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Constitutional Law—Right of Married High School Students to Engage in Extracurricular Activities.

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court[66] would place the burden of proof on the teacher and would respect nonrenewal decisions based upon minimal factual support and subtle reasoning. As such, these procedures would not eliminate the distinction between tenured and nontenured teachers, and would not significantly hinder the school board in its efforts to maintain a competent faculty.

Concerning the question of whether a protected interest is at stake, it seems elementary that the nonretention of a professor will have an adverse effect on his career. It also seems apparent from a reading of the fourteenth amendment and past cases that *all* liberty and property interests, no matter how minimal, are entitled to *some* form of procedural due process protection. The balancing process is utilized to determine what form of protection is required in each case, and it is in this balancing that the degree of actual or probable harm should be considered.

The majority requires that a teacher show, on a case-by-case basis, that he has in fact been adversely affected by a nonretention decision. Such a requirement will deny the educator his right to due process protection *prior* to a deprivation of liberty or property in many situations, because to show an adverse effect usually will require one to wait until retention actually fails to occur. The procedural protection formulated by the district court would have eliminated an area of constitutional uncertainty by guaranteeing prior due process in all teacher nonretention situations. This formulation should have been adopted by the Supreme Court.

RUSSELL W. PETIT

CONSTITUTIONAL LAW—RIGHT OF MARRIED HIGH SCHOOL STUDENTS TO ENGAGE IN EXTRACURRICULAR ACTIVITIES.

In March 1970, the Board of Education of the Fremont City Schools unanimously adopted a regulation, later amended and included in its Policy Handbook, which permitted married students to attend class but forbade them participation in school-sponsored extracurricular activities. On January 22, 1972, Albert Davis, age 18, married a 16-year-old girl who was allegedly carrying his child. Pursuant to the adopted rule, Davis, an honor student, was removed from the eligibility list for varsity baseball. Davis brought suit in United

66. 310 F. Supp. at 980.

States District Court for the Northern District of Ohio seeking an order restraining the board of education and school officials from excluding him from the school's extracurricular activities and seeking damages. *Held*: the effect of the enforcement of the regulations is to put an unendurable strain upon the plaintiff's marriage and constitutes an invasion of his marital privacy. *Davis v. Meek,* 344 F. Supp. 298 (N.D. Ohio 1972).

Nancy Kay Holt, a high school senior, was suspended from school for five days because of her marriage. Upon her return, she was allowed to attend classes but was barred from participating in any extracurricular activities. Holt sought an injunction in the United States District Court for the Middle District of Tennessee prohibiting school officials from enforcing the regulation against her. *Held*: the regulation infringes upon the plaintiff's right to marry by limiting her right to an education. *Holt v. Shelton,* 341 F. Supp. 821 (M.D. Tenn. 1972).

School boards have resorted to a variety of sanctions against married students in order to discourage teenage marriages. These include expulsion, suspension, and restriction on participation in extracurricular activities. The justifications advanced by the boards for the restrictions on extracurricular activities are fairly similar in all cases.[1] First, it is asserted that married students may be a bad influence on their fellow students. Thus, the boards attempt to minimize the contacts between married and unmarried students by implementing these sanctions. Secondly, the boards claim that married students need extra time for family affairs. This implies that married students cannot afford the time for extracurricular activities because it would place an undue burden upon their marriages. Thirdly, the married students' actions may gain acceptance by their peers. This is based on the assumption that students will emulate successful students or athletes. Lastly, the boards claim that married students assume adulthood and leave the less mature domain of student. However, this denies one of the functions of education—the development of mature adults. It cannot be assumed that because marriage is an adult institution that everyone who marries automatically becomes an adult. A married student can derive the same benefits as an unmarried student from extracurricular activities.

1. Cochrane v. Board of Educ., 360 Mich. 390, 103 N.W.2d 569 (1960) explicitly states the primary reasons usually advanced by boards of education to justify the regulations.

