

(Intro music)

Kirk McDaniel: There is no institution in American life that has a far-reaching and outsized role in communities quite like the public school system. You may have very well attended a public school at some point in time, and if those days have long since passed, then maybe it's your kids lining up for the bus, schoolbooks in one hand and trumpet case in the other. Don't have kids? Well, your hard-earned tax dollars are shipped off to fund the inner workings of your schools. Point is, you've got a stake in the future of public education. Welcome to Sidebar, a podcast by Courthouse News. I'm your host, Kirk McDaniel. In this episode, reporter Kelsey Reichmann takes us back to the classroom to closely examine the rocky history of public education in America, the school choice movement and the effort to get religion back into the classroom. Schools and education have been having a moment under the magnifying glass these past couple of years. Isn't that right, Kelsey?

Kelsey Reichmann: Yeah, that's right. Whether it's the books on school library shelves or what's being taught in classrooms, there's a newfound interest in how we educate. Headlines across the country tracked contentious fights about everything from how educators talk about civil rights to the way administrators permit student identities to be recognized on school grounds.

KM: Yeah, I've written a fair bit of those headlines myself, covering the Legislature here in Texas.

KR: When you think about it, it makes a lot of sense that public schools sit on the front lines of all the biggest issues in society. Democracies don't exist without an educated electorate, plain and simple. So, it makes sense that how we educate can get heated, particularly in a time of hyper-partisan politics. I spoke to Derek Black, professor at the University of South Carolina's School of Law, who studies the intersection of public education and constitutional law. He also wrote the book "Schoolhouse Burning: Public Education and the Assault on American Democracy." Black describes public education as not only a core function of democracy, but also an important government responsibility.

Derek Black: This country is founded on the sort of radical idea that regular people should control democracy. But if you're going to let regular people control democracy, they have to be able to cast their ballot intelligently, and only a public school system can ensure that for everyone.

KR: Besides just simply educating future voters about reading and writing, public schools also serve as community builders for the common good.

DB: One of the core functions of the public school system is to build community around the common good, right? To understand that we are all in this democratic project together, that we may disagree about a lot of stuff, but that we have to come together around central values, we have to promote those values, have to keep the tolerance, and that we need to simply interact with one another.

KM: Schools haven't always been a place where tolerance proliferated. Until 1954, schools were racially segregated under state laws. The Supreme Court upheld racial segregation as constitutional in its 1896 ruling in *Plessy v. Ferguson*. For nearly 60 years, Black and brown people were treated as second-class citizens under the doctrine of separate but equal.

KR: This unjust system began to unravel when, in 1951, Oliver Brown, a Black resident living in Topeka, Kansas, sued the Board of Education after it refused to enroll his daughter in the school closest to their home. Twelve other families joined the suit, and their case worked its way up to the United States

Supreme Court where, in 1954, the justices unanimously ruled that separate is never equal, ending legal segregation. *Brown v. Board of Education* was not only a bellwether for American society, but for the mission of public education. Here's Black again.

DB: The public school system is doing two incredibly important things. One, it is there as a government responsibility to ensure that voters are prepared to exercise responsibility of citizenship. But number two, it's there to promote good citizenship values and to bring together people of different religions, different socioeconomic status, different gender and different race together for sort of one common vision.

KM: Racism is a disease that cannot be cured with a Supreme Court ruling alone. That is most evident in the hateful and at times violent response to the ruling, especially in the South.

KR: Resistance to the court's ruling in *Brown* was fierce, most notoriously in Arkansas, where the governor ordered the National Guard to block a high school entrance to prevent nine Black students, later known as the Little Rock Nine, from entering. Less widely known, though, were the lower profile efforts to avoid desegregation. Some segregationists used the work of libertarian economist Milton Friedman to advance their cause. Friedman's beliefs centered on choice, allowing the market to decide which product, or in this case schools, were best. The idea became the backbone of efforts to resist, if not overturn, *Brown*. Steve Suitts, an adjunct instructor at Emory University and founding director of the Alabama Civil Liberties Union, has written extensively about these efforts, including his book "Overturning Brown: The Segregationist Legacy of the Modern School Choice Movement." Here's Suitts.

