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ROBERT J. STARRATT

SUPREME COURT OF THE UNITED STATES AND EDUCATION, THE

Prior to the twentieth century, the United States Supreme Court issued few important decisions concerning education, and virtually none dealing with schooling at the elementary and secondary levels. Schooling has always been considered primarily a state and local government function in America, and it was not until well into the twentieth century that the Court seriously imposed on the states provisions of the U.S. Constitution that have turned out to be importantly relevant to education.

By contrast, in the second half of the twentieth century, the Court became a major force in shaping American education, interacting with most of the key educational policy issues confronting society during that era. Many of these issues have been extraordinarily controversial, both as education questions and as legal questions.

Especially from the mid-1950s through the mid-1970s, the Court largely allied itself with the views of "liberals" and thwarted state and local educational policies that were seen to run counter to "liberal" values. Starting in the late 1970s and continuing into the early twenty-first century, however, the Court has become more cautious about imposing Constitutional restraints on the educational process. The decisive, if changing, role of the Court in American education is illustrated by decisions in three major areas: religion, race, and the individual rights of students.

Religion

Following World War I, nativist movements around the nation prompted some state legislatures to try to restrict, or even close, private schools. But in a series of decisions in the 1920s—most importantly *Meyer v. Nebraska* and *Pierce v. Society of Sisters*—the Court declared that parents have a federal Constitutional right to educate their children in private schools, subject to reasonable regulation of those schools by the state. This legal principle, based in the due process clause of the Fourteenth Amendment to the U.S. Constitution, has helped preserve the Catholic school system that grew up in the nineteenth century in response to Protestant domination of public schools and the insistence at the time on Protestant-based prayer and Bible reading in public schools. In 1972, in an even greater deference to religiously based parental claims, the Court decided in *Wisconsin v. Yoder* that Amish parents, given their long history of responsible other-worldliness, had a due process right to withhold their children from school once they reach age sixteen.

Starting in the 1960s, however, the Court's attention turned to cleansing the public schools of religion. For example, in *Engel v. Vitale* and *School District v. Schempp,* it prohibited government-sponsored school prayer and Bible reading, and in *Epperson v. Arkansas* it voided a ban on the teaching of evolution in public schools as violations of the First Amendment's prohibition against the "establishment" of religion.

At the same time the Court was insisting that the public schools must be secular, it also became leery

of direct public financial assistance of private elementary and secondary schools, which were, in the 1960s and 1970s, overwhelmingly Catholic. To be sure, in three earlier cases the Court upheld the public provision of bus rides in *Everson v. Board of Education* and regular textbooks in *Board of Education v. Allen* to children attending nonpublic schools and the exemption of religious schools from the property tax in *Walz v. Tax Commission.* Nevertheless, in the early 1970s the Court announced a series of decisions—most importantly *Lemon v. Kurtzman* and *Committee for Public Education v. Nyquist*—that invalidated financial aid to nonpublic schools and their users. These decisions were based primarily on the theory that the "primary effect" of this funding was the support of religion. Overall, then, by the mid-1970s the Court seemed committed to an interpretation of the First Amendment's "establishment" clause that called for a "high wall of separation" between church and state.

In the last quarter of the twentieth century, the Court held fast to its opposition to prayer in the public schools. In *Wallace v. Jaffree* it extended the ban in 1985 to cover a religiously motivated, required "moment of silence," with the *Lee v. Weisman* decision in 1992 to include invocations and benedictions at public school graduation ceremonies, and in 2000 to student-led prayers at high school football games in the *Santa Fe Independent School District v. Doe* decision. In the same vein, in *Edwards v. Aguillard* in 1987 it struck down as violating the "establishment clause" a law seeking to pair the teaching of evolution with creation science, and in 1994 it invalidated a public school district specially constructed for a group of Hasidic Jews in *Board of Education of Kiryas Joel v. Grumet.*

Yet the Court has also become much more deferential to policies designed to accommodate religious freedom inside schools. Concern for the rights of students to their First Amendment guaranteed "free exercise" of religion has led to the development of "equal access" policies: some adopted by educational institutions; others enacted by legislatures. The Court has upheld these arrangements, allowing student religious groups to use school facilities once that privilege has been accorded to other student groups, in 1981 in *Widmar v. Vincent* at the university level and in *Board of Education of Westside Community Schools v. Mergens* in 1990 at the secondary-school level. Moreover, in 1995, on "free speech" grounds, the Court held in *Rosenberger v. University of Virginia* that when college student fees were used to fund various student newspapers, religious student groups had to be included as beneficiaries.

