THE BURGER COURT AND THE PUBLIC SCHOOLS

by

George Robert Deakin

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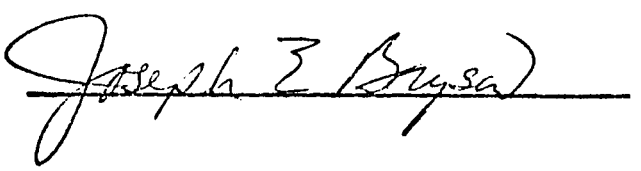

APPROVAL PAGE

This dissertation has been approved by the following committee of the Faculty of the Graduate School at the University of North Carolina at Greensboro.

Dissertation Adviser Joseph B. Grayson

Committee Members C. L. Kidman

R. H. Nelson

William A. Powers

Franklin Parker

March 28 1978
Date of Acceptance by Committee

March 28 1978
Date of Final Oral Examination

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The purpose of this study was to research United States Supreme Court decisions affecting public education from October, 1969, through June, 1977, to provide a source of information for school administrators, school boards, and the general public as an aid to the solution of some common problems in education.

The study began by reviewing all Court decisions prior to October, 1969, which affected the educational process in the areas of religion, desegregation, and academic freedom. The Court decisions from October, 1969, through June, 1977, were then studied. Analysis of the voting patterns of individual Justices was attempted based on concurrence or dissent with the majority opinion of the Court.

In the area of church-state relations, the decisions of Lemon I (1971) laid the cornerstones for subsequent judgment of cases involving public aid to non-public schools. The tests of legislative intent, primary effect, excessive entanglement, and political divisiveness potential were established to decide the legality of various state aid plans, such as tuition reimbursement, tax credit, construction grants, auxiliary services, remedial services, teaching equipment, and other assistance.

In the area of desegregation, the decision of Swann (1971) provided the necessary guidelines for implementation of the Green mandate (1968) to desegregate the public schools immediately. Swann decided the issues of racial quotas, existence of all-Negro

and all-white schools, legality of school boundary rearrangement for desegregation purposes, and busing of students.

In the area of academic freedom, several cases established the extent of Constitutional protection of substantive and procedural rights of teachers and students. Also decided were the issues of the property tax in Rodriguez (1973) and parental rights in Yoder (1972).

Church-state relations saw an easing of restrictions on the amount and type of state aid which may be granted constitutionally to non-public schools. While direct aid to religious schools is prohibited, aid which directly benefits the students is allowed in ever-increasing diversity. Successful legislation in this regard is written so as to simplify and minimize state supervision over the granted funds, thereby escaping the "entanglement" clause.

Desegregation was immediate and rapid in the South, but was delayed more extensively whenever large metropolitan areas were involved. Until the Wright (1972) controversy, Court decisions on desegregation cases were unanimous. Cases involving desegregation of school districts and metropolitan areas outside the South were not readily solved due to absence of "de jure" segregation laws prior to Brown I (1954). The Court is clinging to the concept that such segregation must have been caused by zoning, school law, or state laws in order to be actionable under prior decisions. However, cities such as Dayton, Ohio, and Omaha, Nebraska, are going ahead with busing of students without Supreme Court mandates and with some encouragement from the Court. Court minority opinion holds that "de facto" and "de jure" segregation are distinctions

without a difference.

In the area of human rights, the Court supported the requirement of the loyalty oath as a prerequisite to public employment. The Court extended "due process" rights to non-tenured teachers, forewarning administrators in this regard. The Court also held school board members accountable for unlawful suspension of school children without due process. The legitimacy of the property tax as a means of financing schools was upheld as were the rights of parents to be responsible for secondary education of their children.

The Court has continued and extended the degree to which state statutes may benefit non-public schools, has clarified the practical implementation of school desegregation plans, and has raised to new heights the substantive and procedural rights of individuals under the Constitution.

ACKNOWLEDGMENTS

It is with sincerity that this writer wishes to express appreciation to his major adviser, Dr. Joseph E. Bryson, without whose guidance and counsel this study would not have been possible. The writer acknowledges indebtedness to the other members of the committee: Dr. Chiranji Lal Sharma; Dr. Donald W. Russell; Dr. Roland H. Nelson, Jr.; and Dr. William A. Powers.

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CHAPTER I

INTRODUCTION

The Supreme Court

The Supreme Court of the United States of America is a unique and integral creation of the Constitution of the United States of America. Unique because there is no higher court of law in the land, and integral because it shares power with the legislative and executive branches of government and exerts checks and balances against both. When the Constitution was ratified by the fourteen states during the period from December 7, 1787, through January 10, 1791, resolutions from the States of Virginia and New York eloquently expressed the States' anxiety that individual liberties be guaranteed and that State powers be preserved. Virginia delegates recommended that as the first order of business the new Federal government should accomplish the following:

> Videlicet; That there be a Declaration of Bill of Rights asserting and securing from encroachment the essential and unalienable Rights of the People in some manner as the following;
>
> First, That there are certain natural rights of which men, when they form a social compact cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.[1]

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1 The Constitution of the United States of America (Richmond, Virginia: The Virginia Commission on Constitutional Government, 1965), p. 17.

Among other anxieties, Virginia delegates to the 1788 convention which ratified the Constitution by a narrow vote of 89 to 79 feared the establishment of hereditary offices, including "Magistrate, Legislator or Judge, or any other public office."[2] Delegates from the State of New York, who ratified the Constitution by a vote of 30 to 27 on July 26, 1788, expressed concern about the judicial power of the Supreme Court:

> That the Judicial Power of the Supreme Court of the United States, or of any other Court to be instituted by the Congress, is not in any case to be encreased enlarged or extended by any Fiction Collusion or mere suggestion; - And That no Treaty is to be construed so to operate as to alter the Constitution of any State.[3]

Joined by Massachusetts delegates who ratified the Constitution by a vote of 187 to 168, the States of Virginia and New York made it plain that acceptance of the Constitution was predicated on early action under Article V to proclaim a Bill of Rights or Declaration "asserting and securing from encroachment the essential and unalienable Rights of the People."

Section 1 of Article III of the Constitution of the United States of America established the judicial branch of the Federal Government according to the following rules:

> The judicial power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold

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2 Virginia Commission, op. cit., p. 18.

3 Ibid., p. 22.

> their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.[4]

The Judiciary Act of 1789 provided for a Chief Justice and five Associate Justices to serve as the Supreme Court of the United States of America with power to review

> (1) all cases in lower federal courts, and (2) all cases in state courts in which there is involved a question of the meaning or effect of a federal statute or a constitutional provision.[5]

The first Chief Justice appointed by President George Washington was John Jay, whose tenure began in 1789 and ended in 1795. President Washington appointed ten Justices during his administration who were confirmed by the Senate and actually served on the Court.[6] Chief Justice John Rutledge served briefly in 1795 and was followed by Chief Justice Oliver Ellsworth, who served from 1796 to 1799. The judicial record of the first decade was relatively undistinguished because the Court exercised relatively little influence during that time.

Chief Justice John Marshall served from 1801 to 1835, gaining power and prestige for the Court through adjudication of such politically controversial cases as Marbury v. Madison (1803) in which the majority opinion of the Court held that an act of

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4 Ibid., p. 10.

5 Edward C. Bolmeier, Landmark Supreme Court Decisions on Public School Issues (Virginia: The Michie Company, 1973), p. 3.

6 Henry J. Abraham, Justices and Presidents (New York: The Oxford Press, 1974), p. 4.

Congress may be ruled unenforceable if the act violates the United States Constitution. That case established the supremacy of the Constitution over laws passed by Congress and the right of the court to review the constitutionality of legislation. The Act of February 24, 1807, provided for an increase of the Court to seven members.

