ASBO at 100: A Supreme Court Retrospective on Religion, Student Rights, and Employee Rights

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"What the Supreme Court of the United States has said pertaining to State school administration and how their decisions affect the rights and privileges of individuals are matters of wide interest and concern to school business officials and teachers generally" (Keesecker 1949, p. 1).

This month's column picks up where January's left off, addressing other areas wherein Supreme Court rulings significantly affected public education.

In the opening sentence of his May 1949 article in *School Business Affairs*, Ward W. Keesecker was on the mark in writing, "What the Supreme Court of the United States has said pertaining to State school administration and how their decisions affect the rights and privileges of individuals are matters of wide interest and concern to school business officials and teachers generally" (p. 1).

Based on the role that the Supreme Court has assumed in shaping American education, this column reviews key cases dealing with religious issues in schools, student rights, and employee rights to due process and free speech.

As noted last month, I hope that these two columns afford school business officials and other education leaders a greater sense of understanding of, and respect for, the ways in which the Supreme Court's decisions have shaped, and continue to shape, American schooling and society in general, as well as the life of ASBO International and its members in particular.

The Religion Clauses of the First Amendment

According to the highly litigated 16 words of the religion clauses of the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Although the First Amendment explicitly prohibits only Congress from making laws establishing religion, the Supreme Court applied it to the states through the Fourteenth Amendment in *Cantwell v. Connecticut* (1940) when it invalidated the convictions of Jehovah's Witnesses for violating a law against soliciting funds for religious or other reasons without prior approval of public officials.

The First Amendment was added to the Constitution as part of the Bill of Rights in 1791. Yet, the Court did not address a case on the merits of the establishment clause until 1947 in *Everson v. Board of Education*, wherein it upheld a state law that allowed parents to be reimbursed for the cost of transporting their children to schools that were religiously affiliated.

Earlier, the Court reviewed two cases involving nonpublic schools, allowing parents to satisfy Oregon's compulsory attendance law by sending their children to such schools in *Pierce v. Society of Sisters* (1925) and upholding a statute that provided textbooks for students regardless of whether they attended religious schools in *Cochran v. Louisiana State Board of Education* (1930). However, the Court decided both cases under the due process clause of the Fourteenth Amendment rather than the First Amendment. Since *Everson*, the Court has resolved almost 40 cases over the place of religion in public schools.

State Aid to Religiously Affiliated Nonpublic Schools

The Supreme Court's attitude concerning state aid to religiously affiliated nonpublic schools passed through three stages. The first phase began in 1947 with *Everson v. Board of Education*, described in the previous paragraph, and ended in 1968 with *Board of Education v. Allen*, wherein the justices upheld a statute that required local boards

to loan textbooks to students for secular subjects regardless of where they attended school. During this time, the Court created the child benefit test, a standard that permits publicly funded aid on the basis that it assists children rather than their religiously affiliated nonpublic schools.

During the second phase, 1971–1985, the Supreme Court did not generally permit aid other than books. In its most important religion case, *Lemon v. Kurtzman* (1971), the Court enunciated the tripartite test that it has used in most cases over the years. Pursuant to this test, every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion." (pp. 612–13)

In its one exception during the second phase, *Mueller v. Allen* (1983), the Supreme Court upheld a statute that granted all parents state income tax deductions for the costs of tuition, textbooks, and transportation for their children to K–12 schools. Even though the vast majority of children who attended nonpublic schools attended religiously affiliated ones, the Court was satisfied that the law passed all three parts of the *Lemon* test.

Zobrest v. Catalina Foothills School District (1993) signaled a new era on state aid. The Court reasoned that a student who was deaf was entitled to the on-site services of a sign language interpreter in his religious school. In 1997, in *Agostini v. Felton*, the Court dissolved the injunction that it upheld in *Aguilar*, allowing the on-site delivery of Title I programs in religious schools.

