Case Western Reserve Law Review

Volume 73 | Issue 4 Article 5

2023

Symposium Introduction - America's Classrooms: Frontlines of the First Amendment

Jonathan L. Entin

— Introduction —

AMERICA'S CLASSROOMS: FRONTLINES OF THE FIRST AMENDMENT

Jonathan L. Entin†

The Supreme Court has observed that "education is perhaps the most important function of state and local governments," is essential to "the performance of our most basic public responsibilities," and "is the very foundation of good citizenship."[1] Recognition of the public importance of education goes back to the earliest years of our nation, notably in the Northwest Ordinance that governed the territory from which the State of Ohio was created.[2] Perhaps because of the importance of education, that subject has generated perennial debate.[3]

Not surprisingly, that debate has resulted in frequent litigation. The Supreme Court has decided many education-related cases, several of which have had broad doctrinal significance in other areas of the law. Those cases have involved a wide range of constitutional issues.

Some leading decisions have arisen under the Fourteenth Amendment. For example, the Court has rejected race- and gender-based admissions policies under the Equal Protection Clause.[4] Along

† David L. Brennan Professor Emeritus of Law and Adjunct Professor of Political Science, Case Western Reserve University.

1. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

2. "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Northwest Ordinance, § 3 (1787).

3. *See, e.g.*, DEREK BOK, HIGHER EDUCATION IN AMERICA (2013); LAWRENCE A. CREMIN, POPULAR EDUCATION AND ITS DISCONTENTS (1990); DIANE RAVITCH, THE GREAT SCHOOL WARS: A HISTORY OF THE NEW YORK CITY PUBLIC SCHOOLS (paperback ed. 2000); JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION (3d ed. 2019).

4. *See, e.g.*, *Brown*, 347 U.S. 483; United States v. Virginia, 518 U.S. 515 (1996). The Court has struggled to define the permissible uses of race in education. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (striking down a medical school's race-conscious admissions program in a case that failed to generate a majority opinion); Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the University of Michigan Law School's race-conscious admissions policy); Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down the University of Michigan's undergraduate admissions policy for giving excessive weight to race in admissions); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (striking down policies that considered race in order to promote diverse student bodies in elementary and secondary schools). And in June 2023, the Court rejected race-based affirmative action programs at

the same lines, it has struck down a state law that excluded from public schools all children who were not lawfully admitted to the country.[5] And it rejected the idea that education is a fundamental right in a case challenging disparities in school funding.[6] The Court has used the Due Process Clause to strike down laws forbidding teaching foreign languages to elementary and middle school pupils[7] and laws that outlawed private schools.[8] Other rulings have addressed student discipline.[9] The Fourteenth Amendment has also figured in a number of cases involving faculty members. For example, procedural due process requires a pretermination hearing before teachers may be dismissed, but only if they have a liberty or property interest in their job.[10]

In other contexts, the Court articulated the modern test for defining congressional authority under the Commerce Clause in a case that struck down a federal law which sought to ban firearms in and around

---

Harvard University and the University of North Carolina. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023). The petitioners in both cases asked the Court to overrule *Grutter* and forbid any consideration of race in admissions. The Court did not explicitly do that and left open the possibility that its approach in these cases might not apply to the military academies. *Id.* at 213 n.4. Still, it is difficult to disagree with Justice Thomas's observation that "*Grutter* is, for all intents and purposes, overruled." *Id.* at 287 (Thomas, J., concurring).

5. Plyler v. Doe, 457 U.S. 202 (1982).

6. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). This ruling effectively ended federal litigation about school finance, but many cases have arisen under state constitutions. *See generally* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995). Ohio is one of those states. *See* DeRolph v. State, 677 N.E.2d 733 (Ohio 1997), *appeal after remand*, 728 N.E.2d 993 (Ohio 2000), *modified*, 754 N.E.2d 1184 (Ohio 2001), *vacated on reconsideration*, 780 N.E.2d 529 (Ohio 2002). The Ohio Supreme Court later clarified that its 2002 ruling terminated the case. State *ex rel.* State v. Lewis, 789 N.E.2d 195 (Ohio 2003). *See generally* Jessica Ice, Comment, *A Comment on* DeRolph*'s Impacts on Ohio's School-Financing System, Twenty-Five Years Later*, 70 CASE W. RSRV. L. REV. 1261 (2020); Shadya Yazback, Note, *School Financing in Ohio Yesterday, Today and Tomorrow: Searching for a "Thorough and Efficient" System of Public Schools*, 57 CASE W. RSRV. L. REV. 671 (2007).

7. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923).

8. Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

9. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977) (holding that due process does not require a hearing before a student is subjected to corporal punishment); Goss v. Lopez, 419 U.S. 565 (1975) (requiring an informal hearing before a student is suspended for up to ten days).

10. *See, e.g.*, Bd. of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

schools.[11] And several Fourth Amendment cases have made clear that only reasonable suspicion, rather than probable cause, is required for authorities to search precollege students.[12]

Many other education-related cases have invoked the First Amendment. On the curriculum front, the Supreme Court has rejected efforts to prohibit or discourage the teaching of evolution for violating the Establishment Clause.[13] Similarly, officially mandated school prayers have run afoul of the same clause.[14] And numerous cases have grappled with governmental aid to religious education.[15] Moreover, a significant body of free speech jurisprudence has involved public school students. One leading case on compelled speech invalidated a law requiring schoolchildren to salute the flag.[16] And the Court has addressed the speech rights of students in several cases.[17] Faculty members also enjoy First Amendment rights, as the Court has made clear in various other cases.[18]

Recently, First Amendment issues in higher education and in elementary and secondary schools have become especially salient. Many states have adopted or are considering legislation that would restrict

11. United States v. Lopez, 514 U.S. 549 (1995). *See generally* Symposium, *The New Federalism After* United States v. Lopez, 46 CASE W. RSRV. L. REV. 633 (1996).

12. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985) (upholding the search of a high school girl suspected of smoking in violation of a school rule); Bd. of Educ. v. Earls, 536 U.S. 822 (2002) (upholding a requirement that all students participating in extracurricular activities submit to drug testing); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) (holding that reasonable suspicion did not justify a strip search of a thirteen-year-old girl suspected of providing prohibited drugs to her fellow students).

13. Epperson v. Arkansas, 393 U.S. 97 (1968); Edwards v. Aguillard, 482 U.S. 578 (1987).

14. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Lee v. Weisman, 505 U.S. 577 (1992). *See generally* Symposium, *Religion and the Public Schools After* Lee v. Weisman, 43 CASE W. RSRV. L. REV. 699 (1993).

15. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1 (1947); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1975); Meek v. Pittenger, 421 U.S. 349 (1975); Mueller v. Allen, 463 U.S. 388 (1983); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Locke v. Davey, 540 U.S. 712 (2004).

16. W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

17. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Widmar v. Vincent, 454 U.S. 263 (1981); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Morse v. Frederick, 551 U.S. 393 (2007).

18. *See, e.g.*, Sweezy v. New Hampshire *ex rel.* Wyman, 354 U.S. 234 (1957); Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

what educational institutions can teach about race, gender, and other potentially fraught subjects, and widespread controversy has arisen over books that are assigned in class or are available to students in libraries. Developments in Florida have attracted particular attention. That state has enacted several highly publicized education-related measures: the Stop Wrongs to Our Kids and Employees Act[19] (commonly referred to as the Stop WOKE Act) that limits how public educational institutions may address racial and gender issues; the Parental Rights in Education Act[20] (widely referred to as the Don't Say Gay law) that bans instruction on sexual orientation or gender identity for students below fourth grade and requires instruction on those topics for older children to be developmentally appropriate; and a curricular-transparency law that makes it easier to challenge material in school and classroom libraries.[21] But the Sunshine State is hardly alone. Dozens of states in the past few years have adopted or are considering measures that restrict the teaching of race-related topics, often referred to as bans on critical race theory.[22] Almost as many states have adopted or are considering measures restricting teaching related to sexual orientation and gender identity.[23] At the same time, school (and public) libraries around the nation have faced increasing efforts to restrict their collections.[24]

---

19. Fla. Laws ch. 2022–72 (codified at Fla. Stat. §§ 760.10(8), 1000.05(4), 1003.42(2)(h)).

20. Fla. Laws ch. 2022–22 (codified at Fla. Stat. § 1001.42(8)(c)).

21. Fla. Laws ch. 2022–21 (codified at Fla. Stat. § 1006.28(4)(d)–(e)). This law has led to widespread confusion and at least temporary removal of many books from school libraries and classrooms. *See, e.g.*, Eesha Pendharkar, *There's Confusion Over Book Bans in Florida Schools. Here's Why*, EDUC. WK. (Mar. 16, 2023), https://www.edweek.org/teaching-learning/theres-confusion-over-book-bans-in-florida-schools-heres-why/2023/03 [https://perma.cc/643A-EL2R].