In 1836 Chief Justice Roger B. Taney began a career on the Court which was to last until 1863 and which would involve the Court in the issue of slavery through the Dred Scott v. Sanford case (1857). The Court held that the Negroes could not become United States citizens. However, in 1868 the Fourteenth Amendment to the Constitution made all former slaves citizens and gave them full civil rights.

From the first appointment of Justice James W. Wilson by President George Washington in 1789 to the last appointment of Justice John P. Stevens by President Gerald Ford in 1975, one hundred and one Justices have been confirmed by the Senate and have served on the Supreme Court, the result of 104 successful appointments. Justices Edward D. White, Charles Evans Hughes and Harlan F. Stone each served as both Associate Justice and as Chief Justice.[7]

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7 Ibid., p. 42.

The Flow of Judicial Action

There are three ways that cases can reach the Supreme Court:

> The first is by appeal in which one side or party in the case wants to appeal to a higher court. In this appeal which is a writ of error, the court is not involved in the decision to carry the case to a higher court. The second is by certificate in which the lower court certifies certain points of the case that are in question and requests a decision from the higher court. The parties in the case are not involved in this request. The third is by writ of certiorari in which both the court and a party in the suit are involved. The party in the suit petitions a higher court for a writ of certiorari. The higher court decides whether to grant the petition. If the petition is granted, the writ is issued to the lower court which is required to furnish the record of the case.[8]

The Constitution of the United States provides that the "judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish."[9] Immediately below the Supreme Court in authority are the circuit courts, or courts of appeals, which hear most appeals from district courts and federal administrative agencies. The lowest federal court is the United States district court.

A Justice of the Supreme Court is assigned to each circuit as the Circuit Justice, assuming judicial leadership of respective courts of appeals. There are eleven circuits, ten of which include the fifty States and administrative zones and possessions

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8. Ira Nell Turman, "United States Supreme Court Decisions Affecting Compulsory School Attendance Laws" (Ed. D. dissertation, East Texas State University, 1975), p. 27.

9. U.S., Constitution, art. I, sec. 1.

abroad. The purpose of the circuit courts is

> to relieve the Supreme Court of considering all appeals in cases originally decided by the federal trial courts. They are empowered to review all final decisions of district courts, except in very rare instances in which the law provides for the direct review by the Supreme Court.[10]

United States district courts are the trial courts in which most federal court cases are first heard. Questions of fact are decided by a judge or, if the parties wish, by a jury. There are 88 district courts serving the 50 states and the District of Columbia. In certain instances the decision of a district court may be appealed directly to the United States Supreme Court:

> Cases from the district courts are reviewed by the United States courts of appeals except that injunction orders of 3-judge district courts, certain decisions holding acts of Congress unconstitutional, and certain criminal decisions may be appealed directly to the Supreme Court.[11]

As Professor Bolmeier points out, the great majority of cases involving educational issues are related to the "human rights" provisions of the Constitution as spelled out in the amendments.

> The First Amendment and the Fourteenth Amendment have especially been involved in cases dealing with racial discrimination and religion in the schools. Less frequently the Fifth Amendment, dealing with self-incrimination, has been referred to in cases involving alleged subversive affiliations.[12]

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10 Bolmeier, Supreme Court Decisions, p. 2.

11 Ibid.

12 Ibid.

The First Amendment and the Fifth Amendment were among the first ten amendments proposed by Congress on September 25, 1789, when they passed the Senate. These amendments were ratified by three-fourths of the States and were authenticated by Secretary of State Thomas Jefferson in a circular letter to Governors dated March 1, 1792.[13] These amendments are as follows:

> Article I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[14]

> Article V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.[15]

However, these amendments restrained only the federal government in dealing with human rights, leaving the states nearly free to violate these rights in any way they might wish.

> Not until the Fourteenth Amendment was adopted in 1868 did it become possible for the federal courts and Con-

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13 Virginia Commission, The Constitution, p. 25.

14 U. S., Constitution, amend. I.

15 U. S., Constitution, amend. V.

> gress to restrict state action in matters of human rights.[16]

On July 28, 1868, Secretary of State William H. Seward issued a proclamation that the Fourteenth Amendment was a part of the Constitution.

> Article XIV. Sect. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[17]

Most litigation in the field of education has involved one or more of the amendments just cited. Cases involving the separation of church and state have been decided based on the First Amendment provision against legislation respecting the establishment of religion. Cases involving freedom of speech provisions of the First Amendment have arisen in student publication disputes, hair length cases, and in protest cases involving the wearing of armbands. Teachers have pleaded violation of First Amendment rights in connection with loyalty oath disputes and non-renewal of teaching contracts. Fifth Amendment rights have been held violated in litigation involving self-incrimination and lack of due process.

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16 Bolmeier, Supreme Court Decisions, p. 6.

17 U. S., Constitution, amend. XIV, sec. 1.

The Fourteenth Amendment was held to absorb guarantees of the First Amendment and extend them to citizens of the states in 1940.

> Before 1940 it was assumed, not without some justification, that only Congress was bound by the establishment clause, and that states were not so bound.[18]

All speculation ended when Cantwell v. Connecticut, 310 U. S. 296 (1940) ruled that federal and state governments have the same relationship to religion expressed in the First Amendment.

The flow of judicial action begins whenever an alleged violation of human rights guaranteed by the Constitution has occurred. Unless such allegation is made, no further judicial action will be forthcoming. Complaints may be directed by one party against another in either State courts or Federal courts. Clearly constitutional issues will be accepted for trial in District courts.

The nature of complaints in educational matters has spanned the following alternatives:

1. Suit to compel action.
   a. Reinstatement of teachers or students;
   b. Declaration of State law unconstitutional;
   c. Declaration of local law unconstitutional.

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18 Michael R. Smith and Joseph E. Bryson, Church-State Relations: The Legality of Using Public Funds for Religious Schools, (NOLPE Monograph Series on Legal Aspects of School Administration Number One, 1972), p. 18.

2. Actions in equity
    a. Reimbursement of court costs;
    b. Punitive damages;
    c. Specific performance.
3. Suits to enjoin action
    a. Application of desegregation plan;
    b. Allocation of funds to non-public schools;
    c. Application of uniform dress codes.

A key element in each case coming before federal courts is that rights protected by the Constitution must have been allegedly violated. State courts may hear cases involving educational disputes where negligence or culpability is a factor and criminal proceedings are required or where Constitutional provisions are not clearly involved.

Once the complaint is made, legal arguments are presented before the lowest court having jurisdiction. In the federal court system, as previously pointed out, the District Court would hear the case. Upon rendering a decision, the Court would rule for one litigant or the other or would rule against one litigant or the other. The unsatisfied party then has the option to appeal to a higher court. In the federal court system, the Court of Appeals would review the case and would render a decision by majority rule either supporting the lower court decision or reversing it, in whole or in part. Upon notification of the decision, the unsatisfied party has the right to appeal to the United States Supreme Court for a final decision.

It should be noted that the unsatisfied party may be one or the other of two opposing parties at any stage in these proceedings. However, the decision of the Supreme Court is final and irrevocable, although reversals of Court decisions have been noted over the years in similar cases.

The pattern of litigation just described applies to most court cases involving educational issues. Any aspect of school law is subject to litigation, and it is important to realize that the body of school law derives from legislative acts of the federal government, state government, local municipal and quasi-legislative bodies, and custom.

