as a protected "right" in explicit constitutional language at the state level.

Sixth, the federal government has given federal and national recognition to the issue through three methods: monies for special programs, congressional legislation regulating its operation, and public support through political rhetoric.

The issue, education at public expense, assumes "fundamental interest" status under an implicit interpretation of the fifth, ninth, tenth, and fourteenth amendments to the federal Constitution.

The fifth amendment contains language that holds promise for support of the issue. The amendment stated, in part, that:

> No person shall be . . . deprived of life, liberty, or property without due process of law . . . . (57)

van Geel has maintained that public school employees have been able to secure property rights guarantee using the language of the fifth amendment. He stated that:

> . . . by claiming that the existence of an implicit constitutional right to privacy protects them . . . .(58)

By establishing a common law usage property right to education at public expense, the implicit interpretation of the fifth amendment provides strong support for this position.

The ninth amendment holds the strongest argument for the support of the issue through the exercise of the police power of the states. The ninth amendment states that:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. (59)

Addressing the intent of the ninth amendment, Paust stated that:

> The alternative basis for the protection of fundamental human values is the ninth amendment . . . . Its utility lies . . . in recognizing that basic human rights are already a viable part of the constitutionally guaranteed rights of Americans. . . . (I)t is true that our courts either have not recognized the existence of such a constitutional protection or have been unwilling to use it . . . . (60)

Citing the works of Hamlin, Kelsey, and Rogge, Paust stated that:

> It seems clear from the language of the Ninth Amendment that certain rights exist even though they are not enumerated in the Constitution, that these rights are retained by the people, and that by express command these unenumerated rights are not to be denied or disparaged by any governmental body. (61)

The tenth amendment contains language that through an implicit inter-

pretation may support the "fundamental interest" status of the issue. The amendment states that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. (62)

The amendment prevents intrusion of the federal government into the area of states' rights. It supports the premise that although education is not explicitly mentioned in the federal Constitution; it is a right that is reserved to the people of the states. The states have exercised their prerogative by inclusion of education as a protected "right" into the language of the state constitutions. (63)

The fourteenth amendment holds support for the issue, generally. The United States Supreme court has rejected the use of the fourteenth amendment as an argument for the inclusion of education as a protected "interest." (64) The amendment, in part, states that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (65)

WHEN IS EDUCATION A "FUNDAMENTAL INTEREST?"

Education exists as a "fundamental interest" when a citizen becomes six years of age and attempts to pursue an education; or when the citizen becomes eighteen years of age and the state has failed to provide one.

2. WHEN IS EDUCATION AT PUBLIC EXPENSE A "RIGHT?"

Education, to be considered as a right at the federal level, must demonstrate that it is a protected interest from an implicit interpretation of the federal Constitution. Senator Joseph Biden, Jr., stated that:

> Do I have certain rights simply because I exist; or do I have these rights because the law says that I do? (66)

Biden addressed implicit interpretation directly; thus the dilemma. Does the right exist as a 'right' from interpretation, or does the right exist before the interpretive attempt? Justice Holmes defined a "right" as:

> A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. (67)

van Alstyne, in analyzing Justice Holmes' nature of a legal right, stated that:

> (F)or legal purposes a right is only the hypostasis of a prophecy-the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it . . . . One phrase adds no more than the other to what we know without. Thus Holmes himself readily admitted that to deny that a person had a 'right' to something was merely to announce the conclusion that a court would not give him any relief; but the denial itself provides no reason whatever why such relief should be denied. (68)

The states have established education as a constitutionally protected "right." (69) The United States Supreme Court has held once a state has established a right to an education that it cannon arbitrarily remove this right without demonstrating a "compelling state interest" to do so. (70) The California supreme court held that education was a protected "right" (71); the Connecticut supreme court agreed (72), as

did the New Jersey supreme court (73)

The United States Supreme Court ruled in a five to four decision in 1973 that education was not a "right" protected by the federal Constitution either by explicit or implicit interpretation. (74)

Justice Thurgood Marshall did not support the majority position of the Court in 1973; nor did he support this position in 1982. He stated that:

> I continue to believe that an individual's interest in education is fundamental, and that this view is amply supported 'by the unique status accorded public education by our society,' and by the close relationship between education and some of our basic constitutional values. (75)

Justice William Brennan did not support the majority position of the Supreme Court in 1973; in a 1982 majority opinion, he stated that:

> Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimeable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement. (76)

Justice Harry Blackmun did not support the majority position in RODRIGUEZ in 1973; in a concurring opinion in 1982, he stated that:

> . . . (D)enial of an education is the analogue of denial of the right to vote . . . . (77)

Justice Oliver Wendell Holmes in a 1907 opinion supported education as a protected right; he stated that education was:

> . . . one of the first objects of public care. (78)

The United States Supreme Court in a majority decision in PLYLER in 1982 stated that:

> 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. (79)

But more directly, 'education prepares individuals to be self-reliant and self-sufficient participants in society. (80)

de Tocqueville, in commenting upon the relationship of education to the political process in the United States, stated that:

. . . (I)n the United States, the instruction of the people powerfully contributes to the support of the democratic republic . . . (P)olitics are the end and aim of education. (81)

President Calvin Coolidge, in a speech in 1926, stated that:

Having in mind that education is peculiarly a local problem, and that it should always be pursued with the largest freedom of choice by students and parents, nevertheless, the Federal Government might well give the benefit of its counsel and encouragement more freely in this direction. I do consider it a fundamental requirement of National activity . . . . (82)

David L. Kirp, quoting from a United States Supreme Court decision decided in 1964, stated that:

the fundamental importance of public education compelled . . .the Court to the extroardinary remedy of ordering the county to levy taxes sufficient to reopen the public schools. (83)

Kirp stated that education was of "fundamental interest;" however,

Were one somehow free to select the branch of government best suited to resolve the problems of equality of educational opportunity, the judiciary would not be the branch picked. Massive inaction of the other two branches, however, makes the judiciary the instrument of last resort for the assertion of fundamental constitutional rights. (84)

