The Impact of Court Decisions on Educational Strategies

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MOST leaders in education are well acquainted with the legislative and administrative branches of governments and their local, state, and federal relationships to public education. The judicial branch is different. It seldom benefits from their understanding and participation. To all but a few, the courts seem remote, mysterious in making their surprising impacts on the schools, too technical to be understood, and too independent to be amenable to the views of most citizens.

On the basis of such mixed reasons and suppositions, most citizens and professional leaders in education seldom interest themselves in the making of public policy in education through the courts. The judiciary incubates great educational strategies and shapes the future by its mandates while most educational leadership busily pursues less demanding routines.

Important court decisions surprise the leaders who habitually fail to participate in judicial planning in ways entirely appropriate for any citizen. Too often educators and other friends of public education avoid being plaintiffs, or defendants, or policy makers, or planners, or professional, political, and financial supporters of judicial action to uphold what they privately profess to believe in education. Fearful of criticism, this ostrichlike, vital concern of their lives is too often spent in isolation from the judiciary. There is massive unwillingness to synthesize and express principles in written or spoken forms, to contribute personal learning time and financial resources, or to work quietly and wait for a few years to achieve fundamentally important judicial results.

Courts are not remote from education. They are important determiners of some of its most basic strategies. Public education is a part of government at all levels, and private education is also subject to the minimum educational and institutional standards prescribed by local, state, and federal laws within the fundamental constitutional limitations that apply.

The most important legal questions in education involve how the First Amendment to the Constitution will be applied to public and private institutions of education. In tax-supported public institutions the question is usually whether denominational religion is present. The Supreme Court has defined the constitutional limitations of religion in public schools [1] in considerable detail in re-

[1] Abington School District *v.* Schempp, 374 U.S. 203 (1963) and cases cited. The relevant part of the First Amendment is as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ." It has been applied to state and local governments through judicial construction of the Fourteenth Amendment since 1940.

cent years. This has been due to the fact that taxpayers have had standing to sue in these cases, as they have in most other instances involving civil rights.

A different line of constitutional litigation deals with use of tax-raised funds for individual benefits to pupils or teachers. The First Amendment question here is whether there is unconstitutional direct or indirect aid to sectarian institutions when the funds have been directed primarily to their pupils or teachers. Health, welfare, and safety benefits, such as those which fall within the Welfare Clause and the reserved police powers of the states under the Tenth Amendment, are general rights of all the people. These constitutional rights become involved with First Amendment applications to education in ways that require judicial determinations. Some prevailing judicial guidelines can be illustrated. Tax-raised funds for health services and school lunches for private school pupils, and for scholarships under the so-called GI Bills, are not issues under the First Amendment. Public tax funds for pupil transportation, textbooks, library materials, and some types of remedial instruction are constitutionally controversial. Use of tax-raised funds for regular salaries of sectarian school teachers or for sectarian school facilities or equipment is unconstitutional.

There have been no decisions and only a few dicta that differentiate on First Amendment grounds the use of tax-raised funds by college-level institutions from the use of such funds by elementary and secondary educational institutions. Most state constitutions and laws bar the use of tax-raised educational funds for nonpublic educational institutions at all academic levels, whether they are commercial, nonprofit private or sectarian. Thus state and local tax funds are not used directly to support sectarian educational institutions, although nonprofit private secular institutions of higher education in a few states receive limited state funds. State constitutions and laws, however, have not prevented federal uses of tax-raised funds in direct violation of state and local legal standards of public use set for state and local funds.

The Rule of Frothingham *v.* Mellon

In regard to private nonprofit secular and sectarian institutions the usual question is whether tax-raised funds may be used for financing such institutions directly or indirectly. This situation remains to be clarified constitutionally because federal taxpayers, until 1968, were barred from the federal courts on the basis of a 1923 Supreme Court decision holding that they had no standing to sue under the First Amendment to prevent expenditures of federal funds.[2]

During the past decade the federal government has made increasingly large grants of tax funds and gifts of federal property to nonprofit private, secular, and sectarian educational institutions. On March 28, 1961, the U.S. Department of Health, Education, and Welfare, with the approval of the U.S. Attorney General, released a comprehensive legal memorandum on First Amendment implications of these federal practices.[3] This memorandum advised that federal taxpayers were not being allowed to sue in the federal courts on First Amendment cases, and that although some of the federal aids to education were admittedly of uncertain constitutionality, Congress could continue these and other aids to sectarian institutions of education without substantial danger of having to defend its practices in the courts. The memorandum concluded that since federal spending legislation ordinarily carried no provisions for judicial review, "In the absence of some such statutory provisions, there appears to be no realistic likelihood that Federal legislation raising the constitutional issues discussed in this memorandum will be resolved by judicial decision."[4]

Until 1968, Congress and the President made their own constitutional law on the major First Amendment question in education. One might also believe this has been true in the field of civil rights enforcement,

[2] Frothingham *v.* Mellon, 262 U.S. 447 (1923).