Moreover, on the issue of the aid to private schools, starting in the 1980s the Court began to permit many more types of financial assistance. These have ranged from tax deductions for financial contributions made to private schools in *Mueller v. Allen*; to the provision of a sign language interpreter for a deaf student in a private school in *Zobrest v. Catalina Foothills School District*; reading specialists and similar assistance for low-income private school pupils in *Agostini v. Felton*; and computers and other educational materials to private schools in *Mitchell v. Helms.* At the level of higher education, the Court even upheld a program under which a state would pay for a student's education to become a clergyman in *Witters v. Washington Department of Services for the Blind.*

In sum, the Court has clearly backed away from a rigid adherence to the "high wall of separation" vision of the First Amendment. Yet, the legal doctrine in this area has become so convoluted that in 2001 legal scholars were quite uncertain about whether it is constitutional for states and school districts to adopt, as three had, school choice plans that permit families to pay for tuition at private schools (including religious schools) with publicly funded vouchers.

Race

Starting in 1954 the Court centrally immersed itself in issues of race and American education by taking the lead in dismantling the system of official and intentional segregation that marked American public schools not only in the South, but also in many school districts throughout the nation. Before its famous 1954 decision in *Brown v. Board of Education,* the Court tolerated a scheme of "separate but equal" as in *Plessy v. Ferguson* (1896). During the twenty years leading up to *Brown,* the Court issued several decisions—*Missouri ex rel Gaines v. Canada* and *Sweat v. Painter*—invalidating evasive schemes that pretended to treat whites and blacks equally, but clearly did not. But in *Brown I,* the Court relied upon the "equal protection" clause of the Fourteenth Amendment to declare "separate" inherently "unequal" and a year later, in *Brown II,* it ordered public school desegregation "with all deliberate speed."

Although the Court then became embroiled in "massive resistance" strategies throughout much of the South, it held its ground. For example, in 1964 the *Griffin v. County School Board* decision prevented districts from closing their schools to avoid desegregation. In 1968 it rejected in *Green v. County School Board* purported "choice" plans that left schools identifiably black and white. In 1971 the *Swann v. Charlotte-Mecklenburg Board of Education* decision refused to approve a neighborhood school assignment policy that maintained the prior system of black and white schools. *Norwood v. Harrison* blocked in 1973 desegregation-evading schemes that sought to fund an alternative system of private "white academies," and the *Runyon v. McCrary* decision in 1976 precluded private schools from excluding applicants because they were black.

In 1973 in *Keyes v. School District No. 1,* the Court also extended the reach of *Brown* to northern and western school districts when it could be shown that officials had deliberately drawn school lines, erected new schools, and made other decisions on the basis of race. And with the help of Congressional enactment of the 1964 Civil Rights Act, the intervention of federal government officials from the executive branch, and the tireless work of many federal district judges often working in a hostile local environment, what has became known as formal "de jure" school segregation was rooted out.

Yet over time it became clear that continued racial isolation in public schools and the accompanying continued lower academic achievement of non-white pupils is not so easily blamed on the official racism of identified state and local school officials. The combination of (1) individual residential decisions by white (and non-white) families; (2) the suburbanization of America and the traditional existence outside the South of many small school districts surrounding the large central city district; (3) national and local housing policies; (4) persistent differences in family poverty between whites and non-whites; and other factors demonstrate that de facto school segregation, especially in urban cities, is not primarily caused by, and can not easily be eliminated by, the deliberate actions of local public school officials.

Although some legal and policy scholars and political leaders called for the end of racial isolation whatever its cause, others began to challenge the fairness, desirability, or feasibility of doing so. By 1974 a closely divided Supreme Court gave an early signal that it was going to start withdrawing the judiciary from this battle. It refused to bring the Detroit suburbs into a proposed metropolitan remedy of a school segregation case in which the federal district judge was presented with a Detroit public school district that had already become overwhelmingly populated by black children in *Milliken v. Bradley.* Starting in the 1990s, it has been telling lower federal courts to relinquish their supervision of school districts, thereby freeing local officials from the affirmative obligation to keep their schools from becoming racially identifable, for instance *Board of Education of Oklahoma City Public Schools v. Dowell* and *Freeman v. Pitts.* And it voided a remedy adopted by a federal district judge in a Kansas City case that had imposed substantial obligations upon the state and was seen impermissibly to involve the surrounding suburbs in *Missouri v. Jenkins.*

Nonetheless, something of a political turnaround took place in many venues across the nation. Concluding that merely ending obvious official discrimination against minorities was insufficient, many public and private entities (prodded by federal agencies) began to engage in affirmative action. Some saw this as a way to remedy institutional or invisible racism that continued; others viewed it as desirable social policy even in a setting that was no longer officially hostile to racial minorities. Selective colleges and universities began to give preferences to non-white applicants; some employers, including school district employers, did the same; some school districts that had previously fought tenaciously for segregation turned completely about and were now committed to racially balanced schools.

But this practice has generated its own backlash, into which the Court has been drawn. Although a badly divided Court declared in 1978 that race was one of the many factors that colleges could legally employ in order to decide who to admit as students in *Regents of the University of California v. Bakke,* by the mid-1990s the Court had became much more hostile to affirmative action efforts outside of education. If the official action was not racially neutral and was not part of a remedy designed to undo past specific acts of illegal segregation, then the Court decided, in *Adarand Constructors, Inc. v. Pena,* that deliberate race-based actions said to benefit minorities were just as illegal as those adopted to harm them.

As a result, legal scholars in 2001 were uncertain whether affirmative action engaged in by selective high schools and selective colleges was still permissible. Indeed, it was unclear whether racially prompted school busing and other school assignment decisions at the elementary and secondary school levels could be kept in place once a formerly discriminating school district had been declared "unitary" by having eliminated the past vestiges of official segregation.

Individual Rights of Students

The Court's dealing with free speech and other constitutional rights of individual public school children has undergone something of a zig-zag as well. During World War II, the Court relied upon the First Amendment's "free speech" clause to uphold the refusal of religiously motivated Jehovah's Witnesses to participate in the flag salute at school in *West Virginia Board of Education v. Barnette.* Student free speech rights were much further strengthened during the Vietnam War, when the Court protected affirmative student rights of expression at school in the form of non-disruptive wearing of antiwar arm bands in *Tinker v. Des Moines School District.* In that same period, the Court extended to students the right to a hearing before serious disciplinary penalties are imposed on them, thereby bringing the Fourteenth Amendment's "procedural due process" clause into the schoolhouse in *Goss v. Lopez.* Later, in *Board of Education Island Trees Union Free School District No. 26 v. Pico,* the Court, on free speech grounds, thwarted religiously inspired efforts to rid school libraries of books that offended some parent groups.

But in subsequent cases, starting in the late 1970s, the Court has drawn back from this pro-student rights' agenda. It allowed public officials to discipline a student who gave a "lewd" speech at an assembly in *Bethel School District No. 403 v. Frazer;* to delete pages from a high school student newspaper in *Hazelwood School District v. Kuhlmeier;* to impose corporal punishment on public school children in *Ingraham v. Wright;* and to search student possessions (e.g., purses) under circumstances that would be illegal if done to adults in normal circumstances in *New Jersey v. T.L.O.* The Court also declined to get involved with academic dismissals at the college level in its decision *Board of Curators of the University of Missouri v. Horowitz.*

Hence, while it remains true that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," it is also now quite clear that school children have many fewer rights than adults have.

Although the Court has involved itself in many additional important issues as well (e.g., teachers' rights, gender discrimination, bilingual education, and the rights of disabled children), the three areas discussed illustrate not only the Court's great importance to American education, but also the Court's own shifting view of its role.

See also: AFFIRMATIVE ACTION COMPLIANCE IN HIGHER EDUCATION; SEGREGATION, LEGAL ASPECTS.

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