The Burger Court

The era of the Burger court began on June 23, 1969, when President Richard M. Nixon fulfilled his campaign promise to

> nominate to the bench: one whose work on the Court would "strengthen the peace forces as against the criminal forces of the land"; one who would have an appreciation of the basic tenets of "law and order," being "thoroughly experienced and versed in the criminal laws of the country"; one who would see himself as a "caretaker" of the Constitution and not as a "super-legislator with a free hand to impose . . . social and political view-points upon the American people"; one who was a "strict constructionist" of the basic document; and one who had had broad experience as an appeals judge on a lower judicial level.[19]

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19 Henry J. Abraham, Justices and Presidents (New York: The Oxford Press, 1974), p. 4.

Warren Earl Burger was born on September 17, 1907, in St. Paul, Minnesota, graduated magna cum laude from the St. Paul College of Law in 1931, entered public service in 1953 as assistant attorney general under President Dwight D. Eisenhower and became a member of the United States Court of Appeals for the District of Columbia in 1956. On June 23, 1969, Judge Burger became the nation's 15th Chief Justice.

Following a series of unsuccessful nominations, President Richard M. Nixon succeeded in securing the appointment of Harry Andrew Blackmun to the Court on June 9, 1970. Justice Blackmun, a lifelong friend of Chief Justice Warren Burger, was born November 12, 1908, in Nashville, Illinois, but has spent most of his life in Minneapolis and St. Paul, Minnesota. He became a member of the United States Court of Appeals for the Eighth Circuit in 1959.

The retirement of Justices Hugo L. Black and John M. Harlan in 1971 prompted the selection of two more Justices for the Supreme Court. Justice Lewis F. Powell, Jr., of Richmond, Virginia, was confirmed rapidly by the Senate by a vote of 89:1.

> Powell was a past-President of the American Bar Association, a distinguished member of the legal profession in the Harlan mold with recorded views on criminal justice and governmental "paternalism" akin to those of the President. Here then was the President's "Southern strict constructionist"![20]

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20 Ibid., p. 11

Justice William Hubb Rehnquist was appointed to the Court on December 10, 1971:

> Rehnquist was a brilliant ideological conservative who had been one of Senator Barry Goldwater's chief aides in the latter's unsuccessful 1964 campaign for the Presidency. Rehnquist's career had been chiefly political, but his legal credentials were considerable, including a stint as a law clerk on the Supreme Court to Mr. Justice Robert H. Jackson.[21]

The retirement of Justice William O. Douglas in 1975 led to the selection of Judge John Paul Stevens as Associate Justice of the Supreme Court. Justice Stevens had been a judge of the United States Court of Appeals since 1970.

The United States Supreme Court, as constituted in January, 1977, is presented as a group photograph in the Appendix. With the exception of three retired Justices, the Court sits as photographed for the 1977-1978 term.

This brief introduction to the United States Supreme Court could be augmented by lengthy statements as to the qualifications of Justices, the selection process and political reasons for judgments rendered. However, the scope of this study includes only those Court decisions which bear on the educational process. This research is directed toward better understanding of the decisions themselves as forecasters of future decisions in the area of religion, academic freedom, and desegregation cases. It is considered more fruitful to analyze the decisions on the

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21 Ibid., p. 11.

basis of precedent and constitutional law rather than the personality and background of individual Justices.

However, as human beings each Justice reflects personal ideals through decisions rendered in each case. Some Justices dissent more frequently than others. It should be recognized that the dissenting opinion of today may become the majority opinion of tomorrow.

Purpose

This study had as its purpose an examination and analysis of public school cases decided by the United States Supreme Court under the leadership of Chief Justice Warren E. Burger during the period from June 23, 1969, through June 28, 1977. The accomplishment of this purpose was attempted through a review of Court decisions rendered during this period. Landmark cases were studied closely for concurring and dissenting opinion on the part of individual Justices. This study attempted to provide a source of information to school administrators, school boards and the general public as an aid in the solution of common problems in the educational process.

Method of Procedure

This study utilized United States Supreme Court Reports as the primary source of Court decisions during the period studied. Secondary sources are listed in the Bibliography. Cases were grouped under the following major headings:

1. Religion: cases which involved alleged violations of human rights under the First Amendment to the Constitution.
2. Desegregation: cases involving the establishment of unitary school systems and alleged attempts to avoid desegregation orders through redistricting or school board manipulation.
3. Freedoms guaranteed by the Constitution: cases involving teacher dismissals, student suspensions and compulsory school attendance in which First, Fifth and Fourteenth Amendment issues arose.

An attempt was made to identify landmark cases according to the the criteria set forth by Professor E. C. Bolmeier (1973) as:

1. The extent to which the decision has shaped educational policy;
2. The extent to which the decision has aroused public concern;
3. The reaction of the other two branches of the federal government on the actions taken by the judicial branch.

Scope and Limitations

This study included decisions of the United States Supreme Court which were rendered from the beginning of the October session, 1969, through the end of the June session, 1977. With few exceptions, cases studied concerned only elementary and secondary school issues and omit cases involving higher education

or persons other than those directly involved in the educational process.

Trends of decisions by the Burger Court were evaluated by reference to appropriate literary works to provide insight as to possible future rulings by the Court. For example, modern writers hold that the Burger court is not receptive to civil rights pleas and has repeatedly refused to contradict decisions of lower courts, causing complainants to seek redress of grievances in the legislative and executive branches of government.[22]

Definitions of Terms Used

affirm: to ratify, make firm, confirm, establish, reassert.

Amicus Curiae: a friend of the Court. A by-stander, usually a counsellor, who interposes and volunteers information upon some matter of law in regard to which the judge is doubtful or mistaken. Also, a person who has no right to appear in a suit but is allowed to introduce argument, authority, or evidence to protect his interests.

appellant: the party who takes an appeal from one court or jurisdiction to another.

appellate: pertaining to or having cognizance of appeals and other proceedings for the judicial review.

appellee: the party in a cause against whom an appeal is taken; that is, the party who has an interest adverse to setting aside or reversing the judgment.

certiorari: the name of a writ of review or inquiry. Certiorari is an appellate proceeding for the re-examination of action of inferior tribunal or as auxiliary process to enable appellate court to obtain further information in pending cause.

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22 Dale Eisman, "State Courts Making Comeback," Richmond Times-Dispatch, 20 July 1977, p. 4.

child-benefit theory: the theory that the benefit of state aid is intended for the child and that any simultaneous benefit accruing to a religious institution is incidental.

concurring opinion: an opinion separate from that which embodies the views and decision of the majority of the court, prepared and filed by a judge who agrees in the general result of the decision, and which either reinforces the majority opinion by the expression of the particular judge's own views or reasoning or, more commonly, voices his disapproval of the grounds of the decision or the arguments on which it was based, though approving the final results.

contract theory: the theory that a legislature may contract to purchase secular educational services from nonpublic (including parochial) schools, since these services would otherwise have to be provided by the legislature to fulfill its constitutional duty of providing education for the people of the state.

dissenting opinion: a separate opinion in which a particular judge announces his dissent from the conclusion held by a majority of the court and expounds his own views.

due process: law in its regular course of administration through courts of justice.

en banc: in the bench.

enjoin: to require; command, positively direct. To require a person by writ of injunction from a court of equity to perform, or to abstain or desist from some act.

general welfare theory: the theory that derives from the fact that Congress is constitutionally charged with maintaining the welfare of all citizens; aid may be extended under this theory even though it incidently aids a sectarian institution.

parity: the concept that religious schools seek aid of the same magnitude as states grant to public schools.

parochial school: a school controlled directly by the local church, parish, or diocese.

per curiam : a phrase used in the reports to distinguish an opinion of the whole court from an opinion written by any one judge. Sometimes it denotes an opinion written by the Chief Justice or presiding judge.

public funds: funds which are derived from either federal or state revenues.

religious school: may mean parochial school but is not necessarily tied to a local church, parish or diocese.

remand: to send back

reverse: to overthrow, vacate, set aside, make void, annul, repeal or revoke.

supra (Latin): above, upon. This word occurring by itself in a book refers the reader to a previous part of the book, like "ante," it is also the initial word of several Latin phrases.