In the earlier cases involving these sanctions the courts rarely reached the issue of the students' rights. They merely considered whether school regulations were reasonable and were within the scope of the board's authority. The most extreme sanction employed by some school boards was expulsion of the student. In *McLeod v. State*,[2] the trustees of the public schools adopted an ordinance barring all otherwise eligible married students from school attendance. In a mandamus proceeding to compel the trustees to admit the plaintiff, the court held that the ordinance was unreasonable, arbitrary and void.[3] The court considered marriage a "refining and elevating" institution, even though the participants were minors.[4] A similar regulation was also held unreasonable in another case decided in the same year.[5] However, in this latter case, moral turpitude on the part of the married plaintiff was alleged by the board. Although accepting the proposition that the constitutional and statutory right to attend school was conditional upon reasonable moral standards, thus qualifying the unreasonableness of expelling married students, the court held that the evidence was insufficient to support the charge of immoral conduct and the expulsion of the plaintiff.[6] More recently, in *Board of Education of Harrodsburg v. Bentley*,[7] a school board regulation which provided for the expulsion of married students, subject to readmittance after one year, was invalidated because of its "sweeping advance predetermination" that all married students must be suspended.[8] The court recognized that the board was vested with broad power and authority to enforce reasonable rules and regulations. However, it found no allegation of scandal, misbehavior or sensation—disruptions which it believed necessary to support expulsion.[9] The court in *Harrodsburg* noted one case which supported that board's position.[10] In that case, the adopted rule required the expulsion of married students for the

2. 154 Miss. 468, 122 So. 737 (1929).
3. *Id.* at 474, 122 So. at 739.
4. *Id.* at 473, 122 So. at 738.
5. Nutt v. Board of Educ., 128 Kan. 507, 278 P. 1065 (1929).
6. *Id.* at 508, 278 P. at 1066.
7. 383 S.W.2d 677 (Ky. Ct. App. 1964); *accord,* Carrollton-Farmer's Branch Ind. School Dist. v. Knight, 418 S.W.2d 535 (Tex. Civ. App. 1967) (invalidating a three-week suspension); Anderson v. Canyon Ind. School Dist., 412 S.W.2d 387 (Tex. Civ. App. 1967) (striking down a similar provision).
8. 383 S.W.2d 677, 680 (Ky. Ct. App. 1964).
9. The court also took judicial notice of the increasing demand for a high school education. *Id.*
10. State *ex rel.* Thompson v. Marion Co. Bd. of Educ., 202 Tenn. 29, 302 S.W.2d 57 (1957).

remainder of the current term because of the "serious problem concerning marriage of high school students."[11] Great weight was accorded the principal's expert testimony which concluded that the presence of married students has an adverse effect on the efficient functioning of the school. As a result, the rule was held to have a reasonable bearing on the efficiency and progress of the school, which the board was statutorily empowered to promote.[12] However, the majority of the courts now hold that expulsion, or suspension for an extended period, of married students is an unreasonable abuse of a board of education's authority.

The validity of rules expelling unmarried pregnant students is a related issue that has been considered by some courts. In one such case,[13] the plaintiff attacked a board regulation requiring pregnant students to withdraw from school. The court found the primary purpose of the regulation was to insure the physical well-being of the student. It stated that the board could determine any adverse secondary effects which pregnant students might have on the school. These effects are impliedly the same as those which married students might create, but it is not clear if they are sufficient, in themselves, to support expulsion. However, the court did hold that the necessity for preserving the student's bodily safety was sufficient grounds for suspension and that the board did not exceed its discretionary powers in determining such necessity.[14]

School boards have occasionally attempted to compel married students to attend school. This policy illustrates the contradictory attitude of school boards toward married students. These cases arise when school boards seek to enforce the compulsory school attendance laws[15] against "delinquent" or "truant" married minors. In one such case,[16] the defendant sought to set aside a juvenile court judgment committing her to reform school for "delinquency" and "truancy." She claimed emancipation through marriage. In reversing the judgment below, the court held that the defendant was no longer a "child"

