

Quick! Before *Every Child Is Left Behind*: Conservative Judicial Activism and Globalization in Public Education Reform

by

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On October 15th, 2004, Jessica Lopez filed litigation against the New York City Department of Education on behalf of her two sons (Gewertz). Her twins, who attended pre-kindergarten in Public School 114 the previous year, were moved by the Department to Public School 225 in 2004 (Levy). P.S. 225 had been labeled as a school "in need of improvement" under the federal No Child Left Behind (NCLB) Act for failing to push 100 percent of their students over "proficiency bars" on standardized tests. NCLB, aimed at repairing the public school system, contends that children in chronically failing schools, those continuously "in need of improvement," may transfer to more successful schools in their district (Ponnuru 50). When Lopez's children were moved out of a succeeding school because of overcrowding fears and into a "chronically failing school," she applied to have her boys transfer back into P.S. 114. The New York City Department of Education limited the number of transfers, and the lawsuit contends that doing so "effectively denies the transfer option" to students who would normally be able to transfer (Gewertz). Thus, *Lopez v. The New York City Department of Education* is, at its bare bones, an attempt of an individual citizen to hold the public school system accountable to what Congress has said must be done in order to improve the learning environment for American children.

This case demonstrates not only how the legislative branch has failed Americans but also how the judicial branch has failed them as well. It can be

inferred that Lopez's case was not successful in the courtroom because of a Supreme Court precedent making it nearly impossible for an individual to hold an educational institution accountable to federal standard. When examined, the Supreme Court case *Gonzaga University v. Doe* shows an ideological shift in the Supreme Court from "rights-creating" activism and towards conservative activism, a change with far-reaching implications for the country. Through my discussion of the legal case *Lopez v. New York City Department of Education*, I argue that a failing public school system, coupled with fundamental changes in the global economy, is diminishing America's future economic success. Not all agree that globalization is beneficial, and accusations may emerge of me advocating judicial activism in hopes to repair the school system. However, the tools needed to rebuild America's global competitiveness and broaden our civil liberties are right here in front of us, but we need to act in order to maximize on these opportunities.

The No Child Left Behind Act is a piece of legislation passed in 2001 under the Bush administration with the hope of repairing the public school system. NCLB attempts to raise national test scores in public schools, focusing on reading and science. However, NCLB has been accused by a panel of bipartisan lawmakers as being "flawed, convoluted and unconstitutional" (Dillon). Problems arise in several aspects of the Act in addition to the transfer option. A worry that has already begun to manifest itself is that NCLB encourages teachers to educate directly to the test. Ramesh Ponnuru, a columnist for *National Review*, in his article "Bush's Centerpiece" asserts:

Earlier this year, the *New York Times* carried a front-page story

alleging that No Child Left Behind, with its emphasis on reading and math, has caused schools to narrow their curricula by sacrificing other subjects. ... Over time, it is likely that the act will have that effect. (50)

Measuring schools' progress on test results presents additional problems. The Act demands all schools make "adequate yearly progress" by creating "accountability systems" to assure that children "in grades three through eight are 'proficient' in reading and math (No Child Left Behind Act). But, as Ponnuru points out, central issues arise from allowing individual states to determine the definition of "proficiency," as "[i]t rewards states for setting a low bar. So while states are posting impressive gains in 'proficiency,' their kids aren't scoring any higher" (50). The Act also fails both to reward schools for moving students closer to the "proficiency bar" without passing it and to give attention to continuing improvement of those students who are already above the bar (Ponnuru 50). Furthermore, the way in which the law gives incentives to schools to improve is flawed, punishing schools through, as the law states, with "the loss of federal funding for failing to comply" (qtd. in Cook 7). NCLB, essentially holds federal funding, the very means of fixing many of the school system's problems, ransom. Without this money, schools are left without funding and lose the ability to become "proficient."