If the judiciary accepts its responsibility and acts with imagination and sensitivity, it may be able to show the way to the beginnings of solution, to make good the American promise of an equal choice for all through public education. (85)

Kirp proposed three questions to be pursued in any analysis of the establishment of a right. He stated that:

FIRST, does the right bear directly on the individual's effective participation in the political process? . . . SECOND, is the preservation of the right essential to the maintenance of the values

> of the society? . . . THIRD, is the right generally considered essential for the individual's satisfactory life prospects? (86)

Kirp attributes the "fundamental rights" analysis to Professor Frank I. Michelman of the Harvard University Law School; Michelman had raised similar points both in unpublished course materials and in discussions that he had conducted. (87)

In reaching its decision in SERRANO, the California Supreme Court had included much of the content of Michelman's discussions. Addressing the three points raised by Michelman, the California court had discussed:

(a) INDIVIDUAL INTEREST. The court held that education was an essential element to the interests of the individual citizen. Education provided the tools necessary to provide an individual with an opportunity to reach self-realization. The court recognized the utility of obtaining an education.

(b) PUBLIC INTEREST. The decision recognized the value of having educated workmen to contribute to the success of the society. The public interest was served by an educated work-pool to aid in management and operation of the American economy, political networks, and governmental services. All elements are enhanced through education of the membership responsible for successful performance.

(c) SOCIETAL INTEREST. Societal interests was made by the court's statement that " . . . education is unmatched in the extent to which it molds the personality of the youth of the society." (88) The nation's youth are the future of the society. Public schools provide instruction in the values, goals, philosophy, and America's past. An education of the youth shapes the future of the nation. There is no greater right

or fundamental interest than ensuring that the nation survives with its values and Constitution intact.

Education, as a protected constitutional "right" in the federal arena, is conditioned upon six points; these points are derived from an implicit interpretation of the United States Constitution. These points are similar to the argument presented in SERRANO v. PRIEST; they were of overwhelming evidence to the California supreme court in 1971. Their impact has diminished little over the intervening seventeen years.

FIRST, education is essential in providing an individual with opportunities despite disadvantaged background. (89) The key word that operates within the process of becoming educated is opportunity. Education is essential in possessing social, economical, and political mobility. It does not guarantee success; however, it does provide that opportunity.

SECOND, everyone benefits from education. (90) An individual may live a life time without requiring the services of a fire department, police protection, public assistance, public housing, or medical services; yet, in 1988, it is rare that an individual is not required to use an education - shopping for food, employment, travel, or obtaining aid.

THIRD, education continues over the period of an individual's life. (91) In all types, variations, and interests, education opens interest in learning more. No governmental service is this assured for citizens of all ages in and out of the public schools and colleges settings. Education is a process that grows with increased use over the life of the individual.

FOURTH, education is unmatched in its ability to influence and shape the youth of America. (92) The Roman Catholic Church recognized this early in the history of the church; many Jesuit priests have been heard to say "Give me a child's mind for the first six years, and he will be a Catholic forever." Saturday morning television, with cartoons and commercials, vividly demonstrate the power of education. An education is unmatched in its power to influence.

FIFTH, education is so important to the general welfare of citizens that fifty states have cited its "fundamental interest" in state constitutions. (93) The United States Supreme Court in PLYLER v. DOE in 1982 stated that:

> In sum, education has a fundamental role in maintaining the fabric of our society. (94)

The supreme court in SERRANO v. PRIEST in 1971 stated that:

> . . . education is unmatched in the extent to which it molds the personality of the youth of the Society. (95)

The United States Supreme Court in BROWN v. BOARD OF EDUCATION in 1954 stated that:

> Education is the most important function of state and local governments . . . (96)

SIXTH, education is a protected "right" from established historical and common law tradition and practice. (97) Writers, politicians, jurists, congressmen, and historians uphold the historical impact and importance that education has had upon the history of this nation.

Education is a protected "right" from an implicit interpretation of the federal Constitution. Implicit interpretation addresses and supplies positive responses to an examination of individual, public, and

societal interests maintained by a "right" to an education. Two branches of the federal government have acknowledged the "fundamental" importance of education. The United States Supreme Court has not accepted education as a constitutionally protected "right."

3. WHEN IS EDUCATION AT PUBLIC EXPENSE AN "ENTITLEMENT?"

The answer to the posed question is simple. The United States Supreme Court in GOSS v. LOPEZ held that an entitlement was a state created action; once the state had conferred the right through state statute, the individual was clearly entitled to recieve the benefit of the state's action.

The United States Supreme tourt in GOSS defined an entitlement to a public education as:

> . . . (T)here is no constitutional right to an education at public expense. . . . The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally 'not created by the Constitution.' Rather, <u>they are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits</u>. . . . Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. (98)

Based upon the Court's explanation of an entitlement, the following conditions were present to create an entitlement to an education at public expense. These conditions are:

(a) it must be a legally created issue by the actions of the state government (99)

(b) it must be the intent of the state to create this issue and entitle its citizens to receive the benefit of this action (100);

(c) the receiver of the action or benefit must understand the nature of the state's intent (101)

(d) there must be established guidelines that create certain, specific limits to the state action. (102)

(e) the state must share in the created action through a bureaucracy to manage the action (103);

(f) the fiscal responsibilities associated with the action must be clearly delineated for all, and must be applicable to all (104);

(g) there must exist methodology for accountability of both state and recipent of the state action (105);

(h) the state has anticipated longevity for education by legislating laws, rules, and regulations to govern and regulate the functions of education and related services throughout the state (106);

(i) once the state has provided the service, it can not arbitrarily end or remove the service. (107).

4. WHEN IS EDUCATION AT PUBLIC EXPENSE A "PRIVILEGE?"

A privilege is defined as "an advantage not enjoyed by all." (108) Education is conferred by the states upon a special class of individuals without a federal mandate to do so. The states have chosen to grant the privilege of an education to a special class of individuals; the states, having chosen to grant the privilege, may select to terminate or remove this service.