Sources of definitions:

Black's Law Dictionary (1968).

Turman, "U. S. Supreme Court Decisions . . .," p. 5.

Smith and Bryson, Church-State Relations, p. 82.

Organization of the Remainder of the Study

This study was organized into six chapters. Chapter II presented the background of Supreme Court decisions involving educational issues which were made prior to the appointment of Chief Justice Warren E. Burger. Chapter III presented a study of Burger Court cases involving religious issues in the schools. Chapter IV presented cases decided by the Burger Court with respect to desegregation issues in the public schools. Chapter V presented those Burger Court cases which involved alleged violation of human rights guaranteed by the Constitution in which public school teachers or students were involved.

Chapter VI summarized all cases decided by the Burger Court which may affect the educational process in future years. A list of all cases studied was prepared in chronological order and placed in the Bibliography.

The primary sources of data were the United States Supreme Court Reports. Over 60 cases were studied, of which 55 were retained for this report. Several cases fell outside the scope of this study because they concerned non-school personnel, higher education tuition regulations or were connected with military personnel. Secondary sources were books and periodicals which were needed to provide necessary perspective.

CHAPTER II

BACKGROUND

Introduction

The development of universal education in the United States occurred about 100 years after Chief Justice John Marshall was appointed by President John Adams at the beginning of the 19th century. Educational matters did not concern the Supreme Court during the 19th century, although certain cases such as Bradfield v. Roberts were said to have formed a basis of law for subsequent support of religious schools by use of public funds.[1] In 1896 the case of Plessy v. Ferguson supported the "separate but equal" doctrine by which public schools were governed until the Brown I mandate of 1954.[2]

Background cases are categorized as follows:

1. Religion - this category includes those cases which test constitutionality of actions mandated by state agencies, of which the school organization is but one, in which First Amendment provisions are involved.
2. Desegregation - this category includes those cases which

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1 Bradfield v. Roberts, 175 U. S. 291 (1899).

2 Plessy v. Ferguson, 163 U. S. 537 (1896).

test constitutionality of actions mandated by state agencies to maintain segregation of the races in violation of Fifth Amendment provisions, made applicable to the States by the Fourteenth Amendment.

3. Freedoms Guaranteed by the Constitution - this category includes those cases which involve jeopardy of First, Fifth and Fourteenth Amendment rights of individuals.

Following passage of the Civil Rights Act of 1964, litigation in the area of desegregation became widespread, and immediate establishment of unitary school systems was demanded regardless of cost. Non-public schools continued attempts to secure public funds in spite of grudging concessions of the courts in allowing funds for textbooks and transportation but denying public support for other student services. Specific cases are cited in following sections of this research to explain the background for each type of case cited.

Religion

It is significant that the First Amendment to the Constitution of the United States of America enjoined only the Federal Government in matters affecting individual religious beliefs and practices. The two clauses of importance in this context are the "establishment of religion" clause and the "free exercise" clause. The Supreme Court has been called upon to rule in cases involving state statutes and actions of school districts which have had the effect of violating both of these clauses.

Quick Bear v. Leupp (1908) invoked a ruling from Chief Justice Melville W. Fuller that the Constitution precluded any law that would prohibit the free exercise of religion, saying

> . . . it seems inconceivable that Congress shall have intended to prohibit them (the Sioux Indians) from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion amongst the Indians, and such would be the effect of the construction for which the complainants contend.[3]

At issue was the appropriation of Indian funds to secure an education for Indian children at a Roman Catholic School. Reuben Quick Bear and others sued to prevent such expenditure of funds, claiming violation of the "establishment" of religion clause. This case has been cited to support legislation calling for the expenditure of public funds to support non-public schools.

Meyer v. Nebraska (1923) involved the constitutionality of a Nebraska statute which forbade the teaching of any foreign language to students in or below the eight grade and which made it a crime to teach in any language other than English.[4] This case established the principle that the state may not interfere with constitutional rights of parents to guide the education of their children.

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3. Quick Bear v. Leupp, 210 U. S. 50 at 82 (1908).

4. Meyer v. Nebraska, 262 U. S. 390 (1923).

Frothingham v. Mellon (1923) questioned the constitutionality of an Act of Congress to appropriate funds for improved maternal care within states which agreed to comply with provisions of the act.[5] The complainant claimed deprivation of property without due process of law in that her taxes would be increased to support the program, which would be of no direct benefit to her. The Court upheld lower court decisions to dismiss the complaint. This case established the legality of federal appropriations for any purpose.

Pierce v. Society of Sisters (1925) tested the constitutionality of an Oregon statute which required children to attend only public schools.[6] Citing Meyer v. Nebraska, the Supreme Court affirmed the decision of the United States District Court of Oregon which enjoined that state from enforcing the statute. In discussing these cases, Professor E. C. Bolmeier spoke of the rights of citizens to private school education:

> In virtually all cases where legislation is in conflict with "the due process of law" clause of the Fourteenth Amendment, the legislation will be nullified. Legislators would do well to study the opinion of the United States Supreme Court in Pierce v. Society before proposing an act which would deprive citizens of liberty and property without due process of law and the equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution.[7]

5 Frothingham v. Mellon, 262 U. S. 447 (1923).

6 Pierce v. Society of Sisters, 268 U. S. 510 (1925).

7 Bolmeier, Supreme Court Decisions, p. 26.

Cochran v. Louisiana State Board of Education (1930) tested the constitutionality of a Louisiana statute which mandated free school books for all school children of the state. Cochran objected to free books for private schools and sought to restrain the act on Fourteenth Amendment grounds of deprivation of property without due process. The lower court refused the injunction, and the Supreme Court affirmed in an opinion given by Chief Justice Charles Evans Hughes which represented the unanimous opinion of the Court:

> Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded.[8]

This decision has been referred to as the foundation of the "child benefit theory," the theory that the benefit of state aid is intended for the child and that any simultaneous benefit accruing to a religious institution is incidental. Many believe that the theory can be stretched too far.[9]

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8 Cochran v. Louisiana State Board of Education, 281 U. S. 370 at 374 (1930).

9 Bolmeier, Supreme Court Decisions, p. 31.

Cantwell v. Connecticut (1940) tested the constitutionality of a Connecticut statute which required licensing of solicitors for any religious cause.[10] The lower courts which tried the case held Cantwell in violation of the law. On appeal to the Supreme Court, the Court held the statute in question offensive to the Fourteenth Amendment in that it summarily prevented Cantwell from practicing his religion and speaking, without due process of law. This Court decision established the power of the Fourteenth Amendment to bind State governments to enforce provisions of the First Amendment to the Constitution.

Everson v. Board of Education (1947) concerned a New Jersey statute which provided reimbursement of public funds to parents of parochial school students for bus service to the private schools.[11] Everson objected on the grounds of deprivation of property without due process of law under the Fourteenth Amendment ban and establishment of religion under the First Amendment ban. The Supreme Court upheld the New Jersey statute based on a 5-4 decision. In rendering a dissenting vote, Justice Wiley Rutledge made the following statement:

> Like St. Paul's freedom, religious liberty with a great price must be bought. And for those who exercise it most fully, by insisting upon religious education for

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10 Cantwell v. Connecticut, 310 U. S. 296 (1940).

