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Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

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THE UNITED STATES SUPREME COURT AND PUBLIC EDUCATION

Overview

The first Monday in October is rapidly approaching. This date marks the beginning of the official term of the United States Supreme Court. The term typically lasts until the end of June or until the Justices have handed down opinions on all cases that they have heard. Even though the Court is in recess in the months of July, August, and September, petitions for review can be filed during these months.

This year's term will prove interesting to watch, because the Court is in the process of change. No longer will the list of nine members include Chief Justice William H. Rehnquist and Associate Justice Sandra Day O'Connor. As of this writing the position of Chief Justice, once occupied by the late William Rehnquist, likely will be filled by John G. Roberts, Jr., but the vacancy created by Justice O'Connor's retirement remains open.

Change in the Court's membership is not a rare occurrence. In my fifty years as a student of the law, I have witnessed several changes take place. Gone from the bench are such luminaries as Earl Warren, Hugo Black, William O. Douglas, John Harlan, Potter Stewart, Warren Burger, William Brennan, Byron White, Thurgood Marshall, Harry Blackmun, and Lewis Powell.

The Burger Court and the Schools (1969 to 1986). A few years ago, my late research partner H.C. Hudgins, Jr., and I studied the sixteen-plus years of the Supreme Court under the leadership of Chief Justice Warren Burger. Between 1969 (*Tinker v Des Moines*) and 1986 (*Bethel School District v Fraser*), the Burger Court decided more than one hundred cases involving education-related issues. Suffice it to say, the Burger Court years produced many important decisions involving public schools. Over the seventeen-years under Chief Justice Burger's leadership, the Court's membership changed. (Vacca and Hudgins, 1991)

The Rehnquist Court (1986 to 2005). Membership on the Supreme Court continued to change under Chief Justice Rehnquist. By 1994, the Rehnquist Court was set and it remained the same until Chief Justice Rehnquist's death and Associate Justice O'Connor's retirement.

Based on my analysis of the education decisions during the Rehnquist years, the Justices formed three distinct groups, as evidenced in their voting patterns. With few exceptions, Chief Justice Rehnquist and Associate

Justices Scalia and Thomas voted together; Associate Justices O'Connor, Soutor, and Kennedy voted together; and Associate Justices Stevens, Ginsburg, and Breyer voted together. In effect, three courts actually functioned when considering education issues. The votes generally were 6-3; and, when the vote was 5-4 it was because Justices O'Connor and Kennedy furnished the swing votes.

The Impact of the Supreme Court on Public Education. Lesser known than the other two branches of government, the United States Supreme Court has a profound impact on the daily operation of this nation's public schools. While most people recognize such landmark decisions as Brown v Board of Education (a unanimous decision of the Warren Court in 1954), what is often not known is that more recent decisions of the United States Supreme Court during the Burger and Rehnquist eras (1969 to 2005) have had a major impact on public school system policy and procedures.

Constitutional Issues and Case Law Examples

As a general rule, constitutional issues involving public schools most often spring from the *First Amendment* (the religion clauses, speech, and press), the *Fourth Amendment* (privacy, search, and seizure), the *Tenth Amendment* (conflicts of state versus federal authority), and the *Fourteenth Amendment* (the due process and equal protection clauses). What follow are examples of important Supreme Court decisions involving public schools. These decisions were selected from the period beginning in 1969 and ending in 2005. The author's intent is to demonstrate the powerful influence and impact of United States Supreme Court on (1) school system policy formulation, and (2) the implementation of daily procedures in contemporary schools.

I. Compulsory Attendance, Parent Rights:

Wisconsin v Yoder (1972): In this decision the Court ruled that the Wisconsin compulsory attendance statute, as applied to the Old Order Amish, violated the Free Exercise Clause of the First Amendment. In the Court's view, the State of Wisconsin could not successfully argue that *parens patriae* is more compelling than is the *liberty interest* of parents in bringing up children.

Mueller v Allen (1988): By a vote of 5 to 4, the Supreme Court upheld a State of Minnesota law allowing state income tax deductions for education expenses (tuition, books, transportation) incurred by parents. The law allowed tax deductions for all parents, including parents who paid tuition to private and parochial elementary and secondary schools. The Court applied a "child benefit" rationale in reaching its decision.