Under the broad and general police powers of the state, it may establish and remove any institution that promotes and provides for the general welfare of its citizens. (109) Education at public's expense is one of these creations; the state has provided the action, public education, outside of federal consideration of a constitutional "fundamental interest."

Holmes maintained that an individual possesses a right/privilege to a state-created action (110); he held that an individual has a right or privilege:

(a) to improve oneself through being educated, or receiving educational instruction (111)

(b) to benefit from the expenditure of state monies for the maintenance of the general welfare of the citizens of the state (112);

(c) to require and expect prudent use of state tax revenues (113);

(d) to anticipate that the state will provide services for the general welfare of the citizens of the state (114); however, an individual does not have a right to receive an individual education at the expense of tax revenues, or to attend a public school.

5. WHAT SITUATIONS MUST EXIST FOR EDUCATION TO BE CONSIDERED A RIGHT, AN ENTITLEMENT, OR A PRIVILEGE PROTECTED BY THE FEDERAL CONSTITUTION?

The situations that must exist to elevate education to a protected "interest" are that it:

(a) receive a "fundamental interest" status from an implicit interpretation of the federal Constitution;

(b) exists as an interest so basic as to demand recognition of its "fundamental interest" status;

(c) have established the historical recognition of the importance of education.

(d) must receive state elevation of education to a constitutionally protected "right";

(e) receive congressional recognition of the "fundamental interest" status of education through explicit legislative language;

(f) receive executive recognition and support for education as a national issue; and

(g) must have the United States Supreme Court's acknowledgment of the fundamental status of education.

EDUCATION AS A RIGHT. Education, to be considered as a constitutionally protected right in the federal arena, must demonstrate that it is protected by an explicit or implicit interpretation of the federal Constitution.

The United States Supreme Court has held that, from an explicit interpretation of the federal Constitution, education was not a protected "right." (115)

Implicit interpretation to the federal Constitution proposes a difficult task. The judiciary has generally ruled that it will consider a right when a deprivation of the proposed right would result in a severe impairment to the independent functioning of the individual (116); a deprivation of the right would trigger 'Strict Judicial Scrutiny" by the United States Supreme court (117); the exercise of the proposed right would result in a significant alteration of the conduct of the individual's life style and the ability to gain meaningful employment (118); and the exercise of the right contributes to an aberrant action in the conduct of the state government (119).

The California Supreme Court proposed several conditions that could, from an implicit interpretation of the federal Constitution, elevate education to a "fundamental interest." (120) First, education is essential in maintaining an individual's opportunity to succeed despite a disadvantaged background. (121) Second, everyone benefits from education. (122) Third, education, acquired during elementary and secondary school years, continues over the period of the individual's life time. (123) Fourth, education is unmatched in its ability to influence and mold young members of the American society. (124) Fifth, education is so important

that fifty states have made it compulsory. Fifty states have cited education as a fundamental "right" in explicit language in state constitutions. (125) The Connecticut Supreme court stated that:

> It is argued that if the State decides that a service shall be furnished, the service should thereby become one of 'fundamental right.' (126)

Sixth, education has established an historical and common law tradition that creates a "fundamental interest." (127) The Connecticut court stated that:

> It is urged that education was so dominated in BROWN v. BOARD OF EDUCATION where the Court said that 'Today, education is perhaps the most important function of state and local governments,' and that 'Such an opportunity, where the state has undertaken to provide it, is a right . . . .' (128)

The United States Supreme Court in MEYER had stated a similar idea thirty years prior; the Court stated that:

> The American people have always regarded education and acquisition of knowledge as matters of supreme importance should be deligently promoted. (129)

Education is a "right" and a "fundamental interest" that has an established historical precedent, support from state governments in constitutional language, support of Congress through congressional policy statements and appropriations for educational programs, and indirect support from the executive branch of the federal government through positive political rhetoric. Education has public support for the public schools. Education, as a "right," lacks only a statement by the United States Supreme Court that it exists.

EDUCATION AS AN ENTITLEMENT. The United States Supreme Court held in GOSS that a protected entitlement to an education rested with the explicit

language of the state constitution. (130) When a state has created a constitutionally protected "right" to an education, has required attendance from a special class of individuals (131), has provided the bureaucracy to regulate education, has appropriated tax revenues to finance education, the United States Supreme Court stated that this created a "fundamental entitlement" to an education. (132) The Court also stated that any attempt to withdraw this protected state "right" would result in "Strict Judicial Review." (133)

An entitlement to an education at public expense is based upon:

(a) the state's explicit constitutional provisions for a "fundamental interest" status;

(b) the state compelling the special class of individual's attendance at the state-created educational institutions, or a state-accepted alternative (134);

(c) the state has established an anticipated longevity, continuation of instruction by providing bureaucracies to manage educational programs and established a system of tax-revenue collections to support education (135);

(d) the historical support for education; this established a common law tradition that added strength to the state's actions (136).

EDUCATION AS A PRIVILEGE. Under the color of the ninth and tenth amendments to the federal Constitution, a state may create a service for the benefit of the citizens of the state, such as education at public expense; however, the state may withdraw the service. (137) Education is a privilege granted by state government under its police powers to provide for the general welfare of its citizens. (138) The United States Supreme

Court has held that education is not a federal right; therefore, it is a state function. As a state function, the state has the power to create any service to promote and provide for the general welfare of its citizens. (139) The State, having created access to an education at public expense, has the right to remove this service at the state's discretion; this may be accomplished by the state proving that it had a "compelling state interest" in removing education at public expenses as a service. (140)

SUMMARY. Education, as a right, an entitlement, and a privilege, is an issue that is inextricably tied to the personal beliefs and professional backgrounds of the membership of the United States Supreme Court. The United States Supreme Court has held that education is not a federal question. This recognition of education's position takes no notice of the societal, individual, historical, and political importance that education has demonstrated over the past three hundred years. Fifty states have stated in their constitutions that education was a protected "right." Under the present format of this study, exploring the question, "Is education a constitutionally protected 'right?', cannot be satisfactorily answered.