However, the problem that *Lopez* specifically deals with is the transfer option. A potentially effective transfer option provides opportunities for children in failing schools to escape their situation and to attend a more successful school that would facilitate their development. Yet, as Ponnuru contends, the transfer

option "is too weak to make much of a difference," especially within inner city school districts (50). Because children in the public education system are limited to district schools, high-poverty inner city districts are more likely to suffer overcrowding within the few succeeding schools. The New York City Department of Education anticipated this problem and placed a restriction upon the number of transfers allowed. Lopez and her lawyer, in turn, interpreted this cap as a violation of the NCLB Act and sued.

These gaping problems of defining proficiency, incentives, and transfer protocols all beg the question as to why this piece of legislation even exists in the first place. Essentially, why does the public school system need overhauling? Lawrence Hardy, in his article "Globalization Is Forcing U.S. Schools To Take a Broader View of Student Performance" states:

As recently as 20 years ago, America led the industrialized world in the percentage of 25-34 year olds with high school and college degrees. OECD [Organization for Economic Co-Operation and Development] says now, it ranks ninth and seventh, respectively, on these measures. With a high school graduation rate of just 73 percent, according to one estimate, the United States ranks 16th among OECD members, behind Greece, Italy and the Czech Republic. (6)

In his reference to countries such as the Czech Republic, Hardy uses shock value by naming countries that are typically regarded as still coming out from behind the Iron Curtain yet now offer a superior school system our own. Hardy is not alone in this assessment of the drastic problems with America's schools. If public

education in America is graduating less than three quarters of our students, as Hardy reports, it must be reformed. ABC News, in an article dated November 20, 2006, calls the high school drop-out rate an “epidemic”: “In some of the largest school systems across the country...half the students are dropping out” (Thomas). The news brief continues: “A recent study by the Department of Education found that 31 percent of American students were dropping out or of failing to graduate in the nation’s largest 100 school districts” (Thomas). Both of these articles, dated in 2006, illustrate the deep and persistent problems with the public school system that NCLB has not repaired.

News about high school graduation may seem discouraging, but its global implications are even worse. Because of both globalization and outsourcing, America’s failing school system has gigantic, global, economic effects. Thomas L. Friedman, in his book *The World is Flat* quotes Nandan Nilekani, CEO of Infosys Technologies Limited, to help explain these terms and their economic implications:

Outsourcing is just one dimension of a much more fundamental thing happening today in the world..... What happened over the last [few] years is that there was a massive investment in technology, especially in the bubble era, when hundreds of millions of dollars were invested in putting broadband around the world, undersea cables, and those things” (7)

Nilekani explains that concurrent to this investment explosion, computers became cheaper and more available throughout the world. Further, software-e-mail, search engines like Google, and proprietary software allowed work to be

divided and outsourced effortlessly to different cities around the world, “creat[ing] a platform where intellectual work, intellectual capital, could be delivered from anywhere. It could be disaggregated, delivered, distributed, produced, and put back together again—and this gave a whole new degree of freedom to the way we do work, especially work of an intellectual nature” (qtd. in Friedman, *The World Is Flat 7*). Businesses have found it progressively easier to avoid centralized work as firms can now cut up and distribute their workload across the globe. While this method improves efficiency, jobs once located in America for simplicity and organization’s sake have found their way into the far corners of the planet, such as Bangalore, India and Beijing, China. This shift in the distribution of work is defined as globalization, and the resulting loss of jobs from American shores to foreign countries is referred to as outsourcing. Compounding these concepts with the fact that America is not producing workers capable of the level of intellectual work desired the future economic success of America certainly looks bleak.

