

## WHAT'S THE PUBLIC IN PUBLIC EDUCATION?

# The courts, the schools, and the Constitution

*The public schools have become our nation's most significant site of constitutional conflict and interpretation.*

By **Justin Driver**

The United States has long exhibited an uncommonly strong belief in the importance of public education and its centrality to national identity. As Adlai Stevenson once remarked, “The free common school system is the most American thing about America” (Tyack, 2003). But many observers have suggested that the nation’s faith in public education may be rivaled only by the faith it places in the judiciary to resolve critical disputes. In the 1830s, Alexis de Tocqueville’s *Democracy in America* offered what remains the most famous formulation of this idea: “There is hardly a political question in the United States which does not sooner or later turn into a judicial one,” Tocqueville (1835/1969) contended. Since this statement appeared, the federal judiciary — with the Supreme Court at its apex — has assumed only a more expansive role in American society.

For a long season, however, many observers believed that these two institutions should have nothing to do with each other. Elementary and secondary public schools, the thinking ran, were singularly local endeavors that educators should be free to administer without needing to worry about anything so grand as the Supreme Court’s decisions interpreting the Constitution. Yet, by 1969, the Supreme Court had abandoned its traditional noninterventionist approach to public schools and announced that the era of separate spheres for law and education had ended: “It can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate” (*Tinker v. Des Moines Independent Community School District*, 1969).

Today, one cannot claim to fully understand public education in the United States without appreciating how the Supreme Court’s decisions involving students’ constitutional rights shape the everyday realities of schools across the country. Conversely, one cannot plausibly hope to com-

prehend the role of the Supreme Court in American society without appreciating how its opinions involving public education reveal the judiciary’s underappreciated capacity for both spurring and forestalling major social change.

I contend that the public school has served as the single most significant site of constitutional interpretation in the nation’s history. No other arena of constitutional decision making — not churches, not hotels, not hospitals, not restaurants, not police stations, not military bases, not automobiles, not even homes — matches the public schools when it comes to the cultural import of



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the Supreme Court's jurisprudence. Houses of public education, though seldom viewed as legal entities by the general public, claim this mantle for four closely related reasons.

## The ubiquity of public schools

The first reason that schools should be deemed our most significant theaters of constitutional conflict is owed to the sheer magnitude of public elementary and secondary education. Today, more than 50 million students attend public schools in the United States, and these schools require a few million adults to serve as teachers, administrators, and support staff to function. Those figures mean that on any given weekday, during school hours, at least one-sixth of the U.S. population can be found in a public school, making it easily the single largest governmental entity that Americans encounter for sustained periods on a near-daily basis.

Yet even this large fraction underestimates the constitutional footprint of public schools; not only does it fail to account for the parents of those students who currently attend public schools, but it also overlooks that the vast majority of adults in the United States are themselves products of those schools. Those ubiquitous interactions are, of course, governed by the constitutional parameters that the Supreme Court and lower courts have articulated for public education. The attitudes students develop during minors' first sustained exposure to governmental authority do not simply vanish on graduation day. Accordingly, it seems eminently reasonable to hold that everyone in the country has a vested interest in the way that the Constitution is interpreted in public schools.

## The ties between schools and history

The schools' great significance in our constitutional order also stems from the fact that school-related cases offer an excellent prism for examining the preceding 100 years of American history, as the cultural anxieties that pervade the larger society often flash where law and education converge. The history of the Court's encounters with the schools thus illuminates both the hopes and the fears that have captivated the American people during the last century.

