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BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM v. NEW LEFT EDUCATION PROJECT, U.S. Supreme Court, No. 70–55

The Board of Regents in a state court sought to restrain the defendants from distributing a newspaper and making other commercial or noncommercial solicitations on the Austin campus of the University of Texas, except in compliance with University rules. The defendants in turn brought a Federal action to enjoin further state court proceedings on the grounds that the rules of the University were in violation of First Amendment rights. A three judge court was convened and granted summary judgment in favor of the New Left Education Project and enjoined the enforcement of the University rules in question.

The U. S. Supreme Court held that the convening of the three judge court was improper, vacated the judgment and remanded the case. Mr. Justice speaking for the Court noted that a three judge court is required when the challenged statute or regulation has state-wide application. While the Board of Regents was created by the Texas legislature and is charged with rulemaking power over 23 four-year colleges and universities in Texas, the regulation in question applies to but three of the institutions. Thus, the regulation is of only local impact and a single judge must hear the case. The purpose of this distinction is to minimize the burden on three judge courts and avoid unduly expanding the U.S. Supreme Court's limited appellate jurisdiction.

UNIVERSITY OF SOUTHERN MISSISSIPPI CHAPTER OF THE MISSISSIPPI CIVIL LIBERTIES UNION v. UNIVERSITY OF SOUTHERN MISSISSIPPI U.S.C.A., 5th Cir., No. 71-1801

During 1970, the plaintiff, Civil Liberties Union, was denied official recognition as a student organization at the University. The denial meant that the plaintiff could neither participate in University approved student activities nor initiate its own student activities. A suit was filed in a Federal district court to compel the University to grant the plaintiff official recognition.

The lower court had held that the denial of official recognition was unwarranted and ordered that the plaintiff be given a chance to reapply for recognition.

The Appeals Court tersely noted that the new application would give the University a new chance to adduce support for its assertion that the plaintiff's activities would interfere with the operation of the University. The court proceeded straight to the facts as presented in the record. There, the only apparent reason for the denial of recognition was that the chapter as well as its state and national counterparts were often involved in litigations. The question then was whether this fact alone is sufficient to sustain the University's position.

Serious bona fide litigation carried on by a minority group as a peaceful means of guaranteeing its rights is a form of expression and association pro-

tected by the First and Fourteenth Amendments. Since *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969), it is no longer a serious contention that students or teachers shed their constitutional rights of freedom of speech or expression at the school house gate. The court also compared the University's restriction to other attempts by other institutions to ban particular speakers on school premises. These bans were uniformly struck down.

There being no legitimate reason for the University's action, the Court of Appeals reversed the district court's judgment, removed the case, and instructed that the University be ordered to grant immediate approval of the application for recognition.

CERRA v. EAST STROUDSBURG AREA SCHOOL DISTRICT, In the Commonwealth Court of Pennsylvania, No. 445, Commonwealth Docket (December 21, 1971)

The plaintiff, a tenured school teacher was dismissed because she failed to resign her position when she passed the end of her fifth month of pregnancy. The local school board held a hearing on the dismissal and sustained same. The lower court also found the procedure reasonable.

The plaintiff in her appeal relied on the argument that pregnancy is an illness and should be treated as an illness. To do otherwise is to set up a discriminatory classification.

The court rejected her argument on several grounds. First, it pointed out that the plaintiff's own medical expert in the field of Obstetrics and Gynecology said that pregnancy is a physiological condition not an illness. Second, the regulation was not unreasonable considering testimony of a principal and the superintendent that when maternity leaves had been granted, nearly always teachers on leave would decide at the last minute not to return to teaching. The result was severe administrative problems just prior to the opening of school.

Note: There are two other recent U.S. District Court Cases reaching different results on the same issue. In *Cohen* v. *Chesterfield County School Board,* 326 F. Supp. 1159 (1971), the court held a teacher could not be required to take a maternity leave. The contrary result was reached in *LaFleur* v. *Cleveland Board of Education,* 326 F. Supp. 1208 (1971).

