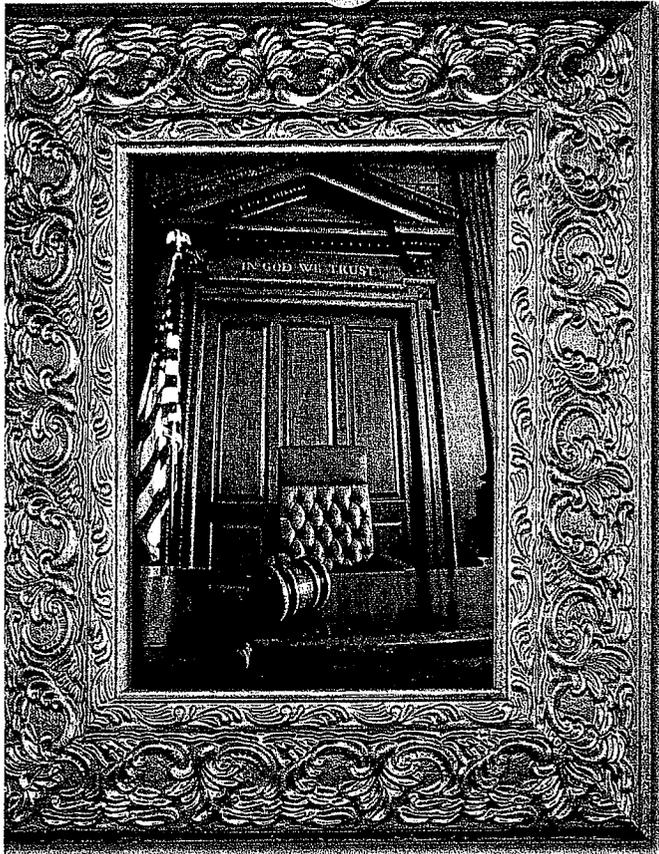


The Big Picture



Five legal issues have changed the face of public schooling in the United States. While federal courts led the way in the earlier cases, the key players now are state courts, state legislatures, and Congress.

BY JAMES E. RYAN

The last half-century has seen dramatic changes in the legal landscape for schools. It is a daunting task, and one that requires some subjective judgments, to generate a list of the most important legal developments. However, five legal developments have had, and will soon have, the most significant systemwide effects on schools and school districts: desegregation, school finance reform, school choice, No Child Left Behind, and publicly funded preschool.

DESEGREGATION

Brown v. Board of Education, decided in 1954, remains the most famous case in education law.¹ *Brown* struck down laws that segregated students by race, declaring that separate schools were inherently unequal. It only hoped that the internment of intentional seg-

regation would inevitably lead to integrated schools. That hope proved hollow.

Little integration occurred during the first decade after *Brown*, as Southern states either ignored the decision or engaged in token compliance. Integration increased with the advent of busing and passage of the 1964 Civil Rights Act, which allowed the federal government to intervene in desegregation cases and withhold funds from schools that refused to integrate. But those gains have disappeared. Schools today are as segregated as they were before busing. Currently, more than 70% of black and Hispanic students attend predominantly minority schools; more than 30% attend schools that are greater than 90% minority.²

The Supreme Court itself is partially to blame. Just a few years after authorizing busing, the Court ruled in 1974 that the buses, absent extraordinary circumstances, could not cross district lines.³ This decision effectively halted school desegregation because it meant suburban students would not be bused with city students. Because most cities, by the mid-1970s, were predominantly minority and most suburbs pre-

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dominantly white, busing within single school districts accomplished little integration.

In the 1990s, the Court continued to cut back on court-ordered desegregation, issuing three decisions that essentially told lower courts to dismantle desegregation decrees.⁴ Many districts, freed from court oversight, returned to neighborhood school assignments, which increased school segregation because of continued residential segregation. However, a few districts continued efforts to integrate schools even after being released from court oversight, as did other districts that were never under any order to integrate.

Even these sporadic, voluntary efforts proved too much for the Court by 2007. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court, in a fractured opinion, established fairly strict limits on the ability of school districts to use race when assigning students, even when the purpose is to integrate rather than segregate schools.⁵ The decision left some room for districts interested in promoting racial integration, but these districts essentially must use indirect, race-neutral means to achieve integrated schools.

Most school districts, even before *Parents Involved*, had given up on racial integration, either because the goal wasn't popular or because it was impossible in light of student demographics. *Parents Involved* will only enhance this trend. More than a half-century after *Brown*, court-ordered desegregation is all but dead, and voluntary integration plans are hamstrung by legal requirements that make it easier to leave racially isolated schools alone than to do something about them.

The failure to produce schools integrated by race has also meant the continued existence of schools of concentrated poverty. These schools, especially those in urban areas, have remained the single greatest challenge in education law and policy, and all of the reforms below are in one way or another responses to the seemingly intractable problem of concentrated poverty.