While education reform across the board is necessary in order to offset the economic shifts Friedman addresses, it is particularly important to emphasize elementary education. While some may argue that Lopez’s lawsuit is an overreaction because her boys are only in kindergarten, a plethora of evidence exists to support elementary education as absolutely essential and in need of immediate reform. In Robert E. Slavin’s and Nancy A. Madden’s book *Success For All*, they discuss in the opening essay the worries of failing elementary education. The authors focus on the idea that elementary schools lay the foundation for skills needed in higher education and how failing to develop

these rudimentary skills has extremely detrimental effects on both personal and aggregate levels:

When a child fails to read well in the early grades, he or she begins a downward progression. As they proceed through the elementary grades, many students begin to see that they are failing at their full-time jobs. When this happens, things begin to unravel. Failing students begin to have poor motivation and poor self-expectations, which lead to continued poor achievements, in a declining spiral that ultimately leads to despair, delinquency and dropout. (Madden and Slavin 4)

This “declining spiral” created when children fail to learn essential skills such as reading while they are young ultimately results in the same problems Hardy and ABC News measure: dropout. With avoiding dropout and pushing students into higher education as the ultimate goal, avoidance of this spiral must begin early and be maintained throughout the grades.

Even if NCLB were doing its job, there are certain concerns that it may not truly offset either outsourcing or globalization. Some economists, including Luc Soete and Chris Freeman, believe that globalization is an unstoppable force and that regardless of what America does, jobs will be moved off shore. They argue:

While... outsourcing might imply higher quality [products] and the use of highly specialized workers, we have some concern that one of the reasons for the growth of outsourcing is the lower wage rates and working conditions in the sub-contractor organizations. There is undoubtedly a potential that major firms, particularly, multi-

nationals, may be attracted by the idea of using sub-contracting to avoid what they consider high levels of social costs in the core businesses in their home regions. (344)

These economists attest that America's competitiveness with other countries is not at issue for causing work to travel off shore, but that production costs within the United States are too expensive. Soete and Freeman worry that outsourcing, at its heart, is essentially exploitation of cheap foreign labor. If this proves to be the case, NCLB would have no effect on globalization because regardless of how well-educated the American worker is, he or she remains exponentially more expensive than an equal worker from a third-world country.

Even if this theory proves true, NCLB can still, if fixed, answer an array of global economic problems. If the basic skills to succeed were facilitated early and continued into post-graduate education, America could erase its dependence on lower and unskilled work. While it is true that a significant fraction of the current outsourcing is classified as skilled work, it is still entirely plausible for NCLB to remedy these problems. Friedman believes globalization to be a beneficial force for the basic reason that greater competition yields a cheaper and more efficient economy. Friedman addresses Freeman's and Soete's concerns in his *New York Times* editorial dated December 13, 2006:

In a globally integrated economy, our workers will get paid a premium only if they or their firms offer a uniquely innovative product or service, which demands a skilled and creative labor force to conceive, design, market and manufacture—and a labor force that is constantly able to keep learning. We can't go on

lagging other major economies in every math/science/reading test...and think that we're going to field a work force able to command premium wages. ("Learning to Keep Learning")

Friedman contests that America must step up in addressing increased competition. It is essential to remind firms of their beginnings in the United States by creating an educated labor force of workers so skilled that firms are willing to pay the extra money for American workers. The country producing the best workers has the most to gain, and Friedman argues America can be the nation that firms look to for extremely specialized work because of our workers' caliber. Therefore, if NCLB can achieve its intended purpose, our nation can produce the best workers and remain competitive in the world economy in terms of our highly skilled and specialized work.

As troublesome as the global economic implications are, there can be no progress when the judicial branch diminishes individuals' ability to hold their school systems accountable. Roughly two weeks after Lopez filed the litigation, the Department of Education offered to grant her the transfer in return for dropping the suit (Levy). Lopez refused the transfer with hopes of winning the lawsuit anyway (Levy). After November 2, 2004, the case drops off the map. No additional news briefs or articles relating to Lopez or the lawsuit exist. To infer what may have happened to Lopez and her two sons, it is necessary to examine similar cases. Lopez is not the first individual to sue a local education department under the NCLB Act. While alternate lawsuits focus on other flaws with NCLB, they are the similar in the respect that an individual was attempting to hold local governments accountable to a federal government standard set

