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LENGTH: 2927 words**PERSPECTIVE:** THE RIGHT TO A "MINIMALLY ADEQUATE EDUCATION" AS GUARANTEED BY THE MISSISSIPPI CONSTITUTION**NAME:** Hon. Michael P. Mills*, **William Quin, II******BIO:**

* Justice Mills was appointed to the Mississippi Supreme Court in 1995 to fill the unexpired term of Chief Justice Armis Hawkins. He was elected to a full term in 1996. Prior to his appointment to the court, Justice Mills served 12 years in the Mississippi Legislature. He held the positions of Chairman of the Judiciary "A" and Judiciary En Banc committees.

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SUMMARY:

... Numerous state supreme courts have been asked to examine the extent to which their state constitutions guarantee a "fundamental right" to minimal standards of free public education in wake of the United States Supreme Court's decision in San Antonio Independent School District v. Rodriguez. ... As a right to free education requires positive governmental action, rather than prohibits governmental interference, it therefore is not implicitly guaranteed by federal law. ... The Rodriguez Court held that education was not one of the rights explicitly or implicitly guaranteed by the Federal Constitution, and therefore was not entitled to the status of a fundamental right. If we apply the Rodriguez analysis to Mississippi constitutional law, the inevitable conclusion is that the right to a free public education is a fundamental right in Mississippi since it is now explicitly guaranteed within the Mississippi Constitution. ... Although some matters found within our state constitution are reflections of our fundamental rights as Mississippians, others simply are not fundamental rights of our citizens. ... The right to demand state government to provide a "minimally adequate public education," is a state constitutional, though not an inherent, right guaranteed by the Mississippi Constitution. ...

TEXT:

[*1521]

Introduction

Numerous state supreme courts have been asked to examine the extent to which their state constitutions guarantee a "fundamental right" to minimal standards of free public education in wake of the United States Supreme Court's decision in San Antonio Independent School District v. Rodriguez. ¹ Many plaintiffs in these cases have based their claims upon the education articles of their state constitutions, whereas others have rooted their claims in state and federal constitutional equal protection and due process doctrines. ² [*1522] The Mississippi Supreme Court found a fundamental right to minimal standards of education within the due process guarantees of the Mississippi Constitution ³ in Clinton Municipal Separate School District v. Byrd. ⁴ This Article critically examines the Rodriguez approach to identifying implicit fundamental rights in [*1523] the federal arena. ⁵ Thereafter, the Article discusses the Mississippi Supreme Court's past attempt to deal with the right to an education under the Mississippi Constitution in light of Rodriguez, and the resultant responsibility placed upon state government to fulfill that duty. ⁶

I. The Rodriguez Approach Under the Federal Constitution

The Framers of the United States Constitution were well-steeped in classic thought regarding the "natural" rights of man. ⁷ Over time, these theoretical natural rights have evolved into the broad concept of certain constitutionally protected "fundamental" rights. Unfortunately, a perusal of learned treatises, judicial opinions, and scholarly writings does not reveal a comprehensive and exhaustive list of these rights, nor are they to be found exclusively within the United States Constitution. ⁸ Such rights are so uniquely personal that they may not be granted nor unlawfully impinged by governmental action. ⁹

In Rodriguez, the United States Supreme Court definitively stated that fundamental rights worthy of governmental protection are either explicitly or implicitly contained within the United States Constitution. ¹⁰ This premise led to the conclusion that the Federal Constitution guaranteed no fundamental right to an education. ¹¹ The Court's conclusion prompted Justice Marshall, an old-time judicial activist, ¹² to rhetorically inquire "where the Constitution guarantees the right to procreate, or the right to vote in state elections, or the right to an appeal from a criminal conviction." ¹³ The answer is clearly that it does not. However, the recognition of rights of expression or participation in political process as fundamental "does not necessarily translate into an affirmative governmental obligation to enrich each individual's personal capacity or ability to exercise these rights." ¹⁴

Most of the fundamental rights guaranteed by the United States Constitution are not gifts created by that document. Rather, these inherent rights stem from judicial recognition of the basic natural rights of man. The Rodriguez Court correctly recognized that these implicit rights are properly limited to the freedom to pursue human activity without improper governmental invasion of mind, body, or soul. ¹⁵ As a right to free education requires positive governmental action, rather than prohibits governmental interference, it therefore is not implicitly guaranteed by federal law.