The five selected periods in the history of education demonstrate a progression of the importance of education as it developed and progressed to a higher level of importance to the nation.

Four periods of United States Supreme Court activity demonstrate four different approaches and holdings toward education. These range from education holding fundamental importance in BROWN (141), MEYER (142),

and PLYLER (143) to education having no constitutional position at the federal level in RODRIGUEZ (144). The Court's activity, or lack of activity, directly affected the perception of education as a "fundamental interest."

CONCLUSIONS

The conclusions to the study have been organized around the research questions proposed in chapter one and explored throughout this work. The following research questions have examined:

1. UNDER COLOR OF THE CONSTITUTION, WHEN IS EDUCATION AT PUBLIC EXPENSE A "FUNDAMENTAL INTEREST?"
2. WHEN IS EDUCATION AT PUBLIC EXPENSE A "RIGHT?"
3. WHEN IS EDUCATION AT PUBLIC EXPENSE AN "ENTITLEMENT?"
4. WHEN IS EDUCATION AT PUBLIC EXPENSE A "PRIVILEGE?"
5. WHAT SITUATIONS MUST EXIST FOR EDUCATION TO BE CONSIDERED A RIGHT, AN ENTITLEMENT, OR A PRIVILEGE PROTECTED BY THE FEDERAL CONSTITUTION?

Each research question is presented prior to findings reached in the study.

1. UNDER COLOR OF THE CONSTITUTION, WHEN IS EDUCATION AT PUBLIC EXPENSE A "FUNDAMENTAL INTEREST?"

Education as a "fundamental interest" places the burden of receipt of the property interest upon the citizen between the ages of six and eighteen years. Education, the process, is an exchange between the citizen and the mandated state environment. Quality of the process may be varied by region, the wealth involved, or the inate intelligence of the citizen; however, the protected "interest" still remains. Education is a federally, constitutionally protected "right."

> . . . '(T)he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. (145)

2. WHEN IS EDUCATION AT PUBLIC EXPENSE A "RIGHT?"

Education as a "right" is premised upon:

(a) the implicit and explicit, historical importance of education;

(b) a critical function of education during the twentieth and twenty first centuries;

(c) fifty state constitutions have mentioned education as a "fundamental interest" for the people of their respective state;

(d) the legislative branch of the United States government has recognized, promoted, and appropriated substantial amounts of money to support education and educational programs;

(e) the present and past leaders of the executive branch have been the spokesperson for increased levels of federal spending to aid education as well as encouraging higher levels of achievement from the school systems across the United States; the executive branch has provided especially high levels of political rhetoric on behalf of education;

(f) none of the other rights mentioned by the United States Supreme Court as possessing "fundamental right" status have the amount of state and federal monies invested in them, or the amount of attention that education arouses, or involves as many of the state and federal citizens as does education;

(g) education involves almost one third of the state's population directly or indirectly in the educational process;

(h) every citizen is directly affected by education;

(1) every industry and business is directly and indirectly affected by the issue and the process of education.

3. WHEN IS EDUCATION AT PUBLIC EXPENSE AN "ENTITLEMENT?"

The implications for education at public expense as a federal question of entitlement are contained in the implicit interpretation of the federal Constitution by the federal judiciary. Using the logic present in the GOSS opinion, the states have created education as a protected property interest through specific constitutional language; therefore, since the states have created education as a state "right" and property right; education must exist as a federal entitlement.

4. WHEN IS EDUCATION AT PUBLIC EXPENSE A "PRIVILEGE?"

It is a privilege to receive an education at public expense. An individual has a right to improve oneself through educational instruction; however, the state is not obligated to use tax revenues to provide for the educational instruction. A state may choose to provide monies for education however, the state, as a sovereign unit, may opt to withdraw from the experience at a time that it deems to be advantageous. (146)

A privilege implies that a service is given unequally to citizens of the state, and it may be arbitrarily administered and withdrawn at the discretion of the state government. (147)

5. WHAT SITUTAIONS MUST EXIST FOR EDUCATION TO BE CONSIDERED A RIGHT, AN ENTITLEMENT, OR A PRIVILEGE PROTECTED BY THE FEDERAL CONSTITUTION?

A "fundamental interest" protected by the federal Constitution re-

quires that it receive standing through an implicit interpretation of the federal Constitution.

SUGGESTIONS FOR FURTHER RESEARCH

The federal Constitution made no explicit reference to education as a protected "fundamental right," nor does it make reference to criminal rights, abortion, voting, and interstate transportation. The United States Supreme Court held that education was not a fundamental "right;" yet, the Court held that criminal rights, abortion, voting, and interstate transportation were "rights" from the Court's implicit interpretation of the federal Constitution. Education, as a federal Constitutional "right," is an issue whose time has arrived.

The following recommendations for further research and study are made.

1. It is recommended that a research study be conducted on the status of education as a state "right."

2. It is recommended that a research study be conducted on the status of education as a federal question.

3. It is recommended that a study be conducted on the United States Supreme Court's view of education as a federal, constitutionally protected "right."

4. It is recommended that a survey study be made of the states' view of education as a federal, constitutionally protected "right."

5. It is recommended that a comparitive study be made of the United States Supreme Court's view and the lower federal courts' view of the status of education as a federal constitutionally protected "right."

6. It is recommended that a study be made of education as a protected "right" from a view of the Congress of the United States.

7. It is recommended that a study of Presidential views on education be made.

8. It is recommended that a study of the relationships between States-Rights views on education placed against United States Supreme Court views on education be explored.

9. It is recommended that a study be made of the United States Supreme Court's decisions on education examined from the four periods of the Court's activity covered in this study.