II. Religion and The Schools:

Lemon v Kurtzman (1971): In this narrow public school finance case, the high court created a litmus test to apply in subsequent Establishment Clause cases. To pass muster under the First Amendment's Establishment Clause, the Court must find: (1) a secular legislative purpose, (2) a primary effect that neither establishes nor inhibits religion, and (3) an absence of excessive entanglement between church and state.

Edwards v Aguillard (1987): A Louisiana statute that required any public school teaching evolution to also teach creation science was declared unconstitutional. Focusing on the legislative intent of the state statute, the Court held that the "balanced treatment" law violated the separation of church and state (i.e., it was written to advance religion).

Board of Education v Mergens (1990): In this case a student-initiated Bible club wanted access to the school's official club period. Applying the federal Equal Access Act (1984) the Court held that a public secondary school that receives federal money and maintains a limited open forum must grant the student-initiated religious club's access request. The Bible club must be allowed to meet during non-instructional hours of the school day, with the same status as any other student-initiated non-curricular club.

Lee v Weisman (1992): Here the Court ruled that it was unconstitutional for a public middle school to include a nonsectarian prayer at graduation, a prayer given by a clergy person selected by the school principal. To quote Justice Kennedy, "[t]he government involvement with this religious activity is so pervasive to a point of creating a state-sponsored and state-directed religious exercise in a public school."

Zobrest v Catalina (1993): Relying on a 'child benefit' rationale, the Court allowed the use of public funds to pay for providing a sign language interpreter for student with educational disabilities. The Justices supported the use of public money, even though the student was enrolled in a Roman Catholic high school.

Board of Education v Newdow (2005): In this recent decision, the Supreme Court reversed the Ninth Circuit in a matter involving the recitation by public school students of the phrase "one nation under God" in the Pledge of Allegiance. However, the high court did not specifically address the "one nation under God" issue. Instead, the Court held that the parent who brought the suit on behalf of his daughter did not have standing to sue. As of this writing the matter is back in court in the Ninth Circuit.

Zelman v Simmons-Harris (2002) and *Locke v Davey (2004)*: Taken together, these decisions reopened and more clearly focused the debate on school vouchers. More specifically the debate centers on whether or not public money in the form of vouchers (expended in private, sectarian schools) is constitutional under the First and Fourteenth Amendments.

III. Student Rights and Protections:

Franklin v Gwinnett (1992): In this decision the Supreme Court held that school officials may be liable for their *deliberate indifference* to reported behavior on the part of employees in situations where students were sexually, physically, or verbally abused. This decision also establishes that it is possible for student victims to sue for money damages under Title 9.

Davis v Monroe (1999): In this decision the high court made it clear that school officials may be found liable where student harassment of students by other students is so severe and pervasive that it "limits a student victim's ability to learn." More specifically, liability for student-on-student harassment will attach where: (1) school officials knew (had actual knowledge) about the harassing behavior, (2) failed to take reasonable steps to remedy the situation, and (3) showed *deliberate indifference* to the matter.

IV. Student Discipline:

Goss v Lopez (1975): In this student disciplinary (short-term suspension) case the Court held that because students have a *property interest* in public education, and a *liberty interest* in their reputations, the Fourteenth Amendment requires that they be afforded *basic procedural due process* before being suspended from school. The Court articulated the *basic elements of due process* as (1) oral or written notice of the charges, (2) an explanation of the evidence [especially where the student denies the charge], and (3) some form of hearing [*i.e.*, a chance to be heard].

Ingraham v Wright (1977): A Florida case, the Court held in Ingraham that the Eighth Amendment cruel and unusual punishment prohibition does not apply to corporal punishment in schools. However, students are not left without remedy. The remedy against excessive corporal punishment, said the Court, is provided in civil and criminal law.

New Jersey v T.L.O. (1985): Here the Supreme Court made it clear that the Fourth Amendment's prohibition against unreasonable searches and seizures applies to students in public schools. Thus, public school students have privacy expectations that must be protected. However, these expectations must be balanced with the legal prerogative of school officials to search students where: (1) reasonable suspicion exists to believe that a violation of school policy and/or the law exists, and (2) the search remains reasonable in scope.

Honig v Doe (1988): In the Court's opinion, the "stay put" provision of IDEA prohibits school officials from unilaterally excluding students with disabilities from school for more than 10-days, where the student's misbehavior grows out of (i.e., is a manifestation of) his or her disability.

Vernonia v Acton (1995) and *Board of Education v Earls (2002)*: Taken together, these two decisions uphold random drug testing of public school students. In essence the Court said, "The privacy interests of students are limited in a public school environment."