11 Everson v. Board of Education, 330 U. S. 1 (1947).

> their children mixed with secular, by the terms of our Constitution the price is greater than for others.[12]

Minersville v. Gobitis (1940) concerned the expulsion of two children for refusing to participate in a flag salute exercise, such action being contrary to their religious beliefs.[13] The Court decision held the flag salute requirement valid by an 8-1 majority. Justice Harlan F. Stone's dissenting statement was prophetic:

> If these (Constitutional) guarantees are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion.[14]

The prophesy came true in the Barnette case three years later.[15] The flag salute requirement was overturned 6-3. The majority opinion, delivered by Justice Robert H. Jackson, signalled an end to governmental power to prescribe how citizens should think and act where religious conviction firmly dictates to the contrary. The subject matter with which this case dealt was not destined to come before the Supreme Court again. Flag salute exercises in the public schools were virtually abandoned, although respect for the flag is universally encouraged.

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12 Abraham, Justices and Presidents, p. 223.

13 Minersville School District, Board of Education of Minersville School District et al. v. Gobitis et al., 310 U. S. 586 (1940).

14 Ibid., p. 604.

15 West Virginia State Board of Education et al. v. Barnette et al., 319 U. S. 624 (1943).

McCollum v. Board of Education (1948) mounted an attack on religious instruction which utilizes state property or personnel.[16] An ecumenical group arranged to provide classes in religious instruction within the framework of the school system, utilizing school facilities at no charge to school authorities. McCollum contended that such action was a violation of the First Amendment establishment clause. The Illinois state courts denied relief. On appeal, the Supreme Court ruled the practice unconstitutional. Justice Hugo L. Black gave the Court's decision, saying that

> religious instruction in the public school buildings during public school time as practiced in the Champaign Public Schools, was illegal under the First and Fourteenth amendment to the Federal Constitution because it amounted to an "establishment of religion."[16]

Professor Bolmeier evaluated the decision as follows:

> Never before had there been a more forceful and unequivocal denunciation of church-school entanglements than that expressed in the majority opinion of McCollum. State courts, and even the federal courts, had struck down certain practices of religious involvements in the public schools, but usually with some reservation and exceptions. In this case, however, the Court was adamant in abiding strictly by the "separation of church and state" principle. It left no doubt in its upholding the impregnability of the "wall of separation."[17]

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16 Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203 at 205 (1948).

17 Bolmeier, Supreme Court Decisions, p. 71.

But the decision in McCollum was shown to be more a matter of degree than principle. Zorach v. Clausen (1952) decided the constitutionality of granting free time for students to attend religious classes outside the public school system.[18] Such classes were held entirely at the expense of the religious groups concerned. However, it was contended that the school system manipulated schedules to accomodate the released-time religious education program. The decision of the Supreme Court upheld lower court decisions sustaining the New York City program in a 6-3 decision.

Bible reading and prayer in the classroom were attacked ten years later. Engel v. Vitale (1962) challenged the legality of voluntary recitation of a prayer composed by the New York State Board of Regents:[19]

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our Country.[20]

The trial court and the New York Court of Appeals found for the defendant, but on certiorari the United States Supreme Court reversed in an 8-1 decision, ruling the recitation of the Regent's prayer a violation of the establishment clause of the First

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18 Zorach et al. v. Clauson et al., Constituting the Board of Education of the City of New York et al., 343 U. S. 306 (1952).

19 Engel v. Vitale, 370 U. S. 421 (1962).

20 Ibid., p. 422.

Amendment.

Abington School District v. Schempp (1963) concerned a Pennsylvania statute which required reading of the Bible without comment and the recitation of the Lord's Prayer at the start of each school day.[21] Complainants brought suit to enjoin enforcement of the statute, and the District Court for the Eastern District of Pennsylvania decided for the plaintiffs. Upon appeal by the school district, the United States Supreme Court affirmed the judgment of the district court. In rendering the decision, the Court reaffirmed the inviolability of the First Amendment of the Constitution and specified tests by which future cases would be decided:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular purpose and a primary effect that neither advances nor inhibits religion.[22]

While attempts to indoctrinate religion under state auspices have ceased, no pause has been seen in the attempt to secure state aid for non-public schools. This activity has made significant progress during several terms of the Burger Court as will be seen in Chapter III, following.

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21 Abington School District v. Schempp, 374 U. S. 203 (1963).

22 Ibid., p. 222.

Aid for non-public schools received further impetus as a result of the Supreme Court decision in Board of Education v. Allen (1968).[23] At issue was the constitutionality of a New York statute that required local public school authorities to lend textbooks, free of charge, to all students in grades seven through twelve, including parochial schools. The trial court found for the complainants, but the New York Court of Appeals reversed the judgment. Upon appeal of the plaintiffs to the Supreme Court, the Court found for the defendant, Commissioner of Education James E. Allen, in a 6-3 decision. The Court found that the New York statute has "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[24] However, dissenting opinions of Justices Hugo L. Black and William O. Douglas voiced concern over the potential advancement of ideologies by parochial school administrators who would be in a position to recommend the types of books procured for all public school students. Alternatively, selection of books by non-Catholics might introduce secularism into the parochial schools. Together with Everson, Allen established legal precedent for future litigation in disputes which arose over state actions to extend state aid to parochial schools beyond free textbooks and transportation.

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23 Board of Education v. Allen, 392 U. S. 236 (1968).

24 Ibid., p. 240.

Another New York action involved the use of funds allocated by the Elementary and Secondary Education Act of 1965 to purchase textbooks and other materials for parochial schools. Flast et al. v. Cohen (1968) contested the constitutionality of this action on the basis of First Amendment violation.[25] The District Court for the Southern District of New York ruled against the plaintiff, Flast, on grounds that he lacked proper standing to bring suit. Upon appeal, the Supreme Court reversed the decision of the district court and granted plaintiffs right to sue on those grounds.

In the coming years 19 more cases arose in which the constitutionality of state aid to parochial or non-public schools was litigated. Three of these cases concerned aid to higher education. Not until the Wolman v. Walter case (1977) did the Court allow more than textbook and transportation costs for elementary and secondary non-public schools. These cases are review in Chapter III, following.

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25 Flast et al v. Cohen, 392, U. S. 83 (1968).

Desegregation

Supreme Court decisions which concern segregation of the races in the United States span over 80 years of this country's 200 year history. The first decision involved the constitutionality of segregation of the races in public transportation facilities, Plessy v. Ferguson (1896).[26] An 1890 statute enacted by the Louisiana legislature established segregated railroad coaches. A group of Negro leaders organized a committee to fight the separate-but-equal law through the courts. On June 2, 1892, Homer Adolph Plessy sat down in a car reserved for whites and was arrested by prior arrangement for violation of the Louisiana statute. Brought before Judge John H. Ferguson of the criminal district court, Plessy was defended by Albion Tourgee of Mayville, New York. Tourgee asked Judge Ferguson to rule the Louisiana statute unconstitutional:

> The judge refused, and an appeal was taken to the state supreme court against his decision, so that the case became for the record Plessy v. Ferguson.[27]

Almost three years later, the Supreme Court took up the appeal of Plessy. Tourgee argued that

> . . . the degradation of the black man was such that most white men would prefer death to living as a Negro in the United States. Tourgee went on to say the law was intended to debase blacks solely to gratify feelings of white superiority, as the exemption of nurses tending white children proved.[28]

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26 Plessy v. Ferguson, 163 U. S. 537 (1896).

27 Morris L. Ernst, The Great Reversals (New York: Weybright and Talley, 1973), p. 159.

28 Ibid., p. 163.

Justice Henry B. Brown delivered the opinion of the Court, starting from the premise that color is a reasonable basis for segregation.

> From that, he deduced that Jim Crow laws are constitutional as an exercise of the police power to preserve peace and order, that "separation (of the races) in places where they are liable to be brought in contact does not necessarily imply the inferiority of either," that laws can never "eradicate racial instincts or . . . abolish distinctions based on physical differences," and that the Fourteenth Amendment intended no more than what he vaguely called "the absolute equality of the two races before the law."[29]

The Court decision in Plessy was followed by progressively more rigid barriers against Negroes.