[3] Memorandum on the Impact of the First Amendment to the Constitution Upon Federal Aid to Education, signed by Alanson W. Willcox, general counsel of the HEW Department.

[4] *Ibid.*, p. 44.

where guidelines were not printed in the Federal Register as regulations having the force of law. Enforcement of such administrative guidelines has been upheld by the courts, including penalties withholding all federal funds from school districts that have not met specific federal mandates to desegregate schools. These situations, however, should not be confused with the First Amendment cases. In civil rights, the courts approved fund withholding for violation of guidelines because the courts themselves approved of those methods of enforcement. In the First Amendment cases involving federal funds for sectarian institutions, however, the courts have held that they had no jurisdiction to make constitutional decisions at all because no one was in a position to achieve standing to sue in the federal courts.

On June 10, 1968, the Supreme Court substantially reversed the Frothingham rule in an eight-to-one decision.[5] Speaking through Chief Justice Warren, the Court suggested that the Frothingham rule rests on something less than a constitutional foundation.

The Court said the law is that a federal taxpayer has standing to ". . . invoke federal judicial power when he alleges that Congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." The taxpayer must establish a logical link between his taxpayer status and the legislative enactment he attacks, and establish another logical link between his taxpayer status and the precise nature of the constitutional infringement he alleges. No personal financial loss is any longer necessary. It is enough that the federal government may be favoring one religion over another or aiding religion in general. The Court held that the Establishment Clause of the First Amendment is a specific constitutional limitation on the taxing and spending powers of Congress.

It is significant that 15 Connecticut taxpayers filed a suit in the U.S. District Court in New Haven on September 26, 1968, challenging the constitutionality of federal grants for educational facilities in four sectarian colleges and universities under the Establishment Clause of the First Amendment.

This is a suit almost identical in its facts to a suit filed on September 10, 1963, by a group of individual Maryland taxpayers and sponsored by the Horace Mann League.[6] Brought in a Maryland county court because the Frothingham rule then barred the suit in the federal courts, four private liberal arts colleges were the substantive defendants. Grants of state funds had been voted by the Maryland legislature for physical facilities similar to those financed in the Connecticut colleges by the federal government, and both cases were brought specifically under the First Amendment to the Federal Constitution.

In the decision of the highest Maryland Court handed down June 2, 1966, the criteria for ascertaining whether an institution of education is sectarian were adopted by the court as recommended by a witness for the Horace Mann League. The Court applied the criteria and judged that three of the defendant colleges were sectarian and one secular. The Supreme Court refused to review the case in November 1966, so the Maryland decision became effective only for state and local funds in Maryland. Now that federal taxpayers can sue in the Federal courts, these or newly developed criteria can be applied to the agencies of the Federal government.

The New York State Textbook Case

Another important decision of the Supreme Court handed down on June 10, 1968, involved a New York law requiring local school authorities to lend textbooks on secular subjects to students in grades 7 through 12 in both public and nonpublic schools. In a six-to-three decision, Justice White[7] spoke for the Court in holding the state textbook

[5] Flast *v.* Cohen, Case No. 416, October Term, 1967.

[6] Horace Mann League *v.* Board of Public Works, 242 Md. 645, 220 A. 2nd 51 (1966).

[7] Board of Education of Central School District No. 1 *et al. v.* James E. Allen, Jr., as Commissioner of Education of New York *et al.* Case No. 660, October Term, 1967.

law constitutional under the First Amendment. Justice Harlan concurred with the majority in a separate opinion and added that he would uphold cases where the contested governmental activity is calculated to achieve nonreligious purposes and does not involve the State "so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom."[8] Justices Black, Douglas, and Fortas dissented vigorously in separate opinions.

The Allen case falls on the permissive side of most previous decisions of the courts that have involved the use of tax-raised funds for auxiliary benefits to individuals. It draws the line for individual benefits rather generously, and has some importance as a judicial indicator in such cases. Justice White, however, based the decision squarely upon the record before the Supreme Court, which contained no factual evidence because the lower court had entered a summary judgment on the pleadings. With no evidence in the record the decision was necessarily a narrow one. Justice White assumed on the basis of background of judgment and experience, unchallenged in the meager record before the Court, that parochial schools are performing acceptably both their sectarian and secular functions. His comment on the lack of factual evidence in the record before the Court made clear the importance of such evidence in cases to come:

> Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books. We are unable to hold, based solely on judicial notice, that this statute results in unconstitutional involvement of the State with religious instruction or that Sec. 701, for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment.[9]

[8] Quoted from Abington School District *v.* Schempp, 374 U.S. 203, p. 307 (1963).