22. *See CRT Forward*, UCLA SCH. L. CRITICAL RACE STUD. PROGRAM, https://crtforward.law.ucla.edu [https://perma.cc/E7VM-VJMC] (last visited Oct 17, 2023); *America's Censored Classrooms*, PEN AM. (Aug. 17, 2022), https://pen.org/report/americas-censored-classrooms/ [https://perma.cc/BP94-23LQ]. *See generally* Eesha Pendharkar, *Efforts to Ban Critical Race Theory Could Restrict Teaching for a Third of America's Kids*, EDUC. WK., https://www.edweek.org/leadership/efforts-to-ban-critical-race-theory-now-restrict-teaching-for-a-third-of-americas-kids/2022/01_[https://perma.cc/J8YM-5QC7] (Feb. 4, 2022).

23. *See America's Censored Classrooms*, *supra* note 22; Eesha Pendharkar, *Which States Are Considering "Don't Say Gay" Bills and Where They Stand*, EDUC. WK. (Feb. 28, 2023), https://www.edweek.org/policy-politics/which-states-are-considering-dont-say-gay-bills-and-where-they-stand/2023/02 [https://perma.cc/L52N-7L76].

24. *See Youth Censorship Database*, NAT'L COAL. AGAINST CENSORSHIP, https://ncac.org/youth-censorship-database [https://perma.cc/7EVK-DCGD]

In addition to these legislative and political developments, courts have rendered significant rulings relating to the speech rights of faculty and students. For instance, in *Meriwether v. Hartop*,[25] the United States Court of Appeals for the Sixth Circuit held that a public university violated the religious rights of a professor who repeatedly misgendered a student.[26] And the Supreme Court recently issued several education-related decisions. In *Mahanoy Area School District v. B.L. ex rel. Levy*,[27] the Court held that school authorities violated the First Amendment rights of a student who posted a vulgar social media message after not being chosen as a varsity cheerleader.[28] Two other cases favored religious claimants in education-related cases. *Carson v. Makin*[29] held that a state could not exclude religious schools from a program that provided tuition assistance to families who lived in school districts that did not have a public high school and therefore sent their children to private schools.[30] And *Kennedy v. Bremerton School District*[31] held that a school district that disciplined a high school football coach for engaging in on-field prayer after games violated the coach's free exercise rights.[32]

All of these developments provided the backdrop for the *Case Western Reserve Law Review*'s symposium on "America's Classrooms: Frontlines of the First Amendment," which took place on October 28, 2022. The program brought together lawyers, legal scholars, and social scientists who examined many constitutional issues related to K–12 and higher education. This issue contains papers that were delivered at the symposium.

Richard Duncan's opening paper argues that school choice is essential for promoting religious values and freedom of conscience.[33] Professor Duncan goes beyond *Carson* to present an argument for

(last visited June 9, 2023); *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sept. 19, 2022), https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/ [https://perma.cc/ED6T-P26H]; *see also Top 10 Most Challenged Books Lists*, AM. LIBR. ASS'N: BANNED & CHALLENGED BOOKS, https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10 [https://perma.cc/VB6U-NGCT] (last visited Apr. 8, 2023).

25. 992 F.3d 492 (6th Cir. 2021).

26. *Id.* at 498–99, 517.

27. 141 S. Ct. 2038 (2021).

28. *Id.* at 2043, 2048.

29. 142 S. Ct. 1987 (2022).

30. *Id.* at 1993, 2002.

31. 142 S. Ct. 2407 (2022).

32. *Id.* at 2416, 2432–34.

33. Richard F. Duncan, *Why School Choice Is Necessary for Religious Liberty and Freedom of Belief*, 73 CASE W. RSRV. L. REV. 1055 (2023).

equitable funding of school choice to vindicate the values underlying the early due process cases limiting governmental authority to regulate schools.[34] He invokes parental rights to control their children's upbringing and emphasizes the inability of any educational institution to be neutral in its instruction. His argument rests not only on the First Amendment but also on principles of federalism to suggest both short- and long-term strategies for advocates of school choice.

Next, Will Creeley carefully analyzes the status of speech rights for elementary and secondary students in the wake of *Mahanoy*.[35] He begins by summarizing the disarray in the lower courts that sought to apply the Supreme Court's apparently inconsistent approach to student speech in the half century leading to this ruling before comparing the contrasting approaches of the Supreme Court and the United States Court of Appeals for the Third Circuit in *Mahanoy*, observing that the Third Circuit applied a bright-line rule whereas the High Court applied an imprecise standard that will challenge lawyers, litigants, and lower courts. After reviewing some early post-*Mahanoy* cases, he concludes that although *Mahanoy* was significant for protecting the student's First Amendment rights after a series of rulings that upheld restrictions on student expression, the Supreme Court's decision has not resolved the uncertainties that bedevil student speech.