> Schools and other facilities for Negroes were notoriously inferior and sedulously kept that way. During the next fifty years, little evidence of white revulsion against legally enforced segregation can be discerned. Lynchings, the brutalities of chain gangs, and the more outrageous denials of the vote provoked popular indignation from time to time, but that was all.
>
> In 1950, it is safe to say, the overwhelming masses of white Americans were quite tolerant of the racial status quo, and foreign observers marveled at the apparent submissiveness of blacks.[30]

Because of the knowledge explosion, wherein knowledge was doubled between 1900 and 1950, the value of a college degree became more evident in securing good jobs. Legal actions were undertaken to desegregate higher education as a prelude to an attack on public school segregation policies.

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29 Ibid., p. 161.

30 Ibid., p. 163.

Legal actions were initiated by the National Association for the Advancement of Colored People to secure both entry and equal treatment and facilities for Negro students. In Gaines v. Canada (1938) college entrance was obtained for a Negro student in Missouri.[31] In Sipuel v. Board of Regents (1948) college entrance was gained for a Negro student in Oklahoma.[32] In McLaurin v. Oklahoma (1950) equal treatment and facilities were obtained for a Negro student who had been segregated from fellow students in all classroom and other activities.[33] In Sweatt v. Painter (1950) admission of a law student to the regular curriculum and facilities was obtained.[34]

> By 1952, the Supreme Court had insisted six times that states must enforce "equal" in higher education, even if it meant giving up "separate." All the decisions affected graduate schools, however, and no one else. The Court reached these decisions without having to confront Plessy v. Ferguson head on.[35]

Having penetrated the walls of segregation in schools of higher education, counsels for the National Association for the Advancement of Colored People took action to overcome racial barriers in elementary and secondary schools of Kansas, South Carolina, Virginia, and Delaware.

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31 Missouri ex rel. Gaines v. Canada, Registrar of the University of Missouri et al., 305 U. S. 337 (1938).

32 Sipuel v. Board of Regents of the University of Oklahoma et al., 332 U. S. 631 (1948).

33 McLaurin v. Oklahoma State Regents for Higher Education et al., 339 U. S. 637 (1950).

34 Sweatt v. Painter et al., 339 U. S. 629 (1950).

35 Ernst, The Great Reversals, p. 163.

Four cases were joined for appeal before the Supreme Court in 1952:

1. Brown et al. v. Board of Education of Topeka. (Kansas)
2. Briggs et al. v Elliott et al. (South Carolina)
3. Davis et al. v. County School Board of Prince Edward County, Va., et al.
4. Gebhart et al. v. Belton et al. (Delaware)

These suits were class actions by which minor Negro plaintiffs sought to obtain admission to public schools on a non-segregated basis. Counsel for the complainants was Thurgood Marshall, who was destined to become the Court's first Negro Justice in 1967. Questions arose concerning the circumstances surrounding the adoption of the Fourteenth Amendment, since it was by no means clear that the intent of the Amendment included the abolition of school segregation, and arguments were rescheduled for December 8, 1953.[36]

During the interim, Chief Justice Fred M. Vinson died, and President Dwight D. Eisenhower appointed Earl Warren to that position. Chief Justice Earl Warren wrote the ultimate decision following unanimous declaration of the Court that

> Segregation of children in public schools solely on the basis of race, even though the physical facilities and

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36 Brown et al., v. Board of Education of Topeka, Shawnee County, Kan., et al., 347 U. S. 483 at 483 (1954).

> other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities, in contravention of the Equal Protection Clause of the Fourteenth Amendment.[37]

The Brown I ruling was applied to the Bolling v. Sharpe case,[38] which involved segregated school facilities in the District of Columbia, on the same day. All cases were restored to docket for further argument regarding formulation of decrees.

Brown II was initiated in 1955 for the purpose of implementing the Brown I decision.

> Because of the nationwide significance of the decision, the Court invited the Attorney General of the United States and the attorneys general of all states requiring or permitting racial discrimination in public education to present their views for resolving issues that lay ahead. After hearing a number of briefs, the Court arrived at a decision and remanded the cases to district courts to "take such proceedings and enter such orders and decrees consistent with their opinion as are necessary and proper to admit to public schools on a nondiscriminatory basis with all deliberate speed the parties to these cases.[39]

Brown II resulted in guidelines for courts to follow in implementing desegregation decisions:

> . . . the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission

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37 Brown et al., v. Board (1954) p. 483.

38 Bolling et al. v. Sharpe et al., 347 U. S. 497 (1954).

39 Bolmeier, Supreme Court Decisions, p. 95.

> to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.[40]

The case of Cooper v. Aaron [41] is regarded as an important landmark decision of the Supreme Court in education following the Brown decisions. The desegregation program planned by the Little Rock, Arkansas, School Board called for integration at the senior high school level in 1957. During subsequent years, integration would continue through the junior high schools and elementary schools, with all levels to be desegregated by 1963. Then, the School Board filed a petition in District Court to postpone further desegregation programs for two and one-half years. The relief was granted by the district court but was then denied by the Court of Appeals. On September 29, 1958, the Supreme Court announced a unanimous decision which affirmed the Circuit Court in that a Legislature and Governor of a state were powerless to obstruct the rulings of the Federal Court.

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40 Brown et al. v. Board of Education of Topeka et al., 349 U. S. 294 at 300-1 (1955).

41 Cooper et al., Members of the Board of Directors of the Little Rock, Arkansas, Independent School District, et al., v. Aaron et al., 358 U. S. 1 (1958).

Another case involved responsibility of private schools to observe the mandates of Brown I. Pennsylvania v. Board ruled that when a state action is involved in operation of the institution, desegregation is mandated.[42]

In Goss v. Board (1963) the Supreme Court ruled that a school transfer plan operating on racial factors would perpetuate de facto segregation in the school systems concerned and was unconstitutional.[43]

In McNeese v. Board (1963) the issue was whether or not state aid could be withdrawn from school districts which had not complied with rules affecting such aid.[44] When fifth and sixth grade classes from an all-white school were transferred bodily into an all-Negro school, the State Superintendant of Public Instruction withdrew aid to that school district. The Court ordered state aid restored to protect petitioners rights under the Fourteenth Amendment. This case demonstrated that state remedies need not be exhausted before seeking relief in a federal court under the federal Civil Rights Act. Justice John M. Harlan provided the lone dissenting vote in this case.

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42 Pennsylvania et al. v. Board of Directors of City Trusts of the City of Philadelphia, 353 U. S. 230 (1957).

43 Goss et al. v. Board of Education of Knoxville, Tennessee, et al., 373 U. S. 683 (1963).

44 McNeese et al. v. Board of Education for Community Unit School District 187, Cahokia, Illinois, et al., 373 U. S. 668 (1963)

Griffin v. School Board (1964) tested the constitutionality of county action to close public schools in defiance of desegregation mandates posed by Brown I and Brown II.[45] After schools in Prince Edward County, Virginia, were closed in 1959, suit was brought to compel reopening of the schools. The Supreme Court ruled that the state may not allow schools to close in one county and remain open in another because of racial factors. The schools were ordered to be reopened under the supervision of the district court.

Rogers v. Paul (1965) concerned the adequacy of a desegregation plan on the basis of one grade per year.[46] The Court decision was split 5-4 in favor of declaring the plan inadequate on the grounds that some children would be denied the opportunity to attend a desegregated school.