for schools. These plaintiffs did not meet much success in the courtroom either. The defendants in the other cases faced dismissal under the precedent set by a Supreme Court decision from 2002, *Gonzaga University v. Doe*. The defendants in these other cases contend that "NCLB does not provide a private right of action (right to sue)" (Zirkel). Through dismissing these older cases under *Gonzaga*, the courts reason that no one may sue local governments for not abiding by NCLB. It is therefore speculated that Lopez faced a dismissal and quietly accepted the transfer she was offered earlier instead of outright losing the case. While this may or may not be the case, it is unlikely she could have won the lawsuit in court because of the dismissal of these similiar cases and the lack of press attention.

We must then examine *Gonzaga* to understand why the cases of Lopez and others were dismissed and failed to provoke reform to NCLB. The premise of *Gonzaga* is that Doe sued the university for releasing confidential personal information, which violated a clause of the Family Educational Rights and Privacy Act of 1974 (FERPA). The clause states that funding will not be made available to educational institutions with the policy of releasing personal information about their students without consent (*Gonzaga*, Rehnquist). Doe is a graduate of Gonzaga University, and in applying for a job as a teacher in Washington State, he needed to obtain an "affidavit of good moral character from [his] graduating college" (*Gonzaga*, Rehnquist). However, Gonzaga's teacher certification specialist overheard a student speak of sexual misconduct performed by Doe to another student during Doe's time as an undergraduate (*Gonzaga*, Rehnquist). The specialist began an investigation by contacting the state agency responsible for teacher certification and, identifying Doe by name,

discussed the allegations (*Gonzaga*, Rehnquist). Doe was then denied his certificate of good moral character and sued Gonzaga under FERPA for violating its funding clauses (*Gonzaga*, Rehnquist). The court, in a 7-to-2 decision, ruled in favor of Gonzaga, contending that “[t]he law’s privacy provisions ‘contain no rights-creating language’ giving students or parents the ability to sue institutions that release confidential information without permission” (qtd. in Schmidt)..

The defendants in *Lopez*, then, argue that under *Gonzaga*, students and parents cannot sue institutions for not abiding by a national standard. As long as NCLB has no ‘rights creating language,’ parents and students may not sue their school districts under it either.

To judge the fairness of *Lopez*, we must go to the source, *Gonzaga*, and examine whether it is fair. To preface the *Gonzaga* decision, authored by Chief Justice William Rehnquist, underlying trends and ideological shifts in the Supreme Court must be discerned. Thomas M. Keck, in his book *The Most Activist Supreme Court in History*, argues the Rehnquist court of the 1990s has historically been one of the most activist courts instead of adhering to a tradition of judicial restraint, defined by *Black’s Law Dictionary* as “a philosophy of judicial decision making whereby judges avoid indulging their own personal beliefs about public good and instead try to merely interpret law as legislated and according to precedent” (“Judicial Restraint” 864). Keck explains the workings of the conservative activist court through the following passage:

Constrained by the inherited traditions of constitutional discourse, the [five conservative] justices had three broad options from which

to choose. First, they could attempt to maintain a consistent commitment to judicial restraint by exercising substantial deference to the elected branches across the board. Second, they could abandon the protection of liberal constitutional rights associated with the [Earl] Warren Court [of the 1960's] tradition, and articulate a new set of conservative rights claims that they were willing to defend instead. None of the justices chose the first path but Scalia, Thomas and Rehnquist have, broadly speaking, opted the second. ... O'Connor and Kennedy have chosen a third option, joining their conservative colleagues to promote the new conservatism activism in defense of limited government while continuing to support the older liberal activism as well. (Keck 199)

Keck illustrates the voting patterns of progressively more conservative justices. He accuses Scalia, Thomas, and Rehnquist of not adhering to judicial restraint and of creating their own form of conservative judicial activism, protecting the rights and interests of a much different crowd than those protected by the Earl Warren court. Keck states that none of the justices have adhered to judicial restraint, an approach that was invoked by conservative complaints against the liberal activism of the Earl Warren Supreme Court of the 1960s. Instead, the justices are guilty of the same accusations faced by the Warren court, yet instead of expanding individual rights, they have been regressing those rights to give more influence to other parties .