SCHOOL FINANCE

School finance litigation began in the late 1960s, at a time when many advocates were growing frustrated with the slow and uneven pace of school desegregation. When the litigation began, spending differences among school districts were fairly dramatic, with some spending many times more per pupil than others. In the earliest challenges, school finance reformers argued that unequal school funding violated the federal Constitution. These challenges came to a fairly abrupt halt in 1973, when the Supreme Court, in *San Antonio v. Rodriguez*, rejected a challenge to unequal school funding in Texas.⁶

Undeterred, advocates turned to state courts and argued that state constitutions — all of which contain provisions guaranteeing a right to education — required school finance reform. The fight continues to this day. All but a handful of states have seen their funding systems challenged in court, with mixed results. The highest courts in roughly 20 states have struck down their funding systems, while about the same number have upheld theirs.

Litigants have offered different theories and requested different remedies in these cases, with some focusing on equalizing funding and others on securing adequate funding. The line between equity and adequacy is often blurred, however, as both courts and advocates seem most interested in securing some kind of rough comparability of resources among districts. Regardless of the theory pressed or remedy requested, moreover, most courts have been reluctant to press legislatures to do much more than eliminate glaring disparities or gross inadequacies in funding.⁷

Court victories haven't always led easily or quickly to legislative reform. Many legislatures have proven recalcitrant, prompting return trips to court. One commentator compared school finance litigation to a Russian novel: "It's long, tedious, and everybody dies in the end."⁸ In New Jersey, for example, the state supreme court has issued over 15 separate opinions in school finance litigation that has spanned more than three decades.

Although there are some exceptions, school finance litigation has been somewhat disappointing. Funding has increased and disparities have been reduced in most states where finance litigation has succeeded, but the increased funding has not led to much improvement on the ground. Exactly why this is so remains the subject of heated debate. Some argue that the funding increases have been too modest, while others suggest the money has been spent unwisely. Still others believe that more funding is not the answer. Whatever the precise reason, school finance litigation has done relatively little to increase achievement levels or close achievement gaps.

This doesn't mean school finance litigation will end anytime soon. It will continue until courts grow tired of prodding legislatures or until legislatures decide on their own to provide all schools with the resources they need to succeed.

SCHOOL CHOICE

Although many assume it is a new invention, school choice has been around in various guises since at least the early 1960s, when Southern states used

freedom-of-choice plans as an attempt to circumvent desegregation. Currently, school-choice plans come in four main varieties: intradistrict and interdistrict public school choice, charter schools, and voucher plans. Vouchers for private schools generate the most controversy and attention, but they represent a tiny portion of the school-choice universe. At the moment, only four publicly funded voucher programs exist, and each program targets only a small slice of students. Roughly 35,000 students currently receive publicly funded vouchers, which represents less than 0.1% of all public school students.

Most students who exercise school choice do so within the confines of the public school system, and they are able to choose schools only within their home districts. Roughly 5 million students participate in intradistrict school choice plans, which dwarfs the number of students exercising other forms of choice but still represents less than 10% of all students. Interdistrict school choice is an option, at least on paper, in most states, as all but seven have open enrollment plans that allow students to cross district lines to attend school. However, most of these plans have restrictions and obstacles that work to limit participation. Less than 1% of all students cross district lines to attend public school.

Charter schools are the most recent arrival on the school-choice scene, and they have proven quite popular. Charter schools are a cross between a public and private school and are seen by many as a halfway station between public school choice and voucher programs. Although details vary by state, charter schools in general are freed from some regulations that govern traditional schools in exchange for greater accountability for results. Forty states and the District of Columbia allow charter schools, and more than a million students attend them.

Courts have played a secondary role in the school-choice context. Whereas courts ordered desegregation and some have ordered funding reform, no court has ordered states or districts to adopt a school-choice plan. Instead, the legal questions have to do with whether certain forms of school choice are allowed, not whether they are required.

The central legal challenge has been to the use of vouchers at religious schools. In 2002, the Supreme Court upheld this use of vouchers, ruling in *Zelman v. Simmons-Harris* that voucher programs did not breach the wall of separation between church and state.⁹ Challenges have continued at the state level, given that many state constitutions erect stricter limits on providing assistance to religious institutions.

Additional challenges, relying on more obscure provisions in state constitutions relating to the provision of public education, have also been raised. Two have succeeded, and voucher plans in Florida and Colorado were repealed as a result.

The biggest challenges facing voucher programs are political, not legal. Vouchers haven't proven very popular. Voucher advocates blame teachers' unions for the paucity of voucher programs, but vouchers aren't very popular among suburban voters, many of whom already exercised school choice when they bought their homes. Indeed, school-choice programs in general, including charter schools, are more popular in city districts than in suburban ones, and most school-choice plans are structured to ensure that suburban districts aren't forced to accept transfer students from the city. The No Child Left Behind Act, for example, grants students the right to transfer from "failing" schools but limits choices to schools within the same district.¹⁰ For the foreseeable future, one should expect to see choice largely confined to urban districts and to see slow but steady growth of charter schools and public school choice plans.