In Green v. County School Board (1968) the issue was whether the school board's adoption of a "freedom of choice" plan constituted adequate compliance with the mandate of Brown II.[47] The Court decision ruled against "freedom of choice," saying

> The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.[48]

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45 Griffin et al. v. County School Board of Prince Edward County et al., 377 U. S. 218 (1964).

46 Rogers et al. v. Paul et al., 383 U. S. 198 (1965).

47 Green v. County School Board, 391 U. S. 430 (1968).

48 Ibid., p. 434.

In companion cases to Green the issue was "free transfer" plans adopted by school boards as a method of desegregation. In Monroe v. Board the free transfer plan was held unacceptable.[49]

> We do not hold that "free transfer" can have no place in a desegregation plan. But like "freedom of choice," if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable.[50]

In Raney v. Board of Education a similar plan was held unacceptable.[51]

Following the resignation of Chief Justice Earl Warren and the subsequent appointment of Chief Justice Warren E. Burger, the dissatisfaction evidenced by those who desired immediate desegregation of school facilities was expressed by the large numbers of desegregation suits filed in 1969 and beyond. From 1969 through 1977 twenty-four cases were prosecuted involving requests for stay of desegregation orders, contesting desegregation procedures, requesting new desegregation procedures and requesting remedial action to offset the effects of enforced segregation. These cases are presented in Chapter IV, following.

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49 Monroe v. Board of Commissioners, 391 U. S. 450 (1968).

50 Ibid., p. 459.

51 Raney v. Board of Education, 391 U. S. 443 (1968).

Academic Freedom

Before the advent of the Burger court in 1969, academic freedom issues were raised in several court cases.

Garner v. Los Angeles (1951) concerned the constitutionality of a city ordinance requiring all public employees to sign a loyalty oath stating whether or not he or she had ever been or was a member of the Communist Party.[52] The lower courts of the state upheld dismissal of public employees for refusal to sign the oath. The Supreme Court affirmed the lower court decision in a 5-4 opinion, rejecting the petitioners' contentions that the ordinance operated to punish past actions as a "bill of attainder" and denied due process. The Court did not consider dismissal from employment in public service as punishment.

Adler v. Board of Education (1951) posed similar circumstances, except that the persons involved were public school teachers.[53] At issue was the constitutionality of loyalty oath requirements involving the Feinberg Law.[54] The teachers refused to sign the oath and were dismissed. Upon appeal to the Supreme Court of Kings County, Special Term, judgment was given for the teachers. The Supreme Court, Appellate Division, Second Judicial Department, reversed, thereby upholding the teachers' dismissal. The Court

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52 Garner v. Board of Public Works of Los Angeles, 341 U. S. 716 (1951).

53 Adler v. Board of Education of the City of New York, 72 S. Ct. 380 (1951).

54 New York, Civil Service Law, Article 7, Title C, Section 105.

of Appeals upheld their dismissal. The Supreme Court affirmed the lower court decision 6-3, rejecting appellants' contention that Constitutional freedoms had been violated and that the oath requirement was a bill of attainder. Mr. Justice Sherman Minton gave the Court decision, holding that teaching is a privilege and not a right and that school authorities have the right and duty to maintain high standards of qualification among teachers.

Wieman v. Updegraff (1952) concerned the legality of an Oklahoma statutory loyalty oath which was required of all teachers. The salaries of Wieman and others who refused to take the oath were cut off, and legal action was begun to free the salaries. The District Court of Oklahoma County denied relief to the teachers. The Oklahoma Supreme Court affirmed. The United States Supreme Court reversed on the grounds that scienter was not a provision of the loyalty oath. The Court held that the oath was unconstitutional because it violated the due process clause of the Fourteenth Amendment. The Court suggested that membership in subversive organizations may be innocent, and that many organizations start out innocent but later develop subversive activities. Therefore, the "indiscriminate classification of innocence with knowing activity must fall as an assertion of arbitrary power."[55]

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55 Wieman v. Updegraff, 344 U. S. 183 (1952).

Slochower v. Board (1956) concerned the discharge of a college professor employed by a tax-supported college in the City of New York.[56] The teacher was questioned about alleged prior membership in the Communist Party over 15 years previous. Slochower invoked the Fifth Amendment before an investigating committee of the United States Senate and was summarily discharged from his position under provisions of the New York City Charter.[57] Slochower appealed through the Supreme Court of Kings County, the Appellate Division, and the Court of Appeals without success. Upon appeal to the United States Supreme Court, the Court reversed 8-1, holding that there had not been any protection of the individual against arbitrary action, which was a denial of due process.[58]

Beilan v. Board (1958) tested the legality of discharge of a teacher for refusing to answer questions pertaining to his alleged affiliation with the Communist Party in 1944.[59] Beilan was given a hearing on charges of incompetency and persistent willful violation of the school laws. The Board of Education ordered Beilan's discharge. Ultimately, the Supreme Court of Pennsylvania sustained the action of the Board of Education.

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56 Slochower v. the Board of Higher Education of the City of New York, 76 S. Ct. 637 (1956).

57 New York City, Charter, Section 903.

58 Slochower v. the Board, p. 641.

59 Beilan v. Board of Education School District of Philadelphia, 78 S. Ct. 1317 (1958).

Upon appeal to the United States Supreme Court, the Court upheld the dismissal in a 5-4 decision which held that incompetency was proper grounds for discharge.

Sweezy v. New Hampshire (1957) concerned the legality of a 1951 New Hampshire statute which made all subversive persons ineligible for state employment.[60] Professor Sweezy refused to respond completely to questioning by investigators from the Attorney General's office. Sweezy testified that he had never been a member of the Communist party, but he refused information on alleged membership in the Progressive Party. Upon appeal of the discharge from state employment, the United States Supreme Court ruled the investigation unconstitutional because it was made by a delegated agency which operated under broad, unclear guidelines.

Barenblatt v. United States (1959) tested the legality of Congressional inquiry into alleged Communist infiltration into educational institutions.[61] Barenblatt refused to answer questions posed by the Subcommittee of the House Committee on Un-American Activities and was discharged for incompetence. Upon appeal to the United States Supreme Court, the Court upheld the discharge in a 5-4 decision.

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60 Sweezy v. New Hampshire, by Wyman, Attorney General, 354 U. S. 234 (1957).

61 Barenblatt v. United States, 360 U. S. 109 (1959).

Shelton v. Tucker (1960) tested the constitutionality of a 1958 Arkansas statute which required a teacher to list all organizations to which the teacher had belonged during the past five years, such an affidavit to be filed annually.[62] The list of prohibited organizations included the National Association for the Advancement of Colored People. The United States Supreme Court ruled that such a requirement restricts the teacher's right of association and constitutes deprivation of the teacher's right to academic freedom which is protected by the due process clause of the Fourteenth Amendment.

Cramp v. Board (1961) concerned the legality of a statute requiring teachers to swear that they have not given "aid, support, advice, counsel or influence" to the Communist Party.[63] Upon appeal, the United States Supreme Court ruled such an oath overly vague and unenforceable.

Baggett v. Bullitt (1964) involved the constitutionality of a state statute requiring all teachers to take an oath under threat of termination of employment, and constraining teachers from joining any subversive organization or advocating the overthrow of the government by force or violence.[64] The Court held this statute to be ambiguous and, therefore, unenforceable.

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62 Shelton et al. v. Tucker et al., 364 U. S. 479 (1960).