Perhaps the most significant development in *Agostini* was that the Court modified the *Lemon* test by reviewing only its first two parts—purpose and effect—reshaping entanglement as one element in evaluating a law's effect. In *Mitchell v. Helms* (2000), a plurality repudiated *Meek* and *Wolman*, allowing loans of instructional materials to religious schools. Finally, in *Zelman v. Simmons–Harris* (2002), the Court upheld the limited use of vouchers for poor children in Cleveland, Ohio.

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In the underlying dispute, the Court struck down statutes that would have provided publicly funded salary supplements for teachers of secular subjects in religiously schools.

Following *Lemon*, the Court permitted loans of textbooks but not instructional materials while allowing on-site diagnostic services in religiously affiliated nonpublic schools; services could be delivered in neutral locations (*Meek v. Pittenger* 1975; *Wolman v. Walter* 1977). The Court refused to allow religious schools to use public school buses for field trips (*Wolman* 1977) and forbade the on-site delivery of Title I services (*Aguilar v. Felton* 1985) in religious schools.

Prayer and Religious Activity

Unlike its attitude toward aid, the Supreme Court's perspective with regard to prayer and religious activity has been constant. Beginning with *Engel v. Vitale* (1962), wherein it invalidated a prayer proposed by the New York State Board of Regents, the Court consistently struck down school-sponsored prayer and religious activities. A year later, in the companion cases of *School District of Abington Township v. Schempp* and *Murray v. Curlett* (1963), the Court invalidated prayer and Bible reading in public schools; the Court also enunciated the "purpose" and "effects" tests, the first two prongs of the *Lemon* test.

Later, in *Lee v. Weisman* (1992), the Court struck down prayer at a graduation ceremony because of the principal's role in selecting the rabbi who offered the prayer and because it could have been "psychologically coercive" to those who had not wished to participate. Finally, in *Santa Fe Independent School District v. Doe* (2000), the Court invalidated prayer before the start of high school football games as impermissible government approval or endorsement of religion.

The Court did uphold the rights of students to organize prayer and Bible study clubs that met during noninstructional time as long as other groups could do so (*Board of Education of Westside Community Schools v. Mergens* (1990). Similarly, the Court allowed nonschool religious groups equal access to facilities as long as they were available to other organizations (*Lamb's Chapel v. Center Moriches Union Free School District* 1993; *Good News Club v. Milford Central School* 2001).

Student Rights

FREE SPEECH

Tinker v. Des Moines Independent Community School District (1969) was important for two reasons. First, *Tinker* initiated an era wherein the Supreme Court focused a fair amount of attention on the rights of students. Second, it was the first of four Supreme Court cases addressing the First Amendment free speech rights of students.

In *Tinker*, the Supreme Court struck down a two-day-old board

policy that sought to prohibit students from wearing black armbands to school in protest of American involvement in Vietnam. Conceding that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (p. 506), the justices sought to balance the rights of students against the needs of educators to maintain order and discipline.

Tinker initiated an era wherein the Supreme Court focused a fair amount of attention on the rights of students.

In an often-quoted passage, the Court determined that "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained" (p. 509).

In *Bethel School District No. 403 v. Fraser* (1986), a student who ignored warnings from two teachers not to deliver a sexual innuendo–laden nomination speech that caused a substantial disruption challenged his three-day suspension. In upholding the suspension, the Court observed that educators could punish the student for delivering a disruptive speech after being advised not to do so. The Court posited that unlike the passive political speech that the armbands represented in *Tinker*, the student's lewd speech was unacceptable because it lacked a political viewpoint and because he imposed it on a captive student audience that was not expecting such a talk.

Hazelwood School District v. Kuhlmeier (1988) upheld the authority of educators to limit student free speech rights in a newspaper that they produced as part of a journalism class. Students challenged the rights of educators to remove two articles: one on teenage pregnancy and another on the divorce of a student's father. In key language, the Supreme Court pointed out that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (p. 273).