Steve Suitts: One of the coincidences of history back in 1954-55 was that while the segregationists in the South were plotting and building up strategies to overturn *Brown*, economist Milton Friedman, libertarian economist Milton Friedman was also thinking about this whole notion of choice and how he believed that government should in fact allow in public schools that would be parent choice, even if the parents decided to discriminate.

KR: Alabama Governor George Wallace took up this campaign.

George Wallace: And I say segregation now, segregation tomorrow and segregation forever.

KR: White parents saw the school choice movement of this time as a way to avoid sending their children to school with Black children. While public schools were being forced to integrate, however slowly, private schools did not have to play by the same rules.

KM: So, how do school vouchers come into this picture?

KR: Private schools aren't free. While some parents would have been able to shell out the extra cash, others either couldn't or didn't think they should have to. School vouchers take money from public schools and allow parents to use it elsewhere. Only a few months after the *Brown* decision, Alabama created the Boutwell Committee, the first strategy group to propose a full plan around private school vouchers. The committee was named after Alabama Lieutenant Governor Albert Boutwell, who presided over the committee on segregation in public schools. Boutwell would pass a Pupil Placement Act designed to maintain segregation.

KM: We know schools eventually integrated. How did we get there?

KR: Civil rights groups like the ACLU and NAACP Legal Defense Fund filed lawsuits in the 1960s and the 1970s to challenge public schools with segregationist policies. While segregationists eventually lose their fight, another group was looking to capitalize on their strategy. We see a resurgence of the school choice movement during the Reagan administration. The effort to use school choice to hold on to segregation failed, but another path emerged. Religious conservatives saw school choice as a way to get public funds for religious education.

KM: And how was this received by the Supreme Court?

KR: Not well. Immediately, advocates looking to lower the wall between church and state and public education faced some big losses. In 1962, the justices ruled in *Engel v. Vitale*, finding it was unconstitutional for state officials to impose official school prayers in public schools. Then, in 1983, the Supreme Court ruled in *Bob Jones University v. The United States*, finding that the government could prohibit race discrimination at the expense of the First Amendment's free exercise clause.

KM: But of course that was a Supreme Court led by Chief Justice Earl Warren, a stark contrast, if you will, to the current Supreme Court. Right?

KR: Yes, the tables really begin to turn in 2002 with Chief Justice William Rehnquist, 5-4 ruling in *Zelman v. Simmons-Harris*. The case concerned Ohio's pilot project scholarship program that gave vouchers to public, private and religious schools. Rehnquist said the voucher program did not violate the establishment clause.

KM: For a refresher, under the First Amendment, the establishment clause prohibits the government from establishing a religion.

KR: I talked to Rachel Laser, the president and CEO at Americans United for Separation of Church and State. Laser said *Zelman* was really where the Supreme Court started to shift its thinking on taxpayer funds going to religious schools.

Rachel Laser: In that case was where the key fiction was established with regard to vouchers, that somehow parents choosing where to send their kids with government funding, even if they were choosing religious education, was not a church-state separation violation. So, that's where that fiction sort of was first established. The court said because parents are the ones who are making the choice, the government funding is going to parents who are then deciding where to give the money that that was not a violation of church state separation, even though taxpayer funding was still going, though, indirectly, to fund religious education.

KR: Then, as we enter into the era of Chief Justice John Roberts, we have *Trinity Lutheran Church of Columbia v. Comer* in 2017. The preschool and daycare included daily religious instruction in its programs. Trinity Lutheran applied for a Missouri program that would provide funds to resurface school playgrounds. However, the state denied its application because Missouri's constitution prevents taxpayer money from funding religious causes. The school sued, arguing the decision violated the First Amendment. The Supreme Court sided with the school in a 7-2 ruling, finding that excluding churches from an otherwise neutral and secular aid program violated the Constitution.

RL: So, they said, when a government program said it's actually against our state and federal Constitution to give these federal funds to religion, right, which, by the way, protects religion, too, from government

interference, let's not miss that point. But what the court did in *Trinity Lutheran*, as they said, that move, which is actually in keeping with our Constitution and our many state constitutions' church-state separation protections would actually be religious discrimination against religious groups. You've got to allow religious entities to take part in these government funding programs.

KR: The trend of wins for religious schools from the Roberts' court continues in 2020 with *Espinoza v. Montana Department of Revenue*. Mothers who wanted tax credit scholarships for their children to attend a Christian school would prevail in a 5-4 ruling. Here, the court said that states could not provide funding for education generally, while prohibiting funding for religious schools.