63 Cramp v. Board of Public Instruction of Orange County, 368 U. S. 278 (1961).

64 Baggett v. Bullitt, 377 U. S. 360 (1964).

Elfbrandt v. Russell (1966) tested the constitutionality of an Arizona statute requiring state employees to take a loyalty oath containing provisions for criminal penalties and discharge from employment if the employee had knowledge of unlawful purpose of the organization.[65] Barbara Elfbrandt, a teacher, refused to take the oath and brought suit for declaratory relief in Superior Court. The Superior Court upheld the constitutionality of the statute and denied relief, a ruling which was subsequently upheld by the Arizona Supreme Court. Judgment was vacated by the United States Supreme Court, and the case was remanded for further consideration. The Arizona Supreme Court reinstated the Superior Court's original judgment (97 Ariz 140, 397 P2d 944). On certiorari, the United States Supreme Court reversed, holding 5-4 that:

> Since the statute did not require a showing that an employee was an active member with the specific intent of assisting in achieving the unlawful ends of an organization which had as one of its purposes the violent overthrow of the government, the statute infringed unnecessarily on the freedom of association protected by the First Amendment to the Federal Constitution, made applicable to the states through the Fourteenth Amendment, and was unconstitutionally broad.[66]

While majority opinion held the statute in question as "unconstitutionally vague," minority dissenting opinion of Justices White, Clark, Harlan, and Stewart held that even if the statute's

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65. Elfbrandt v. Russell, 384 U. S. 11 (1966).

66 Ibid., p. 11.

criminal provisions were unconstitutional, its provision for discharge from employment was not.

Keyishian v. Board of Regents (1967) challenged the constitutionality of New York statutes involved in the Feinberg Certificate which rendered teachers ineligible for public employment on account of seditious activities.[67] The State University of New York at Buffalo required each faculty member to sign a certificate (the "Feinberg certificate") declaring that, among other things, he was not now a member of the Communist party and if he ever had been, he had communicated that fact to the president of the university. Four of the five plaintiffs declined to sign the certificates. Keyishian's term ended and appointment not renewed. On July 8, 1964, the plaintiffs brought a class action suit against a large part of the educational hierarchy of the State of New York, seeking an injunction against enforcement of the civil statutes concerning employment of subversives and of the regulations and procedures used to implement those statutes. The plaintiffs argued that the objectionable regulations infringe upon freedom of expression without being justified by any legitimate state interest. The plaintiffs invoked the Bill of Attainder Clause, the Ex Post Facto Clause, and the Due Process Clause in their defense. The District Court for the Western District of

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67 Keyishian v. Board of Regents of the University of the State of New York, 385 U. S. 859 (1967).

New York gave judgment for the defendants, the Board of Regents. On appeal, the United States Supreme Court reversed in a 5-4 decision, declaring the New York statutes involved in the Feinberg Certificate unconstitutional on at least three counts:

1. Vagueness;
2. First Amendment's freedom of expression and association;
3. Impermissible overbreadth.

Whitehill v. Elkins (1967) challenged the constitutionality of a Maryland teacher's oath, which read as follows:

1. I, _____, do hereby (Print Name - including middle initial) certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
2. I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition).[68]

The teacher sued for declaratory relief that the oath required of teachers was unconstitutional. A three-judge Federal District Court dismissed the complaint.

On appeal, the Supreme Court, in a 6-3 decision, reversed.

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68. Howard Joseph Whitehill v. Wilson Elkins, President, University of Maryland, et al., 389 U. S. 54 at 55 (1967).

Mr. Justice William O. Douglas announced the majority opinion of the Court, saying:

> The lines between permissible and impermissible conduct are quite indistinct. Precision and clarity are not present. Rather we find an overbreadth that makes possible oppressive or capricious application as regimes change. That very threat, as we said in another context . . . may deter the flowering of academic freedom as much as successive suits for perjury.[69]

Justices Harlan, Stewart, and White dissented on the grounds that the oath itself was not unconstitutional.

Pickering v. Board (1968) concerned the dismissal of a teacher who had written an article for publication in a local newspaper criticizing the way in which the Board of Education and the Superintendant of Schools had handled past proposals to raise new revenue for the schools.[70] The Circuit of Will County, Illinois, upheld the dismissal, and the Supreme Court of Illinois, two justices dissenting, affirmed the judgment of the Circuit Court.

On certiorari, the United States Supreme Court reversed, holding that in the absence of proof of false statements knowingly rendered by the teacher, the dismissal violated First Amendment rights to free speech.

Epperson v. State of Arkansas (1968) concerned the constitutionality of an Arkansas State Statute enacted in 1929 which provided severe penalties against "any teacher or other instructor in any University, College, Normal, Public School or other institution who taught that mankind ascended or descended from a

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69 Ibid., p. 62.

70 Pickering v. Board of Education of Township High School District 205, 391 U. S. 563 (1968).

lower order of animals."[71] Susan Epperson, who was aware of the statute and fearful of prosecution as a result of circumstances which would make her liable for dismissal and fine under the law, applied to the state Chancery Court for a declaration that such statute was void and enjoining the state officials from dismissing her for violation of the statute.

The Chancery Court declared the statute unconstitutional, but on appeal the Supreme Court of Arkansas reversed, sustaining the statute as an exercise of the state's power to specify the curriculum in public schools. On appeal, the United States Supreme Court reversed, holding 7-2 that the statute was contrary to the mandate of the First, and in violation of the Fourteenth, Amendment, as conflicting with the constitutional prohibition of state laws respecting establishment of religion or prohibiting the free exercise thereof. Separate opinions were entered by Justices Black, Harlan, and Stewart, concurring in the result.

The last case adjudicated by the United States Supreme Court during Chief Justice Earl Warren's tenure was Tinker v. Des Moines. This case tested the constitutionality of school regulations which banned the wearing of black armbands as a means of protesting the Vietnam war.[72] Five students, from second grade to eleventh grade, mainly members of the same family, violated the

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71 Susan Epperson, et al., v. State of Arkansas, 393 U. S. 97 (1968).

72 John F. Tinker and Mary Beth Tinker, Minors, etc., et al., v. Des Moines Independent Community School District et al., 393 U. S. 503 (1969).

school regulations by wearing black armbands to school and were expelled. Upon complaint of the parents, who sought an injunction restraining the school authorities from disciplining the petitioners and nominal damages, the United States District Court for the Southern District of Iowa dismissed the complaint on the grounds that the school regulation was reasonable in order to prevent disturbances of school discipline. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed without opinion. Upon appeal to the United States Supreme Court, it was held that the wearing of armbands in the circumstances of the case was closely akin to "pure speech" and was protected by the First Amendment. In rendering the 7-2 opinion of the Court, Justice Fortas said:

> It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.[73]

From 1969 through 1977 twelve additional cases reached the United States Supreme Court which involved teacher dismissals, student suspensions, compulsory education, financing of schools and loyalty oath requirements. These cases are presented in Chapter V, following.

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73 Tinker v. Des Moines, 393 U. S. 503 at 506.

CHAPTER III

RELIGION

Introduction

The inception of the Burger Court in 1969 formed a nexus with the rising tide of public demand for aid to non-public schools which was to require much judicial interpretation during coming years. The legacy of Everson (1947) and Allen (1968) in which the use of public funds was sanctioned for the support of transportation costs and textbooks for parochial school students fuelled the hopes of parochial schools for more aid. Listed below are the Decade of the 70's Supreme Court decisions as of June 28, 1977, affecting public funds for religious non-public schools.

The Cases

Lemon v. Kurtzman (1971) contested the legality of Pennsylvania and Rhode Island statutes which benefited non-public school teachers by supplementing teacher salaries and providing other financial benefits.[1] The Supreme Court declared both statutes unconstitutional, with Justice Byron R. White recording the lone dissenting vote with respect to the Rhode Island case. This case will be discussed further in a later section.

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1 Lemon v. Kurtzman and DiCenso v. Robinson, 403 U. S. 602 (1971).

Tilton v. Richardson (1971) was decided on the same day