II. Applying the Rodriguez Test Under the Mississippi Constitution

The Rodriguez Court held that education was not one of the rights explicitly or implicitly guaranteed by the Federal Constitution, and therefore was not entitled to the status of a fundamental right. ¹⁶ If we apply the Rodriguez analysis to Mississippi constitutional law, the inevitable conclusion is that the right to a free public education is a fundamental right in Mississippi since it is now explicitly guaranteed within the Mississippi Constitution. ¹⁷ The Rodriguez test is, however, not entirely workable under Mississippi's constitutional framework.

[*1525] The United States Constitution is a document of restricted authority and delegated powers. ¹⁸ The Mississippi Constitution, though, not only addresses areas deemed fundamental, but also addresses other areas which could have been left to statutory enactment. It logically follows, therefore, that fundamental state rights are not necessarily determined by what is provided in our constitution. ¹⁹ Although some matters found within our state constitution are reflections of our fundamental rights as Mississippians, others simply are not fundamental rights of our citizens. ²⁰

III. The Constitutional Right to an Education as Recognized in the Byrd Decision

The Mississippi Constitution of 1890 imposed upon the legislature a "'duty... to encourage by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement, by establishing a uniform system of free public schools... for all children between the ages of five and twenty-one years.'" ²¹ This constitutional commitment to education explicitly remained throughout the late nineteenth and early twentieth centuries despite the **[*1526]** largely rural and agrarian society's belief that only minimal formal education was necessary. ²²

Mississippi's Education Clause was unfortunately modified in a 1960 legislative attempt to circumvent the mandate of Brown v. Board of Education. ²³ The Mississippi Constitution was amended by language removing the "duty" of establishing free public schools, making free education a discretionary function of the legislature. ²⁴ Clinton Municipal Separate School District v. Byrd ²⁵ was decided under this state of constitutional ambiguity.

In Byrd, two high school students were suspended for defacing school property. ²⁶ The students appealed their suspension to the chancery court, praying that the court permanently enjoin the school board from enforcing the punishment. ²⁷ The chancery court entered final judgment in favor of the students and the school board appealed to the Mississippi Supreme Court. ²⁸

Although the Mississippi Supreme Court acknowledged the United States Supreme Court's pronouncement that there is no federally created fundamental right to education, it labeled "the right to a minimally adequate public education created and entailed by the laws of this state" as fundamental to Mississippi's "young citizens." ²⁹ The court based its finding upon the public policy of Mississippi, as reflected in state statutory law, which recognizes "the social, cultural and economic" importance of education. ³⁰ Peculiarly, Justice Robertson made no attempt to interpret the Mississippi Constitution's ambiguous Education Clause.

Byrd should be read in the strictest of senses. ³¹ It recognizes an individual's defensive right to learn without governmental interference. In this sense, the individual "enjoys the full substantive and procedural protections of the due process clause of the Constitution of the State of Mississippi." ³² The fundamental right to a minimally adequate education may therefore be used as a shield under Byrd. Byrd does not, however, recognize an individual's positive right to force the government to teach absent statutory or state constitutional authority.

IV. The Right to an Education Since the 1987 Revision of the Mississippi Constitution

In 1987, the people of Mississippi fortunately alleviated the state constitutional confusion resulting from the regretful hysteria that followed the Brown decision. ³³ The Mississippi Constitution now provides "for the establishment, maintenance and support

of free public schools." ³⁴ Thus, a dispassionate scholar must conclude that the right to an education has been elevated to the status of a right explicitly protected by the Mississippi Constitution. ³⁵

The right to demand state government to provide a "minimally adequate public education," ³⁶ is a state constitutional, though not an inherent, right guaranteed by the Mississippi Constitution. As such, this constitutional right should never be construed to infringe [*1528] upon other rights that in fact are possessed inherently by Mississippians. ³⁷ This is not to say that basic, minimal standards of education fail to have an impact upon the rights and liberties that lie at the heart of the relationship between the individual and his or her government. ³⁸ Our citizens' interest in obtaining an education is essential to our state's continued growth. ³⁹ However, an education is not a "right" in and of itself. It is a life-long journey, resulting from individual initiative, ⁴⁰ not to be impeded by governmental action. The right to educate one's own self is inherent. The right to receive a free public education from the Mississippi state government is now constitutionally mandated and reflective of Mississippi's interest in obtaining an enlightened populace. ⁴¹

Conclusion

The Rodriguez analysis of fundamental rights is correct in its intended context and interpretation of the Federal Constitution. Basic precepts of federalism dictate a fresh approach for state constitutional doctrine. It is our hope that a healthy re-examination of state constitutional rights to free public education will continue to illuminate state courts of last resort, not only in Mississippi, but throughout the nation.

