



Uncommon Confusion

Washington Supreme Court strikes down charter schools

by JOSHUA DUNN

In September 2015, the Washington state supreme court became the nation's first to declare charter schools unconstitutional. A 6–3 majority struck down a 2012 ballot initiative, I-1240, which allowed the state to create up to 40 charters. In *Washington Education Association v. Washington State*, the court

maintained that it was merely following the state constitution. However, if applied consistently, the court's reasoning could throw the state's entire public education system into disarray. Since the court is not likely to apply its logic consistently, the ruling looks more like special-interest politics than constitutional fidelity.

According to the court, the initiative authorizing charters suffered from two constitutional problems: 1) charter schools are not “common” schools, because they are not controlled by school boards, and 2) charters would divert money reserved for common schools. The state constitution's education clause stipulates that “the public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established.” It also creates a “common school fund” that must “be exclusively applied to the support of the common schools.”

To justify its decision, the court relied on its 1909 ruling in *School District No. 20 v. Bryan*. That decision held that common school funds could not finance normal schools, which were training schools for common-school teachers. Using no constitutional or historical evidence, the *Bryan* ruling defined a common school as one that is under the “complete control” of the local school board. Complete control, it said, is “most important,” because voters have the right “through their chosen agents, to select qualified teachers, with powers to discharge them if they are incompetent.” Normal schools were ineligible for common school funds, since they were not controlled by local school boards. In *WEA*, the court held that charter schools suffer from the same constitutional infirmity: since they are governed by independent boards, they cannot be supported by the common school fund.

Relying on the 1909 ruling created a fundamental problem for the court: the state constitution nowhere requires “complete control” of common schools by local school boards. In fact, it delegates authority over schools to state officials and institutions. Most important, the superintendent of public instruction, per the constitution, has “supervision over all matters pertaining to public schools.” And the same education clause creating common schools gives the legislature the authority to provide for public schools.

The court's reasoning also threatens a variety of other programs, including tribal schools and schools for youth offenders. But most important, the ruling means that common school funding for high schools is unconstitutional. High schools constitutionally are not common schools and therefore should not receive money from the common school fund. When Washington's constitution was written in 1889, high schools were politically controversial, so the framers excluded them from the common school fund. One critic warned that high schools would create “an oversupply of young men and women with no knowledge of labor,” leaving thousands “to become lightning-rod agents, corn doctors, book canvassers, and corset peddlers.” Such critics wanted to reserve funding solely for common schools, that is, elementary schools. By 1897, fears of corset peddlers had subsided, and the legislature statutorily redefined high schools as common schools. That redefinition, however, was never constitutionally ratified, which means that state funding of high schools has technically violated the constitution for 118 years.

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Consistency should require the court to cut off funding for high schools, if asked. But who would ask? Charter schools, then, were clearly a political target of the plaintiffs, particularly the teachers union. Killing charters in their infancy prevents a pro-charter constituency from forming. Were constitutional fidelity its true motivation, the court could have saved charters by allowing the state to finance them out of the general fund. And if the court valued the ability to fire incompetent teachers, it should have celebrated charter schools, since they bypass the employment rules that hamstring traditional public schools.

Because the court's ruling threatens to unleash educational chaos, the state attorney general filed a motion to reconsider. The court refused, but agreed to strike one footnote. Charter-school supporters hope that action might allow the legislature to create an alternative funding mechanism, but since the court left the rest of its reasoning intact, such optimism seems unjustified.

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