10. It is recommended that a survey study of regional views on education as a protected "right" be made.

11. It is recommended that a survey study be made of higher education as a protected "right."

12. It is recommended that a research study be made on the pattern of federal financing of education spanning ten, fifty, one hundred, and two hundred years segments of time.

13. It is recommended that a statistical study be made of the federal and state monies allocated and expended to support education over the past one hundred years.

14. It is recommended that a study be made of the impact of United States Supreme Court decisions on education and educational rights.

15. It is recommended that a study of the opinions on education that justices of the United States Supreme Court have delivered be explored.

16. It is recommended that a study of the leadership styles of the

Chief Justices of the United States Supreme Court be made.

FOOTNOTES

CHAPTER 5

1 J. Amos Hatch and John M. Conrath, "Refocusing the Identity of schooling: Education for a Democracy of the Intellect," KAPPA DELTA PI RECORD (Winter 1988), Volume 24, Number 2, p. 41.

2 Ibid, p. 45.

3 Ibid.

4 Ibid, pp. 41 -42

5 "Equal Educational Opportunities: Policy and Purpose," USCS Section 1701 (a) (1) UNITED STATES CODE SERVICE (1982) (New York: The Lawyers Co-operative Publishing Company), Volume 20.

6 EDWARDS v. AGUILLARD, 55 USLW 4860 (6-16-87) at 4861.

7 SAN ANTONIO SCHOOL DISTRICT v. RODRIGUEZ, 411 US 1 (1973) at 35.

8 BROWN v. BOARD OF EDUCATION 347 US 483 (1954) at 351.

9 TINKER v. DES MOINES, 393 US 503 (1969) at 393.

10 PLYLER v. DOE, 50 USLW 4650 (6-15-82) at 4655.

11 ROE v. WADE, 410 US 113 (1973) at 129.

12 PLYLER, op. cit., at 4658.

13 Ibid, at 4659.

14 Ibid, at 4660 at footnote number 6.

15 BOARD OF EDUCATION v. PICO, 457 (1982) at 893.

16 JOHNSON v. NEW YORK STATE EDUCATION DEPARTMENT, 449 F. 2d 871 (1971), at 882

17 VORCHHEIMER v. SCHOOL DISTRICT OF THE CITY OF PHILADELPHIA, 532 F. 2d 880 (1976) at 883.

18 SERRANO v. PRIEST, 487 P. 2d 1241 (1971) at 1258.

19 VORCHHEIMER, op. cit., at 883.

20 HALL v. ST. HELENA PARISH SCHOOL BOARD, 197 F. Supp. 649 (1961) at 659.

21 MAPP v. BOARD OF EDUCATION OF CITY OF CHATTANOOGA, 477 F. 2d 851 (1973) at 854.

22 BERKELMAN v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT, 501 F. 2d 1264 (1974) at 1269 - 1270.

23 HOBSON v. HANSEN, 327 F. Supp. 844 (1971) at 860.

24 Ibid.

25 McINNIS v. SHAPIRO, 293 F. Supp. 327 (1968) at 336.

26 Ibid, at 336 - 337.

27 See COOK v. EDWARDS, 341 F. Supp. 307 (1972) ("A public school education through high school is a basic right of all citizens." (310 - 311); FREDRICK L. v. THOMAS, 419 F. Supp. 960 (1976); FERRELL v. DALLAS INDEPENDENT SCHOOL DISTRICT, 392 F. 2d 697 (1968); KNIGHT v. STATE BOARD OF EDUCATION, 200 F. Supp. 174 (1961); van DUSARTZ v. HATFIELD, 334 F. Supp. 870 (1971); HARGRAVE v. KIRK, 313 F. Supp. 944 (1970); SCARNATO v. PARKER, 415 F. Supp. 272 (1976); RYAN v. TENNESSEE, 257 F. 2d 63 (1958); LeBEAUF v. STATE BOARD OF EDUCATION, 244 F. Supp. 256 (1965); HESS v. MULLANEY, 213 F. 2d 635 (1954); DOE v. ANRIG, 561 F. Supp. 121 (1983);

SERRANOv. PRIEST, 487 P. 2d 1241 (SERRANO I, II, and III); ROBINSON v. CAHILL, 303 A. 2d 273 (1973); BOARD OF EDUCATION v. OKLAHOMA, 409 F. 2d 665 (1969); ZOLL v. ANKER, 414 F. Supp. 1024 (1976); and HORTON v. MESKILL 376 A. 2d 359 (1977) (" . . . In Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized; . . . ." (359).

28 The state constitutional provisions are listed on pages 46 and 47 of this work.

29 Robert Leestma, Director, A REPORT FROM THE U. S. STUDY OF EDUCATION IN JAPAN (Washington, D.C. : U. S. Government Printing Office, 1987).

30 Mortimer J. Adler, THE PAIDEIA PROPOSAL: AN EDUCATIONAL MANIFESTO (New York: Mac Millan Publishing Company, 1982), p. 79.

31 Ruthanne Kurth-Schai, "The Roles of Youth in Society: A Reconceptualization," THE EDUCATIONAL FORUM (Winter 1988), Volume 52, Number 2, p. 113.

32 National Commission on Excellence in Education, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (Washington, D. C. : U. S. Government Printing Office, 1983); Task Force on Education for Economic Growth, ACTION FOR EXCELLENCE: A COMPREHENSIVE PLAN TO IMPROVE OUR NATION'S SCHOOLS (Denver: Education Commission of the States, 1983); College Board ACADEMIC PREPARATION FOR COLLEGE: WHAT STUDENTS NEED TO KNOW AND BE ABLE TO DO (New York: College Entrance Examination Board, 1983); Twentheth Century Fund Task Force on Federal Elementary and Secondary Education Policy, MAKING THE GRADE (New York: Twentieth Century Fund, 1983); and National Science Foundation, EDUCATING AMERICANS FOR THE 21ST CENTURY (Washington, D. C.: National Science Foundation, 1983).

