



## TWO THAT GOT AWAY

[By James Kilpatrick]

Last week the Supreme Court turned down appeals in two cases it might usefully have heard. One case came from Kansas, the other from Hawaii. The cases had nothing in common, but they involved interesting points of law. Besides, the court needs something to do.

In *Bergman v. Kansas*, the court had an opportunity to strike a blow, not only for the ordered equality of public schools, but also for their voluntary inequality. This is the question, clumsily worded, that the high court refused to hear:

“Does a state violate equal protection when it purposefully disadvantages schoolchildren by unevenly restricting funds available for public education and then prohibiting underfunded school districts from funding the difference out of local funds?”

Translation: When public schools are financed hugely and equally through state funds, may individual localities independently supplement the state appropriation?

Historically, Kansas was among the 17 Southern and border states that once operated racially segregated public schools. Half a century ago, Oliver Brown of Topeka gained fame as the lead plaintiff in *Brown v. Board of Education*. After the high court’s unanimous opinion came down, the state went to work toward equalizing its black and white schools.

In one way or another, through its legislature and its various courts, Kansas has been struggling toward “equalization” ever since. In the case just snubbed by the U.S. Supreme Court, the state’s own Supreme Court succinctly explained the state’s most recent effort:

“The changes made by H.B. 2247 included modifications to the weighting components of the finance formula and changes to the authority of certain districts to raise revenue through local ad valorem property taxes. H.B. 2247 modified the funding formula by increasing

the Base State Aid Per Pupil (BSAPP), bilingual, and at-risk weightings, phasing in increases in special education funding, eliminating the correlation weighting (while retaining the low enrollment weighting) ...”

In the appeal just rejected by the Supremes, a group of parents in suburban Kansas City argued strenuously (but unavailingly) for their right voluntarily to tax themselves locally to improve their own schools. They ask: Is it constitutional for the state to handicap some school districts that are wrongly perceived as privileged or unduly advantaged, in order to achieve an appearance of equality among all school districts?

The record in the Kansas case suggests that the state has made Herculean efforts, as a state, to equalize and improve its public schools. Counsel for the petitioners ask the high court: Why should parents in Topeka or Lawrence or Wichita be forbidden voluntarily to enlarge the pot by taxing themselves? The nine justices, perhaps numbed by last week’s argument in school cases from Kentucky and Washington State, would not stay for an answer.

In the same Order List in which they turned down the Kansas case, the Supremes denied an appeal from the Center for Bio-Ethical Reform from a ruling of the 9<sup>th</sup> Circuit in Hawaii. In a unanimous panel opinion by Judge Mary Margaret McKeown, the court upheld Honolulu’s ordinance prohibiting aerial advertising. Lovers of the beach at Waikiki will applaud.

Two questions were before the court: Is the ordinance pre-empted by federal aviation law? If not, does the law violate the First Amendment’s protection of free speech? No, answered the

court; and once again, no. “The ordinance is a reasonable and viewpoint-neutral restriction on speech in a nonpublic forum.”

Judge McKeown explained: “The Center for Ethical Reform is a pro-life/anti-abortion advocacy group that hires airplanes to tow aerial banners over heavily populated areas. These banners are typically 100 feet long and display graphic photographs of aborted fetuses. The Center has used this publicity technique in many states and has found it to be very effective in spreading its message.”

Students of constitutional law had hoped the Supreme Court would take the Honolulu case on First Amendment grounds. Is the sky over Waikiki to be equated with a public park? If so, the anti-abortionists might be entitled to their banners. Judge McKeown’s panel refused to buy that argument. The airspace over a city cannot be equated with public parks or public streets. It has never “typically been a focus of expressive activity.”

If the high court’s calendar were packed with high-powered cases awaiting oral argument, denial in these two cases could be easily understood. For good or ill (the alternatives could be argued either way), these days the justices have plenty of time on their hands.

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