11. *Id.* at 30, 302 S.W.2d at 58.
12. *Id.* at 32, 302 S.W.2d at 59.
13. State *ex rel.* Idle v. Chamberlain, 390 Ohio Op. 2d 262, 175 N.E.2d 539 (C.P., Butler County 1961).
14. *Id.* at 265, 175 N.E.2d at 542.
15. *See, e.g.*, N.Y. EDUC. LAW § 3205(1)(a) (McKinney 1964) which provides: "In each school district of the State, each minor from six to sixteen years of age shall attend upon full time instruction."
16. State v. Priest, 210 La. 389, 27 So. 2d 173 (1946).

since she was not under parental control and that her marital obligations were inconsistent with the compulsory school attendance law.[17] Similarly, in a suit involving the conviction of parents for causing the delinquency of a child by participating in her illegal early marriage, it was stated that a married child cannot be forced to attend school.[18] In the case of *In re Rogers*,[19] the petition alleged that a married female student was in need of supervision because of her truancy. The court dismissed the petition by simply holding that the defendant was not in need of supervision.[20] However, there is some dispute as to whether this case supports the proposition that married students cannot be forced to attend school.[21]

A less extreme method of discouraging teenage marriages and minimizing the contact between married and unmarried students is the restriction of married students' participation in extracurricular activities. *State v. Stevenson*[22] involved the marriage of two 16-year-olds. The board of education had adopted a "Code of Ethics" which prohibited married students from engaging in extracurricular activities at the school. In a mandamus proceeding, the plaintiff attacked the regulation as unreasonable, arbitrary, and capricious. The court found the board's action to be within the broad scope of its discretionary powers.[23] It noted the high dropout rate among married students and the tendency of students to emulate the actions of peers perceived

17. *Id.* at 390-91, 27 So. 2d at 174. *See also In re* Goodwin, 214 La. 1062, 39 So. 2d 731 (1949) (married defendant arrested as a truant for refusing to attend school).

18. State v. Gans, 168 Ohio St. 174, 151 N.E.2d 709 (Sup. Ct. 1958), *cert. denied*, 359 U.S. 945 (1959). The court upheld the "causing delinquency" conviction by holding that no actual delinquency need be proven, only that the acts would tend to cause delinquency.

19. 36 Misc. 2d 680, 234 N.Y.S. 2d 172 (Family Ct., Schuyler County 1962).

20. *Id.* at 684, 234 N.Y.S.2d at 174. The court stated that the test for such cases was a balancing of the advantages of school attendance against the harmful effects of forcing married students to associate with fellow students. *Id.* at 682, 234 N.Y.S.2d at 173.

21. *See* Goldstein, *The Scope and Sources of School Board Authority to Regulate Students Conduct and Status: A Non-Constitutional Analysis*, 117 U. PA. L. REV. 373, 409 n.117 (1969). However, Professor Wade Newhouse has stated:

> [T]he only decision of the court was that under the Family Court Act it did not find respondent "a person in need of supervision." . . . [T]he court was simply exercising what it saw as its discretion to frame an appropriate order under the Family Court Act without regard to the meaning of Section 3205 [New York's compulsory attendance law].

W. Newhouse, Law and Public Education in New York State, ch. IV, at 108, Fall 1972 (unpublished, preliminary ed. distributed only to students of The Faculty of Law and Jurisprudence and The Faculty of Educational Studies, State University of New York at Buffalo).

22. 27 Ohio Op. 2d 223, 189 N.E.2d 181 (C.P., Butler County 1962).

23. *Id.* at 225-26, 189 N.E.2d at 185.