BRIGHT v. BAESLER, No. 2249, USDC Eastern District of Kentucky (December 30, 1971)

The plaintiffs, students at the University of Kentucky, were not permitted to register to vote in Lexington, Kentucky, on grounds they had not overcome a presumption that they are domiciliaries of their parents' home. They brought this action against the Fayette County Board of Registration, charging invidious discrimination by the Board in placing a greater burden of proof of domicile upon students than on any other group of citizens. They further contended that the presumption against domicile is violative of the equal protection clause, the Twenty-sixth Amendment, and the Voting Rights Act of 1971.

The Registration Board contended that this matter was really an interpreta-

tion of state statutes and state courts should be allowed to make that determination first. They further held the plaintiffs had not exhausted their administrative remedies and, finally, denied any discrimination on grounds that there is ample reason to believe students are not domiciliaries of the university community.

On the jurisdictional question, the district court noted that the U.S. Supreme Court has always sought to guard against the denial or dilution of the people's right to vote. The case does involve a Federal question of substantial significance which could not be avoided by any adjudication in the state courts and, thus, the Federal district court must not abstain from rendering a judgment.

On the merits of the case, it was agreed that the defendants had failed to register the students, in spite of the fact that they had met the State constitutional requirements of being eighteen, residing in the State one year, in the county six months and in the precinct sixty days. They are able to register only if they complete a series of other questions. No other group is required to undergo an extensive examination of their domicile. Since a student is given such a separate classification, it must meet the traditional constitutional test. Normally, if there is a reasonable basis for a classification, it cannot be said that the State has denied equal protection of the law. However, the classification is suspect and the State must show a compelling reason for it if it impinges on an enumerated constitutional right. Voting rights fall within this sphere of constitutional rights. The State must come forth with its compelling reasons, which it did not.

The court noted that to establish one's domicile, it is only necessary to have abandoned a former domicile and that there exists no intention of returning to it. There need be no intention to remain for all time.

The defendents were enjoined from imposing additional criteria of proof of domicile for students, but were told they may require proof of domicile if said proof is required of all, regardless of occupation.

HOLLINS v. SHOFSTALL, No. C-253652, Superior Court of Arizona

The ruling is on a motion to dismiss a complaint on the grounds that it fails to state a claim for which relief can be granted in a case involving the constitutionality of the Arizona system of financing public education.

The system of school finance is similar to many other areas of the country. The State of Arizona contributes $182.50 per capita, per annum, according to average daily attendance in elementary and high school districts. Each county contributes another $17.50. The rest of school funds are raised by local taxes. In Morena Elementary School District, local taxes produced $249.64 from a tax rate of $.67. In Roosevelt Elementary School District, taxes produced $99.04 from a rate of $7.14. Thus, one rate was 1/10th that of another and produced about two-and-one-half times more revenue per child. Thus, the funds available to any school district are to a highly significant extent determined by the taxable wealth within the district.

The Court noted that it was in full agreement with the reasoning in *Serrano*

v. *Priest,* 487 P.2d 1241 (1971). Public education is indeed a "fundamental interest." The present system of financing education does not further this interest. Finally, the Court, in denying the motion to dismiss, said, "Certainly there can be devised a more equitable system of school financing than what is presently in effect".

VAN DUSARTZ v. HATFIELD, No. 3-71 Civ. 243 _____ F. Supp. _____ (D Minn 1971)

The ruling is on a motion to dismiss in a case involving the constitutionality of the Minnesota system of financing public education. The motion was denied.

The issue in the case is the same as *Serrano* v. *Priest,* 487 P.2d 1242 (1971), i.e., whether pupils in a publicly-financed school enjoy a right under the equal protection clause of the Fourteenth Amendment to have a level of spending for their education unaffected by variations in the taxable wealth of their school district. The Court said that such a right exists and the rule of law is that the level of spending for a child's education may not be a function of wealth other than the wealth of the state as a whole. The Court adopted new terms to describe this principle—fiscal neutrality.

In ruling on the motion, it was first treated as a motion for summary judgments in which, for *the narrow purposes of the motion,* all plaintiffs' allegations are assumed true.

That being the situation, the Minnesota system of education was very similar to California school districts, which vary in taxable wealth from nearly none to $30,000 per child. The state equalization formula offsets only a portion of this imbalance.