NO CHILD LEFT BEHIND

The standards and testing movement traces back to the 1983 publication of *A Nation at Risk*, which dramatically warned that America's educational foundations were being eroded by a "rising tide of mediocrity."¹¹ States responded by adopting academic standards to guide education and raise expectations. The federal government became involved in 1994, and it essentially took over the field in 2002 with the passage of No Child Left Behind (NCLB).

NCLB is perhaps the most important — and certainly the most intrusive — piece of federal education legislation in our nation's history. NCLB requires states to establish "challenging" academic standards, to test all students regularly to see that those standards are being met, and to sanction schools that fail to meet testing benchmarks. It also requires schools to employ "highly qualified" teachers. The ultimate goal is for all students to reach proficiency levels on state tests by 2014; in the interim, states must set testing targets for all schools to reach.

The impact of NCLB is difficult to overstate. The law drives the curriculum and sets the priorities in schools and districts across the country. Its implementation has spawned countless controversies, some of which have made their way into court, others of which have been addressed by the Department of Education. It has brought useful attention to achieve-

ment gaps among different groups of students, and it has in some places helped raise expectations. At the same time, however, it has driven a number of schools to teach to the test, and it has perversely caused a number of states to lower their expectations in order to avoid the bad publicity and sanctions that attach to schools that fail to meet testing benchmarks. Whether the law has actually improved teaching and learning remains an open question.

NCLB also signified a much more forceful role for the federal government in setting education policy. In the past, the federal government had directed its funding and regulatory attention to students with special needs, such as poor and disabled students. NCLB, by contrast, affects all students and goes to the heart of the education enterprise. NCLB is overdue for reauthorization, and what will happen remains anyone's guess. The recently enacted stimulus package, which dramatically increased funding for education, suggests that the federal government will continue to play a central role in setting education policy.

PUBLICLY FUNDED PRESCHOOL

Access to publicly funded preschool looms as the next big issue in education law and policy. The federal government was the first to offer publicly funded preschool when it created the Head Start program in 1965. Over the last 15 years, however, state preschool programs have mushroomed. Public preschool programs now exist in 40 states and in the District of Columbia. More than 25% of all 3- and 4-year-olds attend publicly funded preschool, while another 25% attend private schools.¹²

Public support for increasing access to preschool is substantial and diverse, with groups from across the political spectrum lending their support. Access to preschool has also arisen in some school finance cases, in which plaintiffs have sought recognition of a right to attend preschool. The results have been mixed so far, and it's too early to identify a definite trend.

The popularity of preschool will soon collide with the reality of the economic downturn. Although a shortage of funds may curb the expansion of state programs, it's not too early to think of preschool, at least for 4-year-olds, as the new kindergarten. As access to preschool grows, questions of quality and control will increase in importance. Preschool carries benefits, especially to poor children, only when it is of high quality. Another open question is whether private providers, who now participate in publicly funded programs, will be pushed out if preschool programs expand. This issue hasn't generated the attention one

might expect given controversy surrounding school vouchers, but as preschool programs grow in size, the question of who can provide them will certainly receive more attention. Linger on still further in the background is the explosive issue of whether some states will or should require preschool attendance.

CONCLUSION

As the legal issues have changed over the last 50 years, the key legal arenas have also shifted. Federal courts, at the vanguard of school desegregation, no longer play a central role in education law. Much more important today are state courts, state legislatures, and Congress. As we head further into the 21st century, these institutions will likely remain the key players regarding laws and policies that exert significant systemwide effects on schools and districts. ■

NOTES

1. 347 U.S. 483 (1954).
2. The figures come from Erica Frankenberg, Chungmei Lee, and Gary Orfield, "A Multiracial Society with Segregated Schools: Are We Losing the Dream?" Cambridge, Mass.: Harvard Civil Rights Project, 2003. www.civilrightsproject.ucla.edu/research/reseg03/resegregation03.php.
3. *Milliken v. Bradley*, 418 U.S. 717 (1974).
4. *Board of Education v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Jenkins v. Missouri*, 515 U.S. 70 (1995).
5. 127 S. Ct. 2736 (2007).
6. 411 U.S. 1 (1973).
7. See generally, James E. Ryan, "Standards, Testing, and School Finance Litigation," *Texas Law Review* 86, May 2008, pp. 1223-1262.
8. Mark G. Yudof, "School Finance Reform in Texas: The Edgewood Saga," *Harvard Journal on Legislation* 28, Summer 1991, pp. 499-505.
9. 536 U.S. 639 (2002).
10. No Child Left Behind Act of 2001, Section 1116(b)(1)(A), (E).
11. National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* (Washington, D.C.: U.S. Department of Education, 1983).
12. See generally James E. Ryan, "A Constitutional Right to Preschool," *California Law Review* 94, January 2006, pp. 49-100.