The remaining papers in this issue focus on the expressive rights of faculty members. Keith Whittington examines the extent to which university professors enjoy legal protection for what they say or write for the public as opposed to what they say in the classroom and in academic research.[36] Resolving this question has always been challenging—the more so in our currently polarized political arena and with the rise of the internet. Whittington explains that protection for professors' extramural speech is analyzed under the balancing test first articulated in *Pickering v. Board of Education*[37] and refined in subsequent decisions.[38] None of these cases involved university professors, and Whittington cautions that courts might exaggerate institutional interests at the expense of faculty speech rights, although he recognizes that those institutional interests can have real substance. He thoughtfully analyzes the competing interests and expresses concern about the extent to which clamping down on professors' extramural

34. *See supra* notes 7–8 and accompanying text.

35. Will Creeley, *What Happens at the Cocoa Hut Doesn't Stay at the Cocoa Hut: Assessing K–12 Student Speech Rights After* Mahanoy Area School District v. B.L., 73 CASE W. RSRV. L. REV. 1083 (2023).

36. Keith E. Whittington, *What Can Professors Say in Public? Extramural Speech and the First Amendment*, 73 CASE W. RSRV. L. REV. 1121 (2023).

37. 391 U.S. 563, 568 (1968).

38. *See, e.g.*, Connick v. Myers, 461 U.S. 138 (1983); Garcetti v. Ceballos, 547 U.S. 410 (2006).

speech might give outsiders what amounts to a heckler's veto over faculty expression. Whittington's last substantive section assesses the possibility that extramural expression might in some circumstances reflect on a professor's character and fitness.

The final two papers address issues raised by the *Meriwether* case.[39] Laura Beth Nielsen and her coauthors focus on the interconnection of the First Amendment and social science research on the consequences of faculty misgendering of transgender students.[40] They observe that the harms of misgendering students are not merely or even primarily individual; rather, the practice hurts others who share similar characteristics and therefore should be viewed as a collective harm. Expressing skepticism about religious freedom justifications for misgendering students, Nielsen and her colleagues argue that there are significant countervailing interests that should outweigh First Amendment justifications for misgendering students and propose a mechanism for handling such disputes.

The last paper focuses not only on *Meriwether* but also on *Kennedy*.[41] Andrew Koppelman criticizes both decisions for giving excessive weight to faculty interests in free exercise at the expense of student interests in decent treatment.[42] He says that the Sixth Circuit in *Meriwether* adopted a more expansive view of academic freedom than any other court has ever endorsed while minimizing the university's interest in avoiding demeaning of its students. Similarly, the Supreme Court in *Kennedy* exaggerated the football coach's interest in public prayer while inappropriately discounting the school district's concern that his position could coerce players into joining those prayers to avoid the prospect of losing playing time. This approach might call into question the continuing vitality of the school prayer cases.[43] In short, these cases allow small burdens on religion to overwhelm substantial harms to nonreligious persons.

This program could not have succeeded without the work of many people. This includes all of the speakers, as well as the Law Review's

39. *See supra* notes 25–26 and accompanying text.

40. Laura Beth Nielsen, Elsinore Kuo & Evan Zhao, *Misgendering, Academic Freedom, the First Amendment, and Trans Students*, 73 CASE W. RSRV. L. REV. 1177 (2023).

41. *See supra* notes 31–32 and accompanying text.

42. Andrew Koppelman, *The Emerging First Amendment Right to Mistreat Students*, 73 CASE W. RSRV. L. REV. 1209 (2023).

43. *See supra* note 14 and accompanying text. In *Kennedy*, the majority said that the Court had "abandoned" the three-part Establishment Clause test adopted in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022). *But see id.* at 2449 & n.6 (Sotomayor, J., dissenting) (contending that no majority opinion had rejected *Lemon* so the Court in this case was wrong to treat that test as having been "abandoned" and to overrule *Lemon*).

symposium editor, Kennedy Dickson, and editor-in-chief, Meritt Salathe. Kennedy and Meritt developed the topic and showed enormous dedication to making sure that the symposium went smoothly. In addition, the indefatigable Eric Siler of the law school's academic centers office provided his usual extraordinary support. Thanks also to Deans Jessica W. Berg and Michael P. Scharf for their continuing assistance and encouragement. Finally, we are grateful to the Frank M. Stanton Foundation and the Attorney Admissions Fund of the United States District Court for the Northern District of Ohio for financial support.