as "stars" or "heroes."[24] The court held that it was not an abuse of the board's powers to discourage teenage marriages or to prevent overburdening those marriages. Furthermore, it stated that the plaintiff had failed to sustain the burden of proof required to declare the regulation unreasonable.[25] In *Kissick v. Garland Independent School District,*[26] the board of education adopted a resolution restricting married students to the classroom and barring them from all athletics and honors. The plaintiff sought an injunction against the board alleging that the resolution was arbitrary, a denial of due process, and violative of the equal protection clause and public policy, as well as the retroactivity clause of the Texas Constitution.[27] The plaintiff was anticipating a football scholarship to college. The court found that the prohibition against retroactivity applied only to vested rights and that the plaintiff's scholarship was only an expectancy or conditional right.[28] Therefore, it was not a right subject to constitutional protection. The court held that participation in extracurricular activities depended upon reasonable conditions established by the board and that, in this case, the resolution had a direct relation to a valid purpose.[29] Facing an identical situation, another court held the question moot because the student had graduated.[30] However, in so holding, the majority believed that the reasons for the rule were insufficient and that the board had acted unreasonably.[31] In another attack on an extracurricular activity restriction, the plaintiff in *Starkey v. Board of Education*[32] attempted to expand the scope of the state constitutional requirement that free, uniform schools shall be open to all children, to include availability of extracurricular activities to all children. The court refused to accept this broadened definition of education and held that extracurricular activities are a privilege, participation in which is subject to regulation by the board.[33] In response to a charge that a similar

24. *Id.*

25. *Id.* at 227, 189 N.E.2d at 186.

26. 330 S.W.2d 708 (Tex. Civ. App. 1959).

27. TEXAS CONST. art. I, § 16.

28. Kissick v. Garland Ind. School Dist., 330 S.W.2d 708, 711 (Tex. Civ. App. 1959).

29. *Id.* at 711-12.

30. Cochrane v. Board of Educ., 360 Mich. 390, 407, 103 N.W.2d 569, 583 (1960).

31. *Id.* at 336, 103 N.W.2d at 575.

32. 14 Utah 2d 277, 381 P.2d 718 (1963).

33. *Id.* at 282, 381 P.2d at 721. The court attempted to clarify the matter by stating that the plaintiff had a right to attend classes and to get married, but he had no right to compel the board to exercise its discretion to his advantage. *Id.*

exclusion rule violated equal protection, another court held that the board of education did not act unreasonably or abuse its powers by enacting the rule.[34] It held that the married-unmarried classification was not invidious discrimination which required a higher degree of justification under the fourteenth amendment.[35]

The instant cases extend the scope of judicial review beyond the standard of mere reasonableness of board action employed in the earlier cases. The courts in *Davis* and *Holt* required a showing of a compelling state interest to justify the infringement of the student's constitutional rights. The *Holt* court relied on both *Loving v. Virginia,*[36] which held that marriage is a fundamental right, and *Brown v. Board of Education,*[37] which held that an education is also a fundamental right. Recognition of these rights as fundamental established the court's standard of review under the equal protection clause of the fourteenth amendment. This standard is: any infringement by a state of a fundamental right is "subject to the closest judicial scrutiny" and will be held impermissible unless *necessary* to promote a *compelling* state interest.[38] The court stated that the evidence in *Holt* failed to show the promomotion of *any* state interest.[39] It is indeed curious, in light of the valid purpose of discouraging teenage marriages recognized by other courts, that this court could not find any state interest. Instead, the court determined that the sole purpose of the regulation was to punish married students. Therefore, lacking a sufficient state interest, it held that the regulation violated the plaintiff's right to due process and equal protection. The weakness of the decision lies in its brevity and its failure to give any weight to the state's policy of discouraging teenage marriages, recognized in other decisions. Certainly, *some* purpose is served by these regulations, regardless of how minute. Yet, all the emphasis is given to the fundamental rights of the students without any counterbalancing weight. This approach distorts proper perspective of the opposing interests.

34. Board of Dir. of Ind. School Dist. of Waterloo v. Green, 259 Iowa 1260, 1265, 147 N.W.2d 854, 858 (1967).

35. *Id.* The court also stated that although marriage is favored by public policy, it is so only at the proper age. *Id. Accord,* Estay v. LeFourche Parish School Bd., 230 So. 2d 443 (La. App. 1969) (holding participation in extracurricular activities within the discretion of the board and valid if reasonable and uniformly applied within the classifications created).

36. 388 U.S. 1 (1967).

37. 347 U.S. 483 (1954).