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FOOTNOTES:

ⁿ¹. [411 U.S. 1 \(1973\)](#).

ⁿ². See, e.g., [Opinion of the Justices, 624 So. 2d 107, 107 \(Ala. 1993\)](#) (inquiring whether the finding of Senate Bill 607, stating that "the Legislature is required to provide schoolchildren with substantially equitable and adequate educational opportunities," is required by the state constitution); [Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391 \(Alaska 1997\)](#) (challenging two school funding laws on state constitutional equal protection grounds); [Shofstall v. Hollins, 515 P.2d 590 \(Ariz. 1973\)](#) (basing claim on state and federal equal protection grounds); [DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 \(Ark. 1983\)](#) (challenging method of school financing on state equal protection grounds); [Serrano v. Priest, 487 P.2d 1241 \(Cal. 1971\)](#) (challenging a school financing system on state and federal equal protection grounds); [Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 \(Colo. 1982\)](#) (challenging school financing system on state and federal equal protection grounds); [Horton v. Meskill, 376 A.2d 359 \(Conn. 1977\)](#) (basing claim on state equal rights and equal protection grounds); [McDaniel v. Thomas, 285 S.E.2d 156 \(Ga. 1981\)](#) (challenging the educational finance system on state equal protection grounds); [Thompson v. Engelking, 537 P.2d 635 \(Idaho 1975\)](#) (challenging financing system as violative of state constitution's education and equal protection articles); [Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178 \(Ill. 1996\)](#) (challenging funding scheme on state constitutional grounds); [Exira Community Sch. Dist. v. State, 512 N.W.2d 787 \(Iowa 1994\)](#) (challenging financing system on both state equal protection and due process grounds); [Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170 \(Kan. 1994\)](#) (challenging financing act on state and federal constitutional grounds); [Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 \(Ky. 1989\)](#) (arguing that state common school system violated state constitution's education mandate); [School Admin. Dist. No. 1 v. Commissioner, Dep't of Educ., 659 A.2d 854 \(Me. 1995\)](#) (challenging the constitutionality of funding reductions); [Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 \(Md. 1983\)](#) (challenging financing system on state educational grounds as well as state and federal equal protection grounds); [Milliken v. Green, 212 N.W.2d 711 \(Mich. 1973\)](#) (arguing that a school financing system violated state constitution's equal protection provision); [Skeen v. State, 505 N.W.2d 299 \(Minn. 1993\)](#) (claiming that a school financing system violated education clause of state constitution); [Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 \(Mont. 1989\)](#) (arguing that school financing program violated state constitution's education and equal protection articles), amended by [784 P.2d 412 \(Mont. 1990\)](#); [Kolesnick v. Omaha Pub. Sch. Dist., 558 N.W.2d 807 \(Neb. 1997\)](#) (contending that school disciplinary code violated due process); [Opinion of the Justices, 387 A.2d 333 \(N.H. 1978\)](#) (opining that although there is no fundamental right to education, there might be a federal interest in providing some minimal educational opportunities); [Robinson v. Cahill, 303 A.2d 273 \(N.J. 1973\)](#) (challenging school financing system on state and federal equal protection grounds); [Board of Educ. v. Nyquist, 439 N.E.2d 359 \(N.Y. 1982\)](#) (arguing that school financing system violated both state and federal equal protection as well as state constitution's education provisions); [Leandro v. State, 488 S.E.2d 249 \(N.C. 1997\)](#) (arguing that disparities in wealth among school districts violated state constitutional right to equal educational opportunity); [In re G.H., 218 N.W.2d 441 \(N.D. 1974\)](#) (arguing that failure to provide handicapped children with educational opportunities violated state constitutional education, due process, and privileges and immunities provisions as well as state and federal equal protection); [Board of Educ. v. Walter, 390 N.E.2d 813 \(Ohio 1979\)](#) (challenging school financing system as

violative of state education and equal protection clauses); [Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135 \(Okla. 1987\)](#) (lodging a state and federal equal protection challenge against the state's school financing system); [Olsen v. State, 554 P.2d 139 \(Or. 1976\)](#) (contending that school financing system violated state education and equal protection articles); [Danson v. Casey, 399 A.2d 360 \(Pa. 1979\)](#) (basing claim on state constitutional education article); [City of Pawtucket v. Sundlun, 662 A.2d 40 \(R.I. 1995\)](#) (basing claim on state constitution's education and equal protection provisions); Tennessee [Small Sch. Sys. v. McWherter, 851 S.W.2d 139 \(Tenn. 1993\)](#) (arguing that state funding system violated the state constitutional education and equal protection provisions); [Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 \(Tex. 1989\)](#) (basing claim on state constitutional education article); [Brigham v. State, 692 A.2d 384 \(Vt. 1997\)](#) (per curiam) (challenging school financing system on state education and equal protection grounds); [Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 \(Wash. 1978\)](#) (en banc) (basing claim on state constitutional education provision); [Pauley v. Kelly, 255 S.E.2d 859 \(W. Va. 1979\)](#) (challenging school financing system on state constitutional education and equal protection grounds); [Buse v. Smith, 247 N.W.2d 141 \(Wis. 1976\)](#) (basing claim on state constitution's education article); [Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310 \(Wyo. 1980\)](#) (arguing that school financing system violated state equal protection).