33 Benjamin D. Stickney and Laurence R. Marcus, THE GREAT EDUCATION DEBATE: WASHINGTON AND THE SCHOOLS (Springfield, Illinois: Charles C. Thomas, Publisher, 1984), p. 4.

34 Ibid, p. 6.

35 Ibid, p. 11.

36 Ibid, p. 12.

37 Ibid, p. 13. Authors quoted President Lyndon B. Johnson's speech delivered in a Washington, D. C. press conference in 1964.

38 Ibid, pp. 3 - 101.

39 Ibid, pp. 16 - 160. The authors maintained that education moved from a state constitutionally protected "right" to a federal "right," only the United States Supreme Court failed to notice the transition. David L. Kirp, "The Poor, the Schools, and Equal Protection," HARVARD EDUCATIONAL REVIEW (Fall 1968), Volume 38, Number 4, pp. 635 - 668; Mark Tushnet, "The Newer Property: Suggestion for the Revival of Substantive Due Process," THE SUPREME COURT REVIEW (1975), pp. 261 - 288; and Daniel Selakovich, SCHOOLING IN AMERICA: SOCIAL FOUNDATIONS OF EDUCATION (New York: Longman, Publishers, 1984), pp. 373 - 385.

40 Marvin J. Cetron, SCHOOLS OF THE FUTURE: HOW AMERICAN BUSINESS AND EDUCATION CAN COOPERATE TO SAVE OUR SCHOOLS (New York: McGraw-Hill Book Company, 1985). See generally pages 21 to 139.

41 The nature of voting in REYNOLDS v. SIMMS, 377 US 533 (1964).

42 The right to obtain an abortion in ROE v. WADE, 410 US 113 (1973).

43 The right to privacy in BOWERS v. HARDWICK, 54 USLW 4919 (6-24-86).

44 The explanation of criminal rights in MIRANDA v. ARIZONA, 384 US 367 (1979).

45 The right to interstate travel in UNITED STATES v. GUEST, 383 US 745 (1966) at 757 - 759; and OREGON v. MITCHELL, 400 US 112 (1970) at 229.

46 The right to a guaranteed counsel free of charge for an indigent prisoner in GIDEON v. WAINWRIGHT, 372 US 335 (1963).

47 Steve F. Dalton, A STUDY OF SUPERINTENDENT TURNOVER IN NORTH CAROLINA (1980 - 1982). (An unpublished doctoral dissertation, University

of North Carolina at Greensboro, 1984), pp. 51 - 52.

48 Edward C. Bolmeier, SCHOOL IN THE LEGAL STRUCTURE (Cincinnati, Ohio: W. H. Anderson Company, Publishers, 1973). See generally pages 3 -21. Ellwood P. Cubberley, PUBLIC EDUCATION IN THE UNITED STATES (Chicago, Illinois: Houghton-Mifflin Company, 1934), pp. 84 - 85. Cubberley stated that: ("Were the Constitution to be reframed today there is little doubt but that education would occupy a priminent place in it." E. Edmund Reutter, Jr. and Robert R. Hamilton, THE LAW OF PUBLIC EDUCATION (Mineola, New York: The Foundation Press, Inc., 1976), pp. 1 - 3. Reutter maintained that education occupies fundamental "right" status without United States Supreme Court recognition. Michael W. La Morte, SCHOOL LAW: CASES AND CONCEPTS (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1982), pp. 188 - 420. La Morte generally supported Reutter and Hamilton.

49 SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ, 410 US 1 (1973).

50 Ibid, at 20.

51 Ibid, at 31 - 37.

52 Ibid, at 38 - 40.

53 Ibid, at 40 - 44.

54 SERRANO v. PRIEST, 487 P. 2d 1241 (1971).

55 Ibid, at 1259.

56 Ibid.

57 Ibid.

58 Ibid.

59 Ibid. See also pages 46 - 47 of this work.

60

ROBINSON v. CAHILL, 303 A. 2d 273 (1973) at 285.

61

The courts in SERRANO v. PRIEST, 487 P. 2d 1241 (1971): SAN ANTONIO v. RODRIGUEZ, 41 US 1 (1973); ROBINSON v. CAHILL, 303 A. 2d 273 (1973); HORTON v. MESKILL, 172 CONN 615, 376 A. 2d 359 (1977); PLYLER v. DOE, 50 USLW 4650 (6-15-82); and EDWARDS v. AGUILLARD, 55 USLW 4860 (6-16-87); FIALKOWSKI v. SHAPP, 405 F. Supp. 946 (ED PA. 1975) (" ... (T)here exists a constitutional right to a certain minimum level of education as opposed to a constitutional right to a particular level of education."); FREDRICK L. v. THOMAS, 408 F. Supp. 832 (ED PA. 1976); PETER DOE v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Civ. No. 36851 (CAL, CT. APP. August 6, 1976); WOODAHL v. STRAUB, 164 MONT 141 (147, 520 P. 2d 776 (MONT. 1974) at 779; and BUSE v. SMITH, 247 N.W. 2d 140 (1976) 149. (The court held that local districts ". . retain the power to raise and spend revenue .. ."") The courts have cited the historical importance and the unique relationship that education holds with the state and federal governments. The courts have implied that a common law tradition for education exists.

62

ROBINSON v. CAHILL, 303 A 2d 273 (1973) at 284.

63

MEYER v. NEBRASKA, 262 US 390 (1923) at 400.

64

GOSS v. LOPEZ, 419 US 565 (1975).

65

Following telephone discussions with the State Department of Education of the State of Mississippi, the State of Alabama, the State of Georgia, the State of South Carolina, and the State of Tennessee, it may be generally stated that these states have created a Special Class of Individuals that encompass the age group of 5 years to age 15 years of age. Mississippi and Alabama having pending legislation that purpose to raise the upper age limit to 16 years of age. The telephone survey was conducted between December 3, 1987 and January 10, 1988.