38. Holt v. Shelton, 341 F. Supp. 821, 822 (M.D. Tenn. 1972).

39. *Id.*

On the other hand, the court in *Davis* found the state's purpose in enacting the regulation to be "laudable."[40] It stated:

> [T]he plaintiff has acted wrongly, and the rules adopted by the defendants are based upon a very reasonable desire to deal with a social problem of great complexity and difficulty.[41]

The court rejected the plaintiff's contention that he had a legal right to marry as being based upon a misreading of *Griswold v. Connecticut*,[42] which places marital privacy, not the right to marry, "within the penumbra of the specific guarantees of the Bill of Rights. . . ."[43] Although the court refused the plaintiff's contention, it did recognize that:

> [T]he plaintiff did legally get married, without in doing so violating any law of the state. He had thus attained a status where his marital privacy might not be invaded by the state, even for the laudable purpose of discouraging other children from doing what he did.[44]

In addition, the court found that the rule was not even achieving its purported purposes of discouraging teenage marriage and reducing the resultant high dropout rate.[45] It also concluded that, since *Brown v. Board of Education*,[46] extracurricular activities are "an integral and complementary part of the total school program"[47] to which the plaintiff has a fundamental right. Finally, the court gave no weight to prior state cases[48] which upheld the validity of similar rules, since they were decided prior to *Tinker v. Des Moines Independent Community School District*.[49] In that landmark decision, Mr. Justice Fortas stated:

> School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our

40. Davis v. Meek, 344 F. Supp. 298, 302 (N.D. Ohio 1972).
41. *Id.* at 299.
42. 381 U.S. 479 (1965).
43. 344 F. Supp. at 299-300.
44. *Id.* at 300.
45. *Id.* at 300-01.
46. 347 U.S. 483 (1954).
47. 344 F. Supp. at 301.
48. *See, e.g.*, Cochrane v. Board of Educ., 360 Mich. 390, 103 N.W.2d 569 (1960); Kissick v. Garland Ind. School Dist., 330 S.W.2d 708 (Tex. Civ. App. 1959).
49. 393 U.S. 503 (1969). The district court in *Davis* recognized:

> [T]here is no parallel between the problems of specific First Amendment rights involved in that decision and the matter of . . . marital privacy involved here.

344 F. Supp. at 301.
However, the court accepted the dicta of *Tinker* as applicable here.

> Constitution. They are possessed of fundamental rights which the State must respect.[50]

Relying upon this authority, the *Davis* court concluded that enforcement of the board's regulation had the effect of placing "what may be an unendurable strain upon the plaintiff's marriage."[51] It felt compelled to grant a preliminary injunction to protect the plaintiff's marital privacy as well as his right to an education, pending a final hearing of the case.[52]

The *Davis* court weighted the opposing interests more realistically than did the *Holt* court. However, in light of *Tinker* and *Griswold,* it held that the state's interest was not sufficiently compelling to contravene the fundamental rights of the plaintiff. Furthermore, the court found that the effect of the rule was to "punish the one who has not been deterred at all"[53] with the limited expectation of deterring other students. Thus, "[w]ith real sorrow"[54] it struck down the rule.

Holt and *Davis* reflect the expanding contours of the rights of students.[55] The courts in the earlier state cases emphasized the broad administrative discretion with which boards of education are endowed. Thus, the rules were only required to meet a standard of reasonableness in attaining a permissible state objective. Discouraging teenage marriages was viewed as a permissible state objective, and restrictions on extracurricular activities of married students was viewed as a reasonable method of attaining that goal. However, the courts in the instant cases recognized that these restrictions interferred with fundamental rights of married students. Therefore, the standard of review shifted to the necessity that the action promote a compelling state interest. The courts in *Holt* and *Davis* found the states' interest insufficient in com-

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50. Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 507 (1969). The *Davis* court also cited *Tinker:*

> Certainly 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.

344 F. Supp. at 301.

51. 344 F. Supp. at 302.