[↑](#)n3. See Miss. Const. art. 3, 14.

[↑](#)n4. [477 So. 2d 237, 240 \(Miss. 1985\)](#).

[↑](#)n5. See infra notes 7-15.

[↑](#)n6. See infra notes 16-41.

[↑](#)n7. See The Declaration of Independence para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); John Locke, *The Second Treatise of Government* 5 (Thomas P. Peardon ed., 1952) (1690) (stating that each person has a duty not to "harm another in his life, health, liberty, or possessions"); see also *The Life and Selected Writings of Thomas Jefferson* 39, 52 (Adrienne Koch & William Peden eds., 1972) (referencing natural rights generally).

[↑](#)n8. See [Griswold v. Connecticut, 381 U.S. 479, 488 \(1965\)](#) (discussing the legislative history of the Ninth Amendment which indicates that there are fundamental rights that exist other than those specifically enumerated).

[↑](#)n9. See *id.* (discussing the nature of fundamental rights).

[↑](#)n10. See [San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 \(1973\)](#) (explaining that the Court will not create substantive legal rights by comparing the importance of the purported right to an existing fundamental right). This approach to identifying fundamental rights protected by the United States Constitution has been the subject of much criticism. See William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, [75 Va. L. Rev. 1639, 1651-53 \(1989\)](#) (analyzing the Rodriguez test and advocating an examination of financing reform under state constitutional provisions).

[↑](#)n11. See [Rodriguez, 411 U.S. at 35](#).

[↑](#)n12. See Paul Gerwitz, Thurgood Marshall, [101 Yale L.J. 13, 14 \(1991\)](#) (discussing Justice Marshall's activist role during his career).

[↑](#)n13. [Rodriguez, 411 U.S. at 100](#) (Marshall, J., dissenting) (citations omitted) (citing [Skinner v. Oklahoma, 316 U.S. 535, 541 \(1942\)](#); [Reynolds v. Sims, 377 U.S. 533 \(1964\)](#); and [Griffin v. Illinois, 351 U.S. 12 \(1956\)](#)).

[↑](#)n14. [Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1194-95 \(Ill. 1996\)](#).

[↑](#)n15. See [Rodriguez, 411 U.S. at 38](#) (recognizing that "each of our prior cases involved legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty").

[↑](#)n16. See [id. at 35](#) (reaching this conclusion despite education's "undisputed importance").

[↑](#)n17. See Miss. Const. art. 8, 201.

[↑](#)n18. See [Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135, 1149 \(Okla. 1987\)](#) (distinguishing the federal and state constitutions on the ground that the powers of the state constitution are not limited to those specifically enumerated).

[↑](#)n19. See [Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 785 \(Md. 1983\)](#) (noting that "state constitutions, unlike the federal constitution, are not of limited or delegated powers and are not restricted to provisions of fundamental import; consequently, whether a right is fundamental should not be predicated on its explicit or implicit inclusion in a state constitution"); [Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 240 \(Miss. 1985\)](#) (discussing federal constitutional rights and concluding that a student's interest in obtaining an education "is largely a state created interest"); [Fair Sch. Fin. Council of Okla., Inc., 746 P.2d at 1149](#) (stating that "under the Oklahoma Constitution, fundamental rights are not necessarily determined by whether they are provided for within the document"); see also [Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 \(Ill. 1984\)](#) (stating that fundamental rights are comprised of those rights which "'lie at the heart of the relationship

between the individual and a republican form of nationally integrated government'" (quoting [People ex rel. Tucker v. Kotsos](#), 368 N.E.2d 903, 907 (Ill. 1977)).

¶n20. Such logic would lead to the conclusion that there is a fundamental right to a levee system since the Mississippi Constitution says that the state "shall" maintain one. See Miss. Const. art. 11, 227.