[9] *Ibid.*

Detailed evidence presented at length in the Horace Mann League case and elsewhere tends to show that sectarian religion can and does permeate sectarian institutions and influence their effects on students, just as many of these institutions claim in their institutional purposes. The denominational environment, the faculty, the religious exercises and courses required of students, and a sectarian approach to the teaching of secular subjects are among the hallmarks of sectarian educational institutions. They are justly proud of achieving their aims, and the sole concern of the First Amendment cases is that such religious achievements be privately rather than publicly financed.

Educational Reasons for the First Amendment

Volumes have been written on the historical reasons why Madison and Jefferson pioneered legal restrictions on the use of public funds for the support of religion, first in Virginia and then in the U.S. Constitution. Religious conflict has been common for many centuries, and complete tolerance among differing religious groups remains more an ideal than a practice. If one believes in universal education for every individual according to his needs, he must have recourse to public education. With full freedom for private education privately supported as long as it meets the minimum requirements of the state for secular education, it is imperative to have strongly financed and publicly supported education for all who desire it. From the history of nations concerning the performance of private education everywhere there is no reason to believe that our society can achieve the education it needs without effective public schools.

In our pluralistic society religious conflict is entirely unnecessary in reaching an acceptable balance between Free Exercise and the Establishment Clause in education. The sponsors of the Horace Mann League case entered the courts for purely educational reasons. It was a suit brought by educators on behalf of education for all children and

youth. No funds were sought or accepted from religious denominations. Religious conflict was carefully avoided. Members of all leading religions were sought as plaintiffs. Great care was exercised to praise the defendant institutions, the quality of their work, and the admirable integrity of their teaching according to their purposes. Only one issue separated plaintiffs and defendants—whether educational institutions that teach the tenets of a religious denomination, and are appropriately controlled and financed privately for that purpose under the Free Exercise Clause of the First Amendment, should receive grants of tax-raised funds for their support. Why this is a crucial educational issue deserves a brief comment.

Importance for Effective Public Education

Comprehensive public education of high quality requires general public interest and political support, as well as adequate local, state, and federal financing. In our country it is organized flexibly in thousands of local school districts exercising substantial controls over school operations. In turn, local districts in the several states constitute 50 substantially autonomous state systems of education with freedom to develop 50 statewide experimental laboratories in the practical operation of education.

This system can and does vary widely from district to district and from state to state. It operates close to the people, with the stimulation and support that intermediate service units, states, and the federal government can and do supply. At the local level this education system thrives on the exercise of local autonomy and its inevitable ferment and disagreements. The local-state-federal arrangements stimulate progress without serious or widespread dangers to the fundamental public support necessary for effective operation.

Privately supported and controlled secular and sectarian schools are constitutionally protected and widely patronized as alternatives to or competitors of the public schools. They are a wholesome influence, but only up to the point where they divide the community in ways that may cause the loss of high quality public education for all the children and youth who desire it and can benefit from it.

Public education would be greatly weakened should sectarian and other nonpublic educational institutions obtain large amounts of tax-raised funds. Efforts are being made in Washington and in selected states that might bring this about if the courts uphold legislation already in effect in tests under the First Amendment. The federal approaches take several forms, including essentially unrestricted general development cash grants to private secular and sectarian colleges. The state laws would funnel state funds to parents for transfer to private schools on a per capita basis. Some of the sponsors of such state legislation frankly seek complete financial equality with publicly controlled schools in terms of tax-raised funds.

The decline of the public schools would depend largely on the size of the tax fund incentives offered to expand or to begin private schools at public expense. With much less than full tax support at public school levels the public schools would no longer be effective. A proliferation of nonprofit corporations to operate schools for special social, political, or economic interests and viewpoints would supplement schools under the jurisdiction of many religious denominations.

Should these conditions result from approval of federal subsidies upheld by the courts under the First Amendment, state and local governments would probably be unable to restrict state and local tax funds to publicly controlled educational institutions. With secular and sectarian schools eligible for federal funds, federal funds for public schools might eventually be conditioned upon state and local financial matching of federal funds for private schools. The public schools as a unifying force in a democracy would, in the process, have become history.

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