52. *Id.*

53. *Id.*

54. *Id.*

55. For other discussions of the rights of students, *see* Bolmeier, *Board of Education's Right to Regulate Married Students,* 1 J. FAMILY L. 172 1961); Goldstein, *Reflections on Developing Trends in the Law of Student Rights,* 118 U. PA. L. REV. 612 (1970); Knowles, *High Schools, Marriage, and the Fourteenth Amendment,* 11 J. FAMILY L. 711 (1972); Annot., 11 A.L.R.3d 996 (1969).

parison to the harm done to the students' rights to an education and to marital privacy and accordingly struck down the restrictions.

Although adjudication of the instant cases at the district court level may limit their precedential value, the ramifications of their holdings are significant in several aspects. They reaffirm that students are "persons" with constitutional rights, as first recognized in *Tinker*. In addition, *Davis* and *Holt* extend the scope of those constitutional rights into an area in which they were previously unrecognized by the courts, that is, married students also have a right to marital privacy and to a complete education, including extracurricular activities.

The instant cases also illustrate the diversity of opinions as to the purpose of education and the function of the schools. Courts very rarely engage in a discussion of a philosophy of education generally or of the philosophy which is the basis for their decisions in school law cases. The legal standards which are explicit in judicial determinations are certainly important, but the court's implied perceptions of the purposes of education and the functions of the schools are of deeper and more far-reaching significance. The *Davis* court believed the board's action was "laudable" but found itself constrained by constitutional doctrine to strike down the regulation. Implied in its belief is the assumption that the school boards may properly determine and impose their conception of public policy and social values upon students. Thus, the court assumed that one proper function of the schools is the promotion of the socialization of the students, or in other words, the promotion of uniform acceptance of perceived social standards by the students; in this case social disapproval of early marriage. This philosophy is reflected in many of the earlier state cases. However, rather than relying strictly on constitutional doctrine to resolve the conflict between school board authority and student rights, the courts may find it more useful to reexamine their educational philosophy. No one will dispute that the school can go to great lengths to discourage overtly anti-social behavior in general. These measures implement social values that society requires for its own protection. On the other hand, the restrictions on married students reflect social preferences that society does not require for its own protection and which boards should have no authority to promote. These restrictions, in reality, attempt to protect or deter unmarried students from tragic marriages and from the increased probability that they will drop out of school after marriage. Although the boards may view the rules as beneficial

to the students, the students may perceive these rules as oppressive. Therefore, the rules implement social preferences, not social absolutes, and should not be under the control of the boards. Furthermore, the restrictions on extracurricular activities, by definition, apply to students already married and still in school. The *Davis* and *Holt* courts recognized this paradox of punishing students after the fact of marriage but questioned the means, not the ends, of the rules. Therefore, an alternative view of the function of schools in the socialization of students is that the boards of education should implement only those social values that directly affect the welfare of society and will prepare the student to function in society.

Lastly, it is submitted that a more humane and useful approach to the problem of teenage marriage may be for the schools to create programs that will educate all students on the responsibilities of marriage. This approach will not only attack the problem more directly and efficiently but will also provide future guidance to the students when they finally leave school.

CARL R. REYNOLDS

CRIMINAL LAW—FACULTY MEMBER ENTERING SCHOOL BUILDING DURING TEACHERS STRIKE FOUND GUILTY OF CRIMINAL TRESPASS AND RESISTING ARREST.

During the middle of October, 1968, New York City was in the grips of its third teachers' strike in a month. Staged by the United Federation of Teachers (UFT), this strike, which was later declared illegal,[1] kept more than a million children out of public schools for over a month. Like the two preceding walkouts, it was basically a result of the city's attempt to decentralize its schools. The city had made several moves to set up experimental "demonstration" districts in which a decentralization plan could be tested under set guidelines. During this period deep and angry splits began developing among whites, blacks, and Puerto Ricans over such issues as hiring, firing, transferring, teacher accountability, minority principals, and expulsion of students. Frustrated by the state legislature's failing to back

1. *See* Rankin v. Shanker, 25 N.Y.2d 780, 250 N.E.2d 584, 303 N.Y.S.2d 527 (1969). For two versions of the events in New York City during this time, see B. CARTER, PICKETS, PARENTS AND POWER (1971); M. MAYER, THE TEACHERS STRIKE (1969).