Gonzaga becomes infinitely more interesting if we take into consideration Keck's accusations. Rehnquist, in *Gonzaga's* majority opinion, states:

If Congress wishes to create new rights enforceable under [FERPA], it must do so in clear and unambiguous terms--no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action. FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions. (*Gonzaga*, Rehnquist)

He states that FERPA's intent is aggregate; it is designed to address funding on a grand scale and does not create the right to sue under it. Through this form of argumentation, Rehnquist concedes two main points: Doe has privacy rights under FERPA, and Gonzaga University violated them. Rehnquist's rebuttal is simply that he does not have the right to seek redress in courts. However, FERPA does state:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization. (*Gonzaga*, Rehnquist)

While the focus of the language is aggregate, it does not imply that these rights are essentially unenforceable. *Gonzaga* evidently still violated this law and the

privacy rights within it. *Gonzaga*, however, was still funded and conclusively renders Doe's right to privacy nonexistent.

To answer the question as to whether rights are created under FERPA, one can look to Justice John Paul Stevens. Stevens, one of the oldest justices serving on the Court, borrows a majority of his ideology from Chief Justice Earl Warren's Court of the 1960s. Looking at the context and ideology of the Warren court is significant in understanding Stevens and his dissenting opinion in *Gonzaga*. Fredrick P. Lewis, in his book *The Context of Judicial Activism*, argues that the judicial activism of the Warren court, "rights-creating activism," was and is both important and necessary. He articulates this in the following passage:

Despite the enormous debate and analysis asserting the inappropriateness ... of much of the judicial activism that is primarily associated with the Warren Court, most of such activism was both unavoidable and coherent. ... The extensive recent scholarly debate over the legitimacy of judicial activism has operated primarily on the philosophical level and has largely ignored the broad social, economic, and political context within which the activism in question actually occurred. (Lewis 105)

Lewis contends that the rights-creating activism of the Warren court was, in fact, appropriate because of its context, and a shift towards regressing individual liberties is not healthy. Some of the more famous rights-creating activist decisions of Warren court include *Brown v. Board of Education, Topeka, Kansas* and *Miranda v. Arizona*. *Brown*, widely regarded as the most important decision of the 20th century, which opened the door to ending racial segregation in schools.

Miranda created the “Miranda Rights,” which give strict guidelines to the handling of arrests and criminal legal procedure to protect the constitutional rights of the accused. Lewis further argues that the rights created in the Warren years created “perspective on what civil liberty should mean in the modern era” (105). He attests the activism of the Warren court is appropriate and legitimate not on principle alone but also in its social context and the important implications for defining civil liberties “in the modern era.”

Stevens’s dissenting opinion in *Gonzaga* echoes this ideology of the Warren court, attempting to protect the individual rights of students and parents. He argues powerfully in his opening:

The Court’s ratio decidendi in this case has a “now you see it, now you don’t” character. At times, the Court seems to hold that the Family Educational Rights and Privacy Act of 1974 (FERPA or Act), 20 U. S. C. §1232g, simply does not create any federal rights, thereby disposing of the case with a negative answer to the question “whether Congress intended to create a federal right,” ante, at 9. This interpretation would explain the Court’s studious avoidance of the rights-creating language in the title and the text of the Act. Alternatively, its opinion may be read as accepting the proposition that FERPA does indeed create both parental rights of access to student records and student rights of privacy in such records, but that those federal rights are of a lesser value because Congress did not intend them to be enforceable by their owners. (*Gonzaga*, Stevens)