KM: Wait, didn't the court rule something very similar in the *Trinity Lutheran* ruling?

KR: Kind of. There's a very important distinction. The *Trinity Lutheran* case was about a preschool who wanted money for its playground. There's a disconnect between the taxpayer money actually going towards religious instruction. In *Espinoza*, that disconnect doesn't exist. *Trinity Lutheran* was a 7-2 ruling with Justices Stephen Breyer and Elena Kagan in the majority. Breyer and Kagan then dissent in *Espinoza*. In his dissent, Breyer says the establishment clause forbids government support for religion. He goes on to question the limits of the court's rulings. Here's a portion of Breyer's dissent.

KM: How would the majority's rule distinguish between those states in which support for the charter schools is akin to public school funding and those in which it triggers a constitutional obligation to fund private religious schools?

KR: In 2022, the Supreme Court would issue a 6-3 decision in *Carson v. Makin*, finding that Maine's non-sectarian requirement for tuition assistance payments to parents was unconstitutional. Just as Sonia Sotomayor dissented, noting how far the court had moved on these issues in just the last five years. Sotomayor wrote, "In 2017, I feared that the court was leading us to a place where the separation of church and state is a constitutional slogan, not a constitutional commitment. Today, the court leads us to a place where separation of church and state becomes a constitutional violation. If a state cannot offer subsidies to its citizens without being required to fund religious exercise, any state that values its historic anti-establishment interest more than this court does, will have to curtail the support it offers to its citizens. With growing concern for where this court will lead us next, I respectfully dissent.

KM: So, there's opposition to funding for religious schools from advocacy groups and the liberal justices, but what about the people bringing these cases?

KR: The people who want funding for religious schools say all the court has done in these cases is stop discrimination against religious people. I talked to John Bursch, vice president for appellate advocacy and senior counsel with the Alliance Defending Freedom. The conservative group brought the *Trinity Lutheran* challenge. Bursch characterizes the Supreme Court's recent rulings as leveling the playing field for religious schools.

John Bursch: Whether it's educational savings accounts or vouchers or student scholarships, if the state generally makes those funds available for use at private schools, then it also has to make those funds available to religious schools, because to do otherwise is to discriminate against religion, which the First Amendment specifically prohibits.

KR: The Alliance Defending Freedom was encouraged by the Supreme Court's ruling in *Carson* and thinks it will apply in another case the group is defending out of Oklahoma, where the state has approved the nation's first ever religious public charter school.

KM: What's the distinction here between giving taxpayer dollars to religious schools and what's happening in Oklahoma?

KR: The distinction is that in this case, the charter school draws direct state funding, not a voucher system. Laser, whose organization Americans United brought the challenge to the school with the ACLU, had some thoughts on this.

RL: We are fighting an effort by religious extremists to take over our public schools, and by takeover, I mean a direct takeover.

KR: The idea of a religious charter school would also mean the education would be fully funded. This would be a first of its kind situation.

RL: What's to stop us from seeing this happen with brick-and-mortar charter schools? And since charter schools are so clearly public schools, what's to stop that from happening with your neighborhood public school? Why won't that also fall prey to religious extremists who are attempting this hostile takeover of our public schools?

KR: The Alliance Defending Freedom sees Oklahoma's religious charter school as simply an extension of the court's ruling in *Carson*. Here's Bursch, whose organization will be defending Oklahoma schools.

JB: I think that the principle at issue there is the same one in *Carson vs. Makin* and the other things that we were talking about that when a state creates an opportunity where charter schools can exist these are privately run schools that we see public funding, just like the public schools do the state can't create such a system and just say categorically religious schools don't get to apply. That's the same type of religious discrimination that was at issue in *Carson vs. Makin* and *Espinoza* and *Trinity Lutheran*, and so ultimately, I think the courts will vindicate that position and hold that states cannot discriminate in the charter school context, just like they can't discriminate in any other context.

KR: Americans United and the ACLU represent taxpayers across Oklahoma who do not want to fund religious education. Daniel Mach, the director of the ACLU's Program on Freedom of Religion and Belief, says the idea of a public religious school would completely fly in the face of the constitution.