Consider only a few examples of this phenomenon. In the wake of World War I — when the nation wrestled with how to assimilate its growing immigrant population — the Court confronted laws that prohibited schools from teaching young pupils in languages other than English and that mandated attendance at public schools (because speaking the mother tongue and attending parochial schools were



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both thought to shield minorities from “Americanization”). During World War II, the Court contemplated patriotism by weighing whether schools could expel students for refusing to salute the American flag. In the aftermath of World War II, the Court considered anew whether the nation that had so recently toppled Aryan supremacy abroad could allow schools to separate children by race at home. During the 1960s, the Court weighed whether students who opposed the Vietnam War could express their views without facing reprisals from educators. Within that same decade, the Court accelerated its lengthy and ongoing examination of how, in a nation characterized by increasing religious diversity, various religious groups might peacefully coexist within public schools.

When the Silent Majority of the 1970s feared that American youth culture had spiraled out of control, the Court contemplated what limits, if any, should exist on such disciplinary practices as suspensions or corporal punishment. In the late 1970s, as the nation debated the Equal Rights Amendment, the Court weighed whether single-sex public schools could be reconciled with gender equality. During the 1980s, when prominent political figures expressed deep concern about exposing youngsters to explicit content, the Court entertained cases asking whether a school could punish a student for delivering a speech laced with sexual innuendo and whether a school newspaper could be forced to publish student-written articles addressing teen sexuality.

Not long after first lady Nancy Reagan launched her “Just Say No” campaign, the Supreme Court for the first time contemplated what tolls the war on drugs may exact

upon students' privacy rights. The Court has repeatedly visited this same terrain during the 21st century, as it has addressed whether the war on drugs can justify subjecting students both to suspicionless drug tests and to strip searches and limiting their free speech rights. In no other sphere of constitutional meaning do the Supreme Court's major interventions so closely reflect the nation's larger social concerns.

## The role of hot-button issues

As the previous paragraphs intimated, cases arising from the schooling context involve many of the most doctrinally consequential, hotly contested constitutional questions that the Supreme Court has ever addressed — including lawsuits related to sex, race, crime, safety, liberty, equality, religion, and patriotism. That thumbnail sketch, moreover, omits the Court's momentous cases addressing the permissibility of massive funding disparities between school districts in the same metropolitan area and efforts to exclude unauthorized immigrants from public schools — among many other contentious lawsuits.

Even outside the schooling context, cases implicating these various issues are likely to stir strong emotions. But bringing these matters into the educational arena elevates the temperature higher still, both because the cases tend to involve minors and because of the central place that public schools occupy in the nation's cultural imagination. The recent legal controversy that exploded over transgender students' access to restrooms offers but the latest illustration of how public schools host the most incendiary legal debates that divide American society.

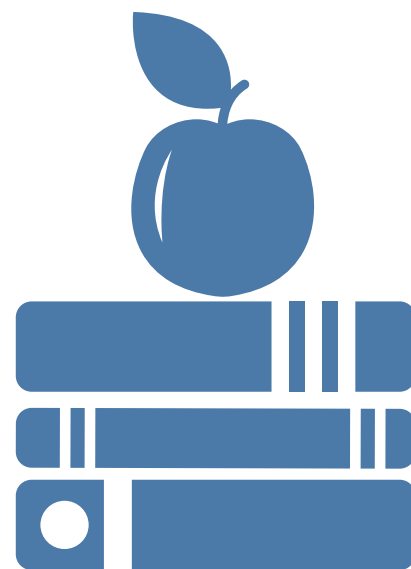
Observers have frequently called the legal disputes of public schools “bitter.” Two well-known figures, writing more than four decades apart, independently invoked this word when they identified the definitive characteristic of legal conflicts in schools. In 1928, the noted intellectual Walter Lippmann — remarking upon the controversies then raging in state courts over teaching evolution — noted that “the struggles for the control of the schools are among the bitterest political struggles,” and claimed further, “It is inevitable that it should be so. Wherever two or more groups within a state differ in religion, or in language and in nationality, the immediate concern of each group is to use the schools to preserve its own faith and tradition” (quoted in Zimmerman, 2002, pp. 1-2). In 1973, Hillary Rodham — then a recent graduate of Yale Law School affiliated with the Children's Defense Fund — wrote an article in the *Harvard Educational Review* that echoed Lippmann's assessment. “From the first confrontations between parents and the state,” Rodham contended, “education has been the

subject of continuous and often bitter struggles, primarily over the proper social role of education and the proper treatment of children within the schools” (p. 43).