Stevens analyzes the court's inconsistencies in its rulings, sometimes contending that FERPA creates rights and, at other times, arguing it does not. He states that the language of the act and its continual use of the word "right" allow for judgment in the opposite direction. He accuses Rehnquist of using excerpts from FERPA that intentionally do not contain the word "right" to support his ruling, despite the references existing, such as the name of the act itself. He lastly accuses Rehnquist of essentially degrading the rights provided by FERPA, contending that they are "of a lesser value" because Congress and the Court have no intention of allowing individuals to be able to enforce them. Stevens looks towards precedent, which is a main characteristic of judicial restraint, to argue his position:

Since FERPA was enacted in 1974, all of the Federal Courts of Appeals expressly deciding the question have concluded that FERPA creates federal rights enforceable under §1983.6 Nearly all other federal and state courts reaching the issue agree with these Circuits. Congress has not overruled these decisions by amending FERPA to expressly preclude recourse to §1983. And yet, the Court departs from over a quarter century of settled law in concluding that FERPA creates no enforceable rights. (*Gonzaga*)

Stevens accuses Rehnquist and company of doing exactly what Keck describes as the ideological appeal: conservative judicial activism, which regresses the rights of individuals. He states that the Court "departs from over a quarter century of settled law" in ruling against Doe; previous cases ruled that FERPA does create rights for the individual and that Congress has not amended FERPA

to preclude these rights. This language traces back to Stevens's imagery in his opening of an inconsistent court and a "now you see it, now you don't" policy.

Gonzaga comes down to two main principles. On the majority's side, we have the fact that FERPA's intent was not only "aggregate" but intentionally *not* individual, and its language is too vague to allow individuals' lawsuits underneath it. On the dissenting side, we see that this decision strays from over 25 years of law ruling in favor of arguing FERPA *does* create rights, and though students and parents may have rights in terms of their privacy, they have no means to enforce them. Looking towards the ideological backgrounds of both sides, we see that the conservative judicial activism introduced by Keck can be directly applied to *Gonzaga* by Stevens and that individuals' fundamental civil liberties are at risk.

Bringing these conclusions back in terms of *Lopez*, similar cases were dismissed under this precedent. If the case had ruled the other way, as Stevens argues it should have, students and their families would possess the power to hold their local school boards accountable to NCLB. Under the Act, children have the right to transfer out of their failing school and into a succeeding one, but because of *Gonzaga*, they are stripped of their ability to enforce this right. As Stevens put it, the court essentially argues these rights are "of a lesser value" because they become unenforceable on an individual basis.

NCLB is seen by many scholars as "flawed, convoluted and unconstitutional" and through global economic and educational shifts, the future of America's international competitiveness is diminishing (Dillon). In its current form, NCLB may not be the answer, and it is hindered by conservative

judicial activism preventing individuals from upholding the few inefficient rights they possess under the current act. Massive revisions to NCLB are required to fix its many flawed areas. More specifically, to begin the process of reforming a law that is likely to shape the economic forecast of America, we need to expunge the ideological judicial shifts that actively hinder individuals' ability to enforce their own rights. If the current Bush administration is so adamant about reforming the public school system and repairing our national lack of competitiveness, ideological partners on the Supreme Court ought to be urged to demonstrate so in its rulings. "The Bush administration had also backed the school district [...] " in *Gonzaga*, illustrating the irony that the side backed by the administration in *Gonzaga* continued on to win and cases that potentially could have helped reform a failing act were dismissed (Gose).

The judicial and legislative branches have failed the American people in terms of global economics and education. The Supreme Court must, in my opinion, stop plucking the tools of reform out of individuals' grasp and handing them to those who have already failed us. Had *Gonzaga* been ruled differently, *Lopez* and fellow litigators would have likely succeeded in the courtroom. The New York City Department of Education would have been accountable to NCLB, despite its many imperfections. This accountability could have encouraged massive, rapid reforms to the No Child Left Behind Act that have not yet begun. Repairing our nation's future economic success is attainable; we simply need to act quickly and stop having our ability to do so eroded by nonsensical governmental actions.

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