Morse v. Frederick (2007) arose when a principal suspended a student for displaying a large banner at an Olympic torch relay that read "BONG HiTS 4 JESUS" because the principal interpreted it as advocating illegal drug use. In upholding the right of educators to discipline the student, the Supreme Court relied on its three previous cases on student expression.

First, the Court explained that the free speech rights of students must be viewed in light of the "special characteristics" of the school environment. Second, the Court recognized that since *Tinker* is neither absolute nor the only basis on which it could restrict student speech, the principal acted properly in disciplining the student who displayed the banner.

STUDENT DISCIPLINE

Goss v. Lopez (1975) represents the high-water mark of student rights. In *Goss*, the Supreme Court set the parameters for dealing with short-term suspensions not in excess of 10 school days. Stopping short of requiring elaborate due process hearings, the Court directed officials to provide students who are subject to short-term suspensions notice and an opportunity to respond to the charges that they face. States have since followed the Court's suggestion and adopted specific procedures for students facing long-term suspensions (in excess of 10 days) or expulsions.

In its only case of the merits of corporal punishment, the Supreme Court refused to prohibit its use in *Ingraham v. Wright* (1977). The Court declared that since the Eighth Amendment's prohibition against cruel and unusual punishments applied to criminals, it was inapplicable to paddling students in order to preserve school discipline.

Previously, in *Baker v. Owen* (1975a, 1975b), the Court summarily affirmed that educators could use corporal punishment even if parents disagreed as long as officials acted pursuant to board policy.

New Jersey v. T.L.O. (1985), in which an assistant principal discovered marijuana in a search of a student's purse, was the Supreme Court's first case involving the Fourth Amendment in schools. The Court declared that "first, one must consider 'whether the . . . action was justified at its inception'; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place'" (p. 341). Second, the Court added that "a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction" (p. 342).

The justices clarified that a search is justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school" (p. 342).

The Court upheld the drug testing of student athletes under the Fourth Amendment in *Vernonia School District 47J v. Acton* (1995a, 1995b) and *Board of Education of Independent School District No. 92 of Pottawatomie v. Earls* (*Earls* 2000a, 2000b).

Insofar as the Court applied essentially the same three-part test in both

cases, making it slightly easier for school officials to pass the final prong in *Earls*, this column focuses on this latter standard.

The Court first asserted that since students have limited privacy interests in school, school officials had taken adequate steps to protect their rights. Second, since the policy had a number of safeguards in place, the Court maintained that the character of the intrusion was such that it did not violate the rights of students. Third, as to the nature and immediacy of the board's concern and the policy's efficacy in meeting them, the Court concluded that in light of the nationwide epidemic of drug use in schools, it did not require schools to have particularized or pervasive drug problems before permitting educators to conduct testing without reason for suspicion.

Employee Rights

The most important Supreme Court case involving the rights of school employees with protected property interests, such as tenure or unexpired contracts, is *Cleveland Board of Education v. Loudermill* (1985). In *Loudermill*, the Court ruled that other than in emergency situations, wherein they can be suspended with pay, under the Fourteenth Amendment "tenured public employee[s] [are] entitled to oral or written notice of the charges against [them], an explanation of the employer's evidence, and an opportunity to present [their] side of the story" (p. 546) before boards can terminate their employment.

The Supreme Court addressed the free speech rights of public school employees on three occasions. In *Pickering v. Board of Education of Township High School District* (1968), the Court acknowledged that teachers have the right to speak out on matters of public concern. In remarking that since the teacher did not have a close working relationship with the board, he was free to speak out, the Court left the door open to allow discipline of school administrators who, as managerial employees, cannot be as critical of board activities.

In *Mt. Healthy City Board of Education v. Doyle* (1977), the Supreme Court considered the effect of including a protected right as a factor when a board elected not to renew the contract of a nontenured teacher who criticized it on a call-in radio program.