The last four decades have, if anything, only deepened this statement's accuracy, as the Court's subsequent student rights decisions have continued to reveal an unusually powerful capacity for eliciting fervent sentiments in American society. What is true of society generally, moreover, also holds within the Supreme Court's marble walls. An unusually large percentage of school cases witness justices adopting seldom-used techniques to signal their profound disagreement with the majority — either by reading their opinions from the bench or by omitting the standard claim that they dissent from the majority “respectfully.” It is hardly mysterious why disputes in this arena spark such passion: When we disagree over what the Constitution means in public schools, we engage in an argument that is fundamentally about what sort of nation we want the United States to be.

## The Court's own statements

The final reason that the public school should be viewed as the preeminent site of constitutional interpretation is that the Supreme Court itself has repeatedly, and convincingly, highlighted the importance of that venue for shaping attitudes toward the nation's governing doc-



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ument. Beginning in the 1940s, the Court made several high-profile declarations that public schools had a special responsibility to honor constitutional rights; otherwise, students would incorrectly conclude that governmental authority had no limits. No one expressed this proposition better than Justice Robert Jackson, when he wrote in *West Virginia State Board of Education v. Barnette* (1943), “That [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” In *Brown v. Board of Education* (1954), moreover, Chief Justice Earl Warren testified to “the importance of education to our democratic society,” before he concluded that permitting racial segregation in schools could harm Black students’ “hearts and minds in a way unlikely ever to be undone.” Six years later, Justice Potter Stewart wrote an opinion for the Court that explicitly identified the public school as a constitutional setting of paramount import: “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools” (*Shelton v. Tucker*, 1960).

In recent decades, however, such sentiments appear more often in the Court’s dissenting opinions than in its majority opinions. Justice John Paul Stevens, for example, advanced this idea in 1985 when he dissented in part from an opinion offering an anemic conception of the Fourth Amendment’s protection against unreasonable governmental searches in public schools:

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court’s decision today is a curious moral for the Nation’s youth. (*New Jersey v. T.L.O.*, 1985)

Transforming public schools into Constitution-free zones, Justice Stevens sagely warned, was dangerous because when today’s students become tomorrow’s adults, they may well retain their anemic understanding of constitutional protections. That risk, if realized, would harm the nation as a whole by distorting the relationship between citizens and their government. The Fourth Amendment, alas, represents only one of many constitutional areas where the Court has in recent decades taught student-citizens regrettable lessons about our constitutional protections.

Indeed, over the last four decades, the Court has often foundered badly in its commitment to vindicating consti-

tutional rights in schools. Since the 1970s, its decisions have frequently risked “teach[ing] youth to discount important principles of our government as mere platitudes,” as *Barnette* long ago warned, by issuing opinions finding that the Constitution allows educators to inflict severe corporal punishment on students, without providing any procedural protections; search students and their possessions, without probable cause, in bids to uncover violations of school rules; engage in drug testing of students who are not suspected of any wrongdoing, and suppress student speech solely for the viewpoint that it espouses.

The Supreme Court has also stumbled by refusing to review many wrongheaded decisions from lower courts, including opinions that have in recent years upheld repressive restrictions on off-campus speech during the internet age; misguided “zero tolerance” disciplinary policies; degrading student strip searches; permissive search regulations geared toward educators, even though uniformed police officers have now become a common sight in public schools, and the quiet resurgence of single-sex public schools, but only in inner-city communities. Such decisions should alarm not only schoolchildren and their parents, but the entire nation, because — as the Supreme Court once recognized — it is impossible to disregard the constitutional rights of students without ultimately damaging the republic to which students pledge allegiance. ■

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