Daniel Mach: Charter schools are public schools under Oklahoma law very explicitly, and the very idea of a religious public school is a constitutional oxymoron. Yet in its application, this Catholic charter school said it will be managed by the Archdiocese of Oklahoma City and that it will participate quote "in the evangelizing mission of the church." And even as the Supreme Court has been shifting religion law in dangerous ways, this is several steps too far, even for anything that they have done.

KR: Participating in an evangelizing mission is really what's at issue here, because one group's religious views do not always comply with anti-discrimination laws.

DM: The school's application to get approved by the state was very clear that it would violate a variety of state laws, not only the state constitution, but statutes and related regulations. Now those rules, which cover anyone wanting to start a charter school, prohibit these schools from discriminating on various

bases like, say, religion or sex or disability, and prevent them from forcing one preferred set of religious beliefs on students. But the state board in Oklahoma approved the application anyway.

KR: The real issue expressed by people opposed to public funding for religious schools is what it represents for public education. Here's Suits, who wrote "Overturning Brown."

SS: I think what's at issue is whether or not we are reestablishing a state sanctioned and publicly funded system of education which allows parents to go to schools that have policies and practices that discriminate against certain students. That's what I fear is being erected in this movement towards school choice, which is a choice that is not bound by the Constitution, nor is it bound by the anti-discrimination laws that are both on the books in our federal statutes and in some state statutes.

KM: This seems to be a prevailing argument in challenges to religious schools that they discriminate based on a variety of factors. How do the schools defend this?

KR: The schools say the qualifications being called discrimination are based on their religious beliefs. Here's Bursch from the Alliance Defending Freedom.

JB: I think that those arguments are ill-founded, because schools draw lines all the time and when they do that consistent with their religious beliefs, there's nothing in the constitution that prohibits that.

KR: Bursch uses the example of a Jewish day school that teaches Orthodox Jewish religion. It might not be appropriate for a student that does not follow the faith to attend that institution, but that doesn't mean the school is discriminating, according to Bursch.

JB: It really comes down to this question of whether we take seriously the First Amendment's command that government officials cannot discriminate against religious beliefs, particularly if they disagree with them, and the Supreme Court has consistently now in three separate cases said that type of religious discrimination is prohibited.

KM: How do the advocates of these schools see the Supreme Court's shift on the separation between church and state?

KR: These advocates view the separation of church and state completely different than those who want to protect that wall. In her dissent, Sotomayor said the Supreme Court was bringing the country to a place where the separation of church and state was a violation instead of a constitutional commitment. A big part of that movement is because these conservative advocates don't actually think the separation of church and state is in the Constitution. Here's Bursch.

JB: There is nothing in the Constitution that requires a so-called wall of separation between church and state. That language comes from a letter that Thomas Jefferson wrote many, many years ago, where he was talking about the importance of keeping the government out of religion, not the other way around, and the U.S. Supreme Court many years ago picked up that language and now people have this mistaken notion that there's supposed to be a wall of separation. There's nothing improper about the government providing money to religious activities so long as the government isn't endorsing a particular religion.

KM: I'm guessing not everyone agrees.

KR: You would be correct. Groups like Americans United and the ACLU see that wall between church and state as fundamental for democracy, especially in the education context. Much from the ACLU had some thoughts on this.

DM: I think there's a real danger that we are going to abandon what are important fundamental, foundational principles about the separation of church and state, and the school context is one of the most important. There is a reason why the Supreme Court has said that it will. It will protect the separation of church and state most vigilantly in that context, and you know it has to do with the importance of schools and our democracy, the fact that education is compulsory, that it needs to be free and available to everyone. If you take all those factors together, public schools are vital, and protecting against religious coercion in public schools is equally vital.

KR: For those who see public schools as this proving ground for democracy, like Laser from Americans United, adding religion to the mix is a dangerous combination.

RL: But people also need to wake up to the way white Christian nationalism is fundamentally attack on our democracy, and there is no better way to see this than to understand the role that white Christian nationalism played on January 6th, which attempted to take down our democracy, right, which was a coup on our democracy. There, the banners about Jesus saves, the banners about Christianity, the Christian prayer, right on the floor of our sacred chambers of Congress, all of that was not a coincidence. That was because the goal of white Christian nationalism is to secure power and privilege for a select few, and that is fundamentally at odds with the goal of our democracy, which is about equality for all. White Christian nationalism has to defeat democracy. It has to take it down in order to win, and that's why what we're seeing in our public schools is, sadly, but a piece of a larger effort, right, to ultimately destroy our democracy.