¶n21. T.H. Freeland et al., Seeking Educational Funding Equity in Mississippi: "I Asked for Water, You Gave Me Gasoline," 58 Miss. L.J. 247, 259 (1988) (quoting Miss. Const. art. 8, 201 (amended 1960)). A constitutional provision for the establishment of a state educational system first appeared during the reconstruction era. See id. at 259 n.52 (citing Miss. Const. of 1869, art. VIII, 1).

¶n22. See **William F. Winter**, Development of Educational Policy in Mississippi, 58 Miss. L.J. 223, 223 (1988) (tracing the history and public perception of education in Mississippi); see also [Myers v. Board of Supervisors](#), 125 So. 718, 721 (Miss. 1930) (construing the Mississippi Constitution to require school boards to provide access to education for all school-age children).

¶n23. [347 U.S. 483 \(1954\)](#).

¶n24. Even in this discretionary form, the right to an education was viewed by the Fifth Circuit Court of Appeals as mandated constitutionally. See [Jackson v. Franklin County Sch. Bd.](#), 806 F.2d 623, 630 n.11 (5th Cir. 1986) (citing to the Mississippi Constitution as one source of law providing for a child's right to an education); [Mitchell v. Board of Trustees](#), 625 F.2d 660, 664 (5th Cir. 1980) (stating that a school board has an obligation to educate its children in a safe environment).

¶n25. [477 So. 2d 237 \(Miss. 1985\)](#).

¶n26. See [id. at 239](#).

¶n27. See [id.](#)

¶n28. See [id.](#) (prohibiting suspension of the students, but allowing the school board to impose "any" punishment commensurate with the offense).

¶n29. [Id. at 240](#).

¶n30. [Id.](#) In the Byrd opinion, Justice Robertson wrote, "our legislature has declared a part of the public policy of this state the provision of "quality education for all school age children in the state"[,] this out of recognition of the effect of education "upon the social, cultural and economic enhancement of the people of Mississippi.'" [Id.](#) (citation omitted) (quoting [Miss. Code Ann. 37-1-2](#) (Supp. 1984)).

¶n31. The court, with the co-author of this Article writing for the majority, recently reaffirmed the Byrd decision. See [In re T. H.](#), III, 681 So. 2d 110, 117 (Miss. 1996) (holding that while the Board of Trustees has discretion in its actions, these actions may not run contrary to the purpose and intent of the law).

¶n32. [Byrd](#), 477 So. 2d at 240; see also [Miss. Code Ann. 37-1-1](#) to -11,37-3-1 to -49 (1996) (explaining the role and powers of the Mississippi State Board of Education).

¶n33. See Miss. Const. art. 8, 201.

¶n34. [Id.](#)

¶n35. Mississippi continues to battle negative misperceptions of its commitment to public education, even after the 1987 addition of Section 201, Article 8, of the Mississippi Constitution. See Thro, supra note 8, at 1661 & n.102 (identifying Mississippi as one of only two states whose constitution lacks an education clause providing for the maintenance of a free public education). In fact, Mississippi's Education Article states: "The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe." Miss. Const. art. 8, 201. The Mississippi legislature is clearly required to establish free public schools, and the flexibility granted to the legislature allows Mississippi to experiment with meaningful educational reform without constitutional restraint. See [id.](#)

¶n36. [Byrd](#), 477 So. 2d at 240.

¶n37. See Miss. Const. art. 3, 32 ("The enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent in, the people.").

¶n38. See [Committee for Educ. Rights v. Edgar](#), 672 N.E.2d 1178, 1189-93 (Ill. 1996) (finding that questions relating to the quality of education are best left for the legislature, not the judiciary, to answer, as it is closer to the people).

¶n39. Thomas Jefferson believed that to preserve republican government and prevent tyranny, it was necessary ""to illuminate, as far as practicable, the minds of the people at large." Willard Sterne Randall, Thomas Jefferson, A Life 305 (1993) (quoting Thomas Jefferson).

n40. Ralph Waldo Emerson's essay on self-reliance is an excellent study on the virtues of individual initiative.

There is a time in every man's education when he arrives at the conviction that envy is ignorance; that imitation is suicide; that he must take himself for better for worse as his portion; that though the wide universe is full of good, no kernel of nourishing corn can come to him but through his toil bestowed on that plot of ground which is given to him to till.

The Selected Writings of Ralph Waldo Emerson 146 (Brooks Atkinson ed., 1950).

n41. Edmund Burke posited the question squarely when he asked: "What is the use of discussing a man's abstract right to food or to medicine? The question is upon the method of procuring and administering them." Edmund Burke, Reflections on the Revolution in France 73 (Dolphin Books 1961) (1790).

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