66

GOSS v. LOPEZ, 419 US 565 (1975). ("Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education."(573); ("The right or entitlement to education so created is protected in a proper case by the Due Process Clause." (586); (" . . . (T)he very legislation .. . 'defines' the 'dimension' of the student's entitlement . . . ." (586) (" . . .(T)he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away . . . ." (574). See also EPPERSON v. ARKANSAS, 393 US 97 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities." (104). GOSS v.

LOPEZ, 419 US 565 (1975) (Justice Lewis Powell dissenting, "State Law, therefore, extends the right of free public school education to Ohio students in accordance with the education laws of that State." (586).

67
GOSS v. LOPEZ, 419 US 565 (1975).

68
The alternative forms to a public education are as diverse and varied as the states that permit this variation to "mainstream public education." Home Based Instruction, Hospital-Home Bound, correspondence schools, vocational schools, early college admissions programs, Shared Time Programs, Computer Assisted Instruction (CAI), and television/home instruction are examples of alternative forms of instruction that various states have accepted as alternative forms of education.

69
See Roe L. Johns, Editor, FINANCING EDUCATION: FISCAL AND LEGAL ALTERNATIVES (New York: Charles A. Merrill Company, 1972); Roe L. Johns and Edgar L. Morphet, THE ECONOMICS AND FINANCING OF EDUCATION: A SYSTEMS APPROACH (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1969); Roe L. Johns and Edgar L. Morphet, FINANCING THE PUBLIC SCHOOLS (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1965), and "Intrastate School Finance Court Cases," LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW (September 11, 1972), Washington, D. C., pp. 1 - 11.

70
Education, being established from an extended period of time, renders an impression of stability and continuity. See Oliver Wendell Holmes, Jr., THE COMMON LAW & OTHER WRITINGS (Birmingham, Alabama: Legal Classics Library, 1982). ("A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force." at p. 214).

71
SKINNER v. OKLAHOMA, 316 US 535 (1941) at 540, 541. (Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual . . . ." at 544. The Court citing BUCK v. BELL, 274 US 200.). See also BOWERS v. HARDWICK, 54USLW 4919 (6-24-86).

72
Tyll van Geel, THE COURTS AND AMERICAN EDUCATION LAW (Buffalo, New York: Prometheus Books, 1987). See generally pp. 70 - 116. HORTON v. MESKILL, 172 CONN 615, 376 A. 2d 359 (1977). ("(A) . . . privilege is granted, and is to be enjoyed upon such terms and under such reasonable conditions and restrictions, as the lawmaking power, within constitutional limits, may see fit to impose; and within those limits . . . ." at 377 -378).

73 MEYER v. NEBRASKA, 262 US 390 (1922) at 394, 395, 399, and 402. ("The police power itself is an attribute of sovereignty. It exists without any reservation in the Constitution." at 395).

74 PLYLER v. DOE, 50 USLW 4650 (6-15-82) at 4657. ("A . . .denial . . . (of a created interest) must be justified by a showing that it furthers some substantial state interest.")

75 BROWN v. BOARD OF EDUCATION 347 US 483 (1954).

76 MEYER v. NEBRASKA, 262 US 390 (1922).

77 PLYLER v. DOE, 50 USLW 4650 (6-15-82).

78 SAN ANTONIO INDEPENDENT SCHOOL DISTRICT v. RODRIGUEZ, 410 US 1 (1973).

79 Daniel Oran, Editor, LAW DICTIONARY FOR NONLAWYERS, Second Edition (St. Paul, Minnesota: West Publishing Company, 1985), p. 110.

80 WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (Springfield, Massachusetts: G. & C. Merriam Company, Publishers, 1970), p. 741.

81 Oliver Wendell Holmes, Jr., THE COMMON LAW & OTHER WRITINGS (Birmingham, Alabama: Legal Classics Library, PUblishers, 1982), p. 214.

82 United States Constitution, First Amendment.

83 Merle Curti, THE GROWTH OF AMERICAN THOUGHT, Third Edition (New York: Harper & Row, Publishers, 1964), pp. 79 - 96.

84 See pages 46 and 47 of this work.

85 E. Kathleen Adams, "The Fiscal Condition of the States," PHI DELTA KAPPAN (May 1982), Volume 63, Number 9, pp. 598 - 600. See also Thomas A. Shannon, "The Emerging Role of the Federal Government in Public Education," PHI DELTA KAPPAN (May 1982), Volume 63, Number 9, pp. 595 - 597.

86 Curti, op. cit., pp. 100 - 250.

87 United States Constitution, Fifth Amendment.

88 van Geel, op. cit., p. 416.

89 United States Constitution, Ninth Amendment.

90 Paust, op. cit., p. 234.

91 Ibid.

92 United States Constitution, Tenth Amendment.

93 See pages 46 and 47 of this work.

94 SAN ANTONIO v. RODRIGUEZ, 410 US 1 (1973).

95 United States Constitution, Fourteenth Amendment.

96 EDWARDS v. AGUILLARD, 55 USLW 4860 (6-16-87) at 4862.

97 Senator Joseph Biden, Jr. (D. Delaware) made this statement on a Cable News Network (CNN) interview on October 6, 1987.

98 Oliver Wendell Holmes, Jr., THE COMMON LAW & OTHER WRITINGS (Birmingham, Alabama: Legal Classics Library, 1982), p. 214.

99 William van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law, " HARVARD LAW REVIEW (1967), Volume 81, p. 1459.

100 See pages 46 and 47 of this work.

101 See GOSS v. LOPEZ, 419 US 565 (1973).

102 SERRANO v. PRIEST, 487 p. 2d 1241 (1971).

103 HORTON v. MESKILL, 172 CONN 615, 376 A 2d 359 (1977).

104 ROBINSON v. CAHILL, 303 A. 2d 273 (1973).

105 SAN ANTONIO v. RODRIGUEZ, 410 US 1 (1973) at 35.

106 PLYLER v. DOE, 50 USLW 4650 (6-15-82) at 4660.

107 Ibid, at 4655.

108 Ibid, at 4661.

109 INTERSTATE CONSOLIDATED ST. RAILWAY v. MASSACHUSETTS, 207 US 79 (1907) at 87.

110 PLYLER, op. cit., at 4655.

111 Ibid.

112 Alexis de Tocqueville, DEMOCRACY IN AMERICA (New York: Vintage Press, 1954), pp. 329 - 330.

113 Portions of President Calvin Coolidge's speech was published in Senate Report S-1078, 95th Congress, Second Session (1978), p. 13.