The Court conceded that since the teacher showed that his protected conduct about a school issue was a substantial factor in not having his contract renewed, the board had to afford him the opportunity to prove that it would have done the same thing even if he had not engaged in protected speech. On remand, the board successfully asserted that it would not have renewed the teacher's contract regardless of whether he called the radio talk show (*Doyle* 1982).

Givhan v. Western Line Consolidated School District (1979) applied *Pickering*'s consideration of the working relationships between school employees in a dispute where a teacher was critical of the school board in private conversations with her supervisor.

Although refusing to reinstate the teacher, the Supreme Court decided that the Fifth Circuit erred in finding that officials were justified in not renewing her contract, suggesting that under *Mt. Healthy*, they may have had sufficient cause on other bases that would have required additional proceedings.

In two cases involving other public employees that are relevant for education, the Court clarified distinctions between workplace disputes and matters of free speech, ruling in favor of employers in both instances when employees criticized employment-related activities (*Connick v. Myers* 1983; *Garcetti v. Ceballos* 2006).

Unions

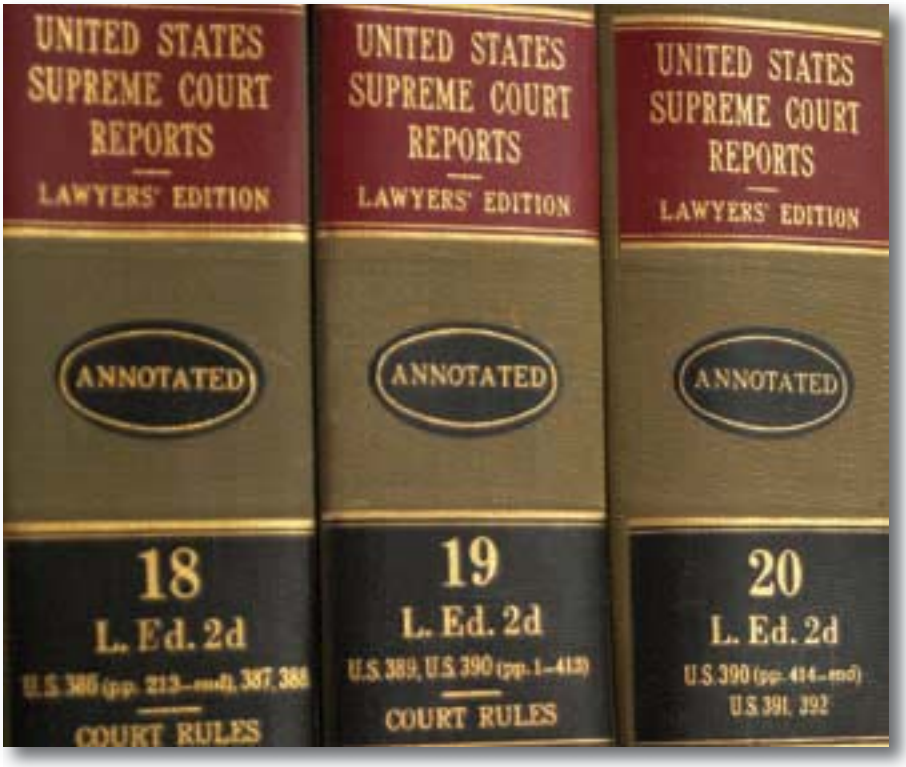
The First Amendment does not require boards to recognize or bargain with unions. Even so, it protects teachers who join unions, not allowing boards to discipline them for engaging in protected activities. Yet, on three occasions involving K–12 schools, the Court upheld restrictions on the ability of unions to collect fair-share fees, charges that nonmembers must pay unions for representing their interests in bargaining.

Goss v. Lopez represents the high-water mark of student rights.