KM: Are taxpayer-funded religious schools the end game here?

KR: No. Experts watching this area take a thousand-foot view. School vouchers and funding for religious schools are just one avenue. There's also the coach Kennedy path. In 2022, the Supreme Court ruled in *Kennedy vs. Bremerton School District*, finding that a public school football coach could pray at halftime during football games. This case brought flashbacks to the court's landmark ruling in *Vitale*, where the justices said official prayers were not allowed in public school. Now these situations do differ, because in the *Kennedy* context the coach was said to be praying on his own time, not in a school-sanctioned context.

KM: Does the *Kennedy* case embolden others who want to bring similar challenges?

KR: Depends on who you ask. Some people downplay the impact of *Kennedy*, claiming it was a case-specific ruling that didn't move the needle on religion in schools. While others worry it could lead to a domino effect, like in Texas, which has tried to replace certified school counselors with religious chaplains, or display the Ten Commandments in school. But Texas is an interesting test case in this context. The state is attempting not only to put religion in schools but also increase vouchers for private education. Although the state has a good number of conservative legislators to pass these laws, they're still facing roadblocks.

KM: You're right about that. Lawmakers have yet to get a voucher proposal passed, because rural Republicans aren't interested in a system that they see would further divert funding from their already underfunded public school districts.

KR: It's no secret what happens when schools are underfunded students suffer. Without the money to update textbooks and technology or even just adequately pay the people responsible for actually teaching children. There are huge barriers to success in the classroom. Attacks on public education are not only coming from religious conservatives. These efforts are, overall, just creating mistrust in the public education system and we have a situation where schools are facing attacks really from all sides. Black, who wrote "Schoolhouse Burning," shared his insight on this topic.

DB: What you see if you back up to the early moments of Covid and then right after Covid, for vouchers and stuff, was this desire to create chaos in the public school system, right, to sort of attack it on every front, whether it be the teachers or the racial history or LGBTQ. To sort of continually attacking it with half-truths and no-truths, to erode confidence, right, because look, the public education system is a pillar of our democracy. Ninety percent of this country went there. Most people have a pretty good feeling about their own educational experience, and they believe in it. It's not that public education is unpopular.

KR: Since public education is popular, the attacks on it target its very value in our democratic system.

DB: The way that you do that is to begin to erode faith in the public school system. I think if you look at a lot of these different attacks, they're all about questioning the basic legitimacy and values of the public school system, to try to turn it into, in the eyes of some people, something that it's not, that it's this evil institution that's indoctrinating. It's this evil institution that's restricting freedom. You know, all of these things. In my mind, it concerted effort to erode the public's faith in public education so that it could ultimately extinguish public education.

KR: As the Supreme Court has made it easier for religious conservatives to have more influence over public education funds, the majority of Americans are shifting away from religion. 2020 marked the first time in a decade that American membership in houses of worship dropped below 50%. The vocal minority advocating for the continued dissolution of the wall between church and state in public education could face opposition into these efforts from an increasingly religiously unaffiliated majority. Maybe they'll take a page out of the book playing out on local school boards. Conservative candidates advocating for book bans and restrictions on conversations on race and gender in the classroom were largely rejected in the November elections. In Iowa, Pennsylvania and Virginia, voters chose instead to support liberal and moderate candidates who didn't want to censor an honest view of history or their own children's identities.

KM: Education is vital to our democracy. Schools are a hub of community. Where a younger generation learns about the world, they will soon inherit and form ideas about what the future will be. What big ideas will that next generation come up with when their education was within the walls of a dogmatic religious school or segregated away from other students with a different worldview and life experience? Thinking about school never ends, even long after graduation. Thank you, Kelsey, for your reporting on this complex topic. If you are looking for more stories like this and more, head on over to [courthousenews.com](https://www.courthousenews.com). If you liked this episode and wanted to share your thoughts, leave us a review on Apple Podcasts. Finally, check out our social media pages for more from your favorite legal news outlet.

Join us next time for our season finale, where we take a look back on the wild year former President Donald Trump has had in courtrooms across the country. Finding it a little hard to keep up with it all? Yeah, don't worry, us, too. We will also be taking a look back on the year that was in legal news, talking about our most memorable cases all the way through 2023. You will not want to miss this legal bonanza.

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