This Court, as the California Supreme Court, looked to a constitutional test of equal protection when weighed against a state's establishment of a classification system. The classification in the instant case is based on the wealth of the school system and the U.S. Supreme Court has over the past fifteen years made it plain that wealth is a suspect classification. The suspect classification then impinges a truly fundamental right—here education. Under such a situation, the state bears the burden of demonstrating a compelling interest of its own to justify the classification.

The court noted that the state may have a compelling interest in emphasizing local control of education. However, if they do wish to accomplish this end, it is possible through other funding systems which do not violate the equal protection clause.

SPANO v. BOARD OF EDUCATION OF LAKELAND CENTRAL SCHOOL DISTRICT, No. 1051-1971, Supreme Court of New York, Westchester County

The plaintiff alleged that he is an aggrieved tax payer and parent and sought a judgment declaring unconstitutional the current system of financing education in New York.

The judge noted that he read *Serrano* v. *Priest,* 487 P.2d 1241 (1971), with considerable interest but was not persuaded by its arguments. He pointed out

that the U.S. Supreme Court in *McInnis* v. *Ogilvie,* 394 U.S. 322 (1969), and *Burress* v. *Wilkerson,* 397 U.S. 44 (1970), sustained the Circuit Court ruling which, in turn, upheld the constitutionality of two state school finance systems. The Court went on to note these were *per curiam* decisions not a denial of *certiorari.* Furthermore, these cases were well litigated by persons and organizations of repute, such as Ramsey Clark, former U.S. Attorney General. Thus, the Court was well alerted to the issues, with Mr. Justice Douglas dissenting in both cases. Obviously the appeals were not treated cavalierly.

Thus, the applicable law is contained in *McInnis* and *Burress.* If they are no longer controlling, it is the responsibility of the U.S. Supreme Court.

The Court went on to note that the *Serrano* decision was not reached on its merits and its reasoning was not necessarily persuasive.

Finally, the Court was persuaded that a decision for the plaintiff would render a grievous if not irreparable disservice to the public schools. Already, the market for school bonds was in a state of turmoil as a consequence of the action. Many school construction projects are in jeopardy. As the court said, "Unless and until the U.S. Supreme Court reverses or modifies *McInnis* and *Burress,* I see no legal virtue championed or laudable judicial purpose served by placing the sword of Damocles over school bond financing in this state for the next several years".

The motion to dismiss the complaint was granted.

RODRIGUEZ v. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, Civil Action No. 68-175-SA (December 23, 1971)

This case is the first decision on its merits wherein a three judge federal court held unconstitutional a state system of financing public education.

Plaintiff in this action brought this suit on behalf of Mexican American school children and their parents who live in the Englewood Independent School District.

The Texas school financial system works as follows:

A school district, in order to provide its share of the Minimum Foundation Program to satisfy bonded indebtedness for capital expenditures and to finance all expenditures above the state minimum, is empowered to levy and collect *ad valorem* taxes. The State does provide funds to school districts under its Minimum Foundation Program. However, combined local and state funds ranged in the school year 1967 from $231 per pupil in Edgewood to $543 in nearby Alamo Heights. Market value of property per student varied from $5,429 in Edgewood to $45,095 in Alamo Heights. According to a survey of school districts for the entire State of Texas, the richest ten enjoyed an equalized tax rate per $100 of only $.31 while the poorest four districts had a rate of $.70.

Yet the low rate in rich districts yielded $585 per child and the high rate in poor districts yielded but $60 per child. There was expert testimony given that the current system tends to subsidize the rich at the expense of the poor.

The framework used by Texas in providing education for its citizens thus draws distinction between citizens based on the wealth of the district in which they reside. The plaintiff contended that this distinction or classification vio-

lates the equal protection clause of the Fourteenth Amendment, while the State urged the court to find that there is a reasonable relationship and a legitimate state purpose in the classification system.

The Court noted that more than mere rationality is required to maintain a State classification which affects a fundamental interest or which is based on wealth, and both factors are present in this case. The fundamental nature of education was brought forth by the U.S. Supreme Court in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and continues. In addition, the court has said, "lines drawn on wealth are suspect". *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 668 (1965).

The Court went on to note that the State not only was unable to demonstrate a compelling State interest for its classification, but it failed even to establish a reasonable basis for them. While it was urged that the present system fostered decision making at the local level, as a matter of fact the financial limitations imposed on the districts because of their lack of wealth prevents the accomplishment of this result.