114 David L. Kirp, "The Poor, the Schools, and Equal Protection," HARVARD EDUCATIONAL REVIEW (Fall 1968), Volume 38, Number 4, p. 642. Citing GRIFFIN v. PRINCE EDWARD COUNTY, 337 US 218 (1964) at 232 - 233. See Mark Tushnet, "The Newer Property: Suggestion for the Revival of Substantive Due Process," THE SUPREME COURT REVIEW (1975), p. 262. "FIRST, no substantive Due Process right should be established unless there is general agreement on the social importance of that right. Social importance, in turn, can be established by referring to the recognition given that right in nonconstitutional contexts, the relationship between the right and other constitutionally guaranteed rights, and the exercise of ordinary common sense by the justices. SECOND, a

substantive due process right should be established only to the extent supported by the settled weight of responsible opinion." See also page 279.

115
Ibid, p. 666.

116
Ibid, p. 668

117
Ibid, p. 641. Kirp, while giving credit to Dr. Michelman, does not list any of the source material credited to Michelman.

118
Ibid.

119
SERRANO v. PIREST, 487 P. 2d 1241 (1971).

120
Ibid, at 1259. See also PIPER v. BIG PINE SCHOOL DISTRICT, 193 CAL 664, 226 P. 926 (1924). ("(T)he common schools are doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities. Opportunities for securing employment are often more or less dependent upon the rating which a youth . . . has received in his school work. These are rights and privileges that cannot be denied." at 673); SAN FRANCISCO UNIFIED SCHOOL DISTRICT v. JOHNSON, 3 CAL 3d 937, 479 P. 2d 669 (1970). ("Unequal education, then, leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society." at 676).

121
Ibid, at 1258. (The court citing the work of Coons, Clune, and Sugarman stated that "Education not only affects directly a vastly greater number of persons than the criminal law, but it affects them in ways which - to the state - have an enormous and much more varied significance. . . . (E)ducation also supports each and every other value of a democratic society - participation, communication, and social mobility, to name but a few.").

122
Ibid, at 1258 - 1259. See also MANJARES v. NEWTON, 64 CAL 2d 365, 411 P. 2d 901 (1966). ("We indulge in no hyperbole to assert that society has a compelling interest in affording children an opportunity to attend school, this was evidenced more than three centuries ago, when Massachusetts provided the first public school system in 1647. . . . And today an education has become the sine qua non of useful existence. . . . " at 908).

123
Ibid, at 1266. ("By our holding today we further the cherished idea of American education that in a democratic society free public schools shall make available to all children equally the abundant gifts of learning . . . which proves the ABSOLUTE RIGHT to an education of every human being that comes into the world, and which, of course, proves to see that the means of that education are provided for all . . . .")

124
See pages 46 and 47 of this work.

125
PLYLER, op. cit., at 4655.

126
SERRANO, op. cit., at 1259.

127
BROWN v. BOARD OF EDUCATION, op. cit., at 493.

128
A discussion of the historical importance is presented in chapter two of this work. The common law tradition is a debatable premise that remains unresolved by a controlling majority of jurists and legal scholars. Laurence Tribe, Paul Brest, David Kirp, and Mark Tushnet are representative of the commentators.

129
GOSS v. LOPEZ, 419 US 565 (1974), at 572 - 573.

130
Mark Tushnet, "The Newer Property: Suggestion for the Revival of Substantive Due Process," THE SUPREME COURT REVIEW (1975), p. 281.

131
GOSS, op. cit., at 572 and 574.

132
Ibid.

133
Ibid.

134
Ibid, at 572 - 574.

135
Ibid, at 570 - 582.

136
Ibid.

137
Ibid, at 574 and 572 - 574.

138
Steven H. Gifis, LAW DICTIONARY (New York: Barron's Educational Series, Inc., 1975), p. 161.

139
MEYER v. NEBRASKA, 262 US 390 (1922) at 395.

140
William van Alstyne, "The Demise of the Right/Privilege Distinction in Constitutional Law," HARVARD LAW REVIEW (May 1968), Volume 81, p. 1454. See also H. L. A. Hart, "Definition and Theory in Jurisprudence," LAW QUARTERLY REVIEW (1954), Volume 70, pp. 37 - 55; and Frank I. Michelman, "The Right to Housing," in THE RIGHTS OF AMERICANS, Editor, Norman Darson (New York: Pantheon Books, Publisher, 1971).

141
Ibid. This is an application of van Alstyne's thesis. A privilege would maintain that an individual has a right/privilege to improve oneself; however, there is no flat for the state to pay for the experience. If the state provides the service, it has a right to distribute the service on an unequal basis. The State of North Carolina operates an unequal educational service today; several counties receive additional funding because of their "poverty-impacted area" status - the counties of Cherokee, Clay, and Graham are examples. If the state provides a service, it possesses the constitutionally granted power to remove this service.

142
GOSS v. LOPEZ, 419 US 565 (1974) at 572 - 574.

143
Ibid.

144
MEYER v. NEBRASKA, 262 US 390 (1922); and GOSS v. LOPEZ, 419 US 565 (1974).

145
Tyll van Geel, THE COURTS AND AMERICAN EDUCATION LAW (Buffalo, New York: Prometheus Books, Publisher, 1987), p. 66.

146
Ibid.

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G. Television Broadcasts.

H. Speeches.

I. Pamphlets.

J. Unpublished Works.

K. Works of Congress.

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