In *Abood v. Detroit Board of Education* (1977), the Supreme Court indicated that the Constitution does not prohibit agency fee provisions in bargaining agreements as long as unions do not use funds to support ideological activities that members and nonmembers oppose and that are unrelated to the bargaining process.

In *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson* (1986), the Court invalidated a system to return fees to nonmembers since it risked having the money temporarily used for improper purposes. In a case from higher education, *Lehnert v. Ferris Faculty Association* (1991), the Court addressed union activities that may be charged to nonmembers, specifying that they must (1) be relevant to bargaining, (2) be justified by the government's interest in labor peace and avoiding "free riders" (allowing nonmembers not to pay their fair share of expenses), and (3) not significantly add to the burdening of free speech inherent in allowing agency or union shops.

Most recently, in *Davenport v. Washington Education Association* (2007), the Supreme Court placed further restrictions on the ability of unions to spend the fair-share fees of nonmembers. The Court found that unions could be required to receive affirmative authorization from a nonmem-



ber before spending their agency fees for election-related purposes.

In another issue involving unions, *Perry Education Association v. Perry Local Educators' Association* (1983), the Supreme Court wrote that a school board could limit access to its intraschool system mail facilities to the exclusive representative of district employees. The Court noted that the board did not limit a rival union's right to free speech because it had alternative means of communication available, such as bulletin boards, meeting rooms, and the mail, and had equal access to mailboxes during election periods.

Conclusion

As this column demonstrates, Supreme Court cases involving the rights of students and school employees have had a profound effect on the lives of school business officials, other education leaders, and everyone else associated with public education. As ASBO embarks on its second century, about the only thing about which we can be certain is that the Court will continue to resolve cases that help shape the future of public education.

References

Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

Agostini v. Felton, 521 U.S. 203 (1997).

Aguilar v. Felton, 473 U.S. 402 (1985).

Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975a); *aff'd*, 423 U.S. 907 (1975b).

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).

Board of Education of Independent School District No. 92 of Pottawatomie v. Earls, 536 U.S. 822 (2002a); *on remand*, 300 F.3d 1222 (10th Cir. 2002b).

Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990).

Board of Education v. Allen, 392 U.S. 236 (1968).

Cantwell v. Connecticut, 310 U.S. 296 (1940).

Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292 (1986).

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930).

Connick v. Myers, 461 U.S. 138 (1983).

Davenport v. Washington Education Association, 127 S. Ct. 2372 (2007).

Engel v. Vitale, 370 U.S. 421 (1962).

Everson v. Board of Education, 330 U.S. 1 (1947).

Garcetti v. Ceballos, 547 U.S. 410 (2006).

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).

Good News Club v. Milford Central School, 533 U.S. 98 (2001).

Goss v. Lopez, 419 U.S. 565 (1975).

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

Ingraham v. Wright, 430 U.S. 651 (1977).

Keesecker, W. W. 1949. Supreme Court decisions affecting school administration. *School Business Affairs* 15 (5): 1–2.

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).

Lee v. Weisman, 505 U.S. 577 (1992).

Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991).

Lemon v. Kurtzman, 403 U.S. 602 (1971).

Meek v. Pittenger, 421 U.S. 349 (1975).

Mitchell v. Helms, 530 U.S. 793 (2000).

Morse v. Frederick, 127 S. Ct. 2618 (2007).

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977); *on remand*, 670 F.2d 59 (6th Cir.1982).

Mueller v. Allen, 463 U.S. 388 (1983).

New Jersey v. T.L.O., 469 U.S. 325 (1985).

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983).

Pickering v. Board of Education of Township High School District, 391 U.S. 563 (1968). *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

School District of Abington Township v. Schempp and *Murray v. Curlett*, 374 U.S. 203 (1963).

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995a); *on remand*, 66 F.3d 217 (9th Cir. 1995b).

Wolman v. Walter, 433 U.S. 229 (1977).

Zelman v. Simmons–Harris, 536 U.S. 639 (2002).

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).

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