The Court went on to find that neither *McInnis* v. *Shapiro,* 394 U.S. 322 (1969), nor *Burress* v. *Wilkerson,* 397 U.S. 44 (1970), was binding. Both of these cases sought to achieve adequate educational financing on the basis of pupil needs—a very nebulous concept. The plaintiff in the instant case only requests fiscal neutrality when the quality of education be not a function of wealth except that of the wealth of the entire State.

Finally, the Court, while agreeing with the defendants that it cannot act as a "super legislature," said it can determine a legislative act in violation of the U.S. Constitution. Those sections of the Education Code setting up this discriminatory financing system were then declared unconstitutional. The Court's mandate was stayed for two years in order to afford the Legislature time to comply with the Constitution.

PITTS v. DEPARTMENT OF REVENUE, No. 69-C-260, U.S. District Court, Eastern District of Wisconsin

Plaintiffs contend the State of Wisconsin's grant of tax exemptions to organizations which discriminate in their membership on the basis of race constitutes state action and is in violation of the equal protection clause of the Fourteenth Amendment. Plaintiffs did not challenge the right of any private organization to discriminate; only the tax exempt status was in question.

The parties to the litigation agreed on the general principles to be applied, i.e., (1) the Fourteenth Amendment prohibits the State from fostering or encouraging racial discrimination, (2) the Amendment does not prohibit purely private discrimination nor does it require the State to assume other than a neutral position, and (3) the State can become involved in private discrimination to such an extent that its conduct is proscribed by the Fourteenth Amendment. The parties also agreed that the state legislation involved was not enacted with any purpose of fostering, encouraging or perpetuating racial discrimination.

Among the cases the District Court had to distinguish was *Walz* v. *Tax*

Commission, 397 U.S. 664 (1970). In that case, the U.S. Supreme Court had upheld tax exemptions for religious properties. Under the First Amendment, as applied to the states under the Fourteenth, tax exemptions were considered affirmative but not significant state action and therefore not unconstitutional. In short, this was an example of only minimal and remote involvement, thus falling within the constitutional concept of "benevolent neutrality".

The instant case however involves the right to equal protection of the law and such rights are accorded special significance where governmental or state action is in question. The court went on to adopt the reasoning of *Green* v. *Connally,* 330 F. Supp. 1150, decided by a three judge court in the District of Columbia on June 30, 1971, Civil Action No. 1355-69. The *Green* ruling reasoned as follows:

> There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War. That government interest is dominant over other constitutional interest to the extent that there is complete and unavoidable conflict.

Green distinguished the equal protection agreement with the ruling in *Walz* by pointing out:

> Tax exemption benefit is only minimal and remote involvement when compared to the kind of identification and support of religion that is prohibited under the Establishment Clause. But governmental and constitutional interest of avoiding racial discrimination in education institutions embraces the interest of avoiding even the 'indirect economic benefit' of a tax exemption.

Using the *Green* argument, the grant of a tax exemption to organizations which discriminate in their membership is significant state action encouraging discrimination and was enjoined.

ROBINSON v. CAHILL, Docket L 18704-69, Superior Court of New Jersey (January 19, 1972)

This litigation is similar to ones in other states in that it challenges the constitutionality of the system of financing elementary and secondary public schools. Plaintiffs are residents, tax payers and officials of Jersey City, Paterson, Plainfield, East Orange and the Township of Berlin. Defendants include the Governor of New Jersey, the State Treasurer, the State Attorney General, President of the New Jersey Senate, Speaker of the New Jersey House, the Commissioner of Education and the State Board of Education.

Factually, the discrimination based on wealth as well as the wide variations of per pupil expenditures was well documented. In fact this long decision goes into tremendous detail about the fiscal status of education in New Jersey. Of particular note in this case is that it is based in part on several portions of the New Jersey Constitution of 1947.

Article I, paragraph 1 provides:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and

liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

Uniformity in taxation is required by Art. VIII, sec. I, par. 1(a):

> Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value, except as otherwise permitted herein, and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.

The conclusion of court was that, using the rationale of *Serrano* and *Rodriguez,* the current system of school finance in New Jersey violated both the State and Federal Constitutions.