Owasso I.S.D. v Falvo (2002) and *Gonzaga University v Doe (2002)*: These decisions did not directly address the privacy rights of students. However, taken together they did establish that the Family Educational Rights and Privacy Act (FERPA) does not give private citizens a "private right to sue" under FERPA.

V. Student Expression:

Tinker v Des Moines (1969): Since public school students are "persons under the constitution" and the First and Fourteenth Amendments are applicable to the states, said the Court, it is unconstitutional to suspend students for engaging in symbolic expression of opinion unless it can be shown that material and substantial disruption occurred because of their exercise of expression. The "material and substantial disruption" test became a basic standard to apply in all subsequent student expression cases.

Board of Education v Fraser (1986) and *Hazelwood v Kuhlmeier (1988)*: In these post-Tinker decisions the Court opined that the determination of the manner of speech in a classroom or in an assembly appropriately rests with school officials and not students. There is a distinction between "symbolic speech (as protected in Tinker)," and "speech sponsored by the school and disseminated under its auspices" (Fraser and Kuhlmeier). However, public school officials must base their actions on "reasonable pedagogical concerns."

VI. Finance and Special Education:

San Antonio I.S.D. v Rodriguez (1973): The Supreme Court reversed a lower court decision that had declared the State of Texas school finance system unconstitutional. The Supreme Court concluded that the Texas finance system: (1) did not operate to the particular disadvantage of any suspect class; (2) wealth discrimination, if it exists at all, does not provide an adequate basis for the Court to invoke strict scrutiny; and (3) education is not among the rights specifically included in the United States Constitution. The "importance" of education is not enough to regard it as a fundamental right under the Equal Protection Clause.

Hendrick Hudson School District v Rowley (1982): In deciding this case the Court interpreted the “appropriate education” language in the IDEA. Students covered by IDEA must be provided with access to a “meaningful educational program,” a “basic floor opportunity” designed to result in some “benefit” to the student. The intent of the law is not to provide “the best educational program,” one designed to ensure maximum development of a student’s full potential.

VII. Employment:

Board of Regents v Roth (1972) and *Perry v Sindermann (1972)*: These two cases added an important dimension to teacher job security and gave meaning to the phrase “property interest in employment.” Taken together these decisions balanced school board (employer) prerogatives with teacher (employee) rights. Because of these decisions even non-tenured faculty can reap the benefits of due process protections where a valid contract exists.

Mt. Healthy v Doyle (1981): In Mt. Healthy, the Court established a standard that has greatly conditioned local school board and administrative authority in school personnel matters, especially a dismissal decision. Created by Chief Justice Rehnquist the standard poses the following three questions: (1) Is there present in this situation some element or exercise [by the employee] of constitutionally or statutorily protected conduct? (2) Did this element or exercise play a “substantial or motivating part” in the personnel decision (to non-renew, dismiss, suspend, transfer, etc.)? (3) Absent the element or exercise would the employer have reached the same decision regarding this employee?

Cleveland Board of Education v Loudermill (1985): In this decision the Court held that a pre-termination hearing must be granted to an employee who possesses a property interest (more than a mere unilateral expectation) in his/her employment.

Implications for Policy

The purpose of this commentary is to demonstrate the influence and impact of United States Supreme Court decisions on policy and practice in public school systems. Given the intent of this commentary, it would be redundant to suggest the potential policy implications of the cases reviewed above. Suffice it to say, public school officials and administrators have dealt with the implications of these decisions for the past three-plus decades. But, what of the future?

Two items are worth pondering. First, what will be the impact of the new United States Supreme Court under the leadership of John G Roberts, Jr.? Second, who will replace Justice Sandra Day O’Connor? Whatever are the answers to these two questions, in my view the direction taken by both the Burger and Rehnquist Courts over the past thirty-five years (as demonstrated in the cases reviewed above) will continue. More specifically, my guess is that the Roberts Court will build on the legacies of the Burger and Rehnquist Courts and continue in a positive, albeit moderate, path through the maze of education related issues coming before it. In essence the Roberts Court will continue to balance the rights of parents and students with the legal and compelling authority of state and local school officials, administrators, and teachers to control the daily operation of schools, including the curriculum.

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Richard S. Vacca
Senior Fellow CEPI

Note: The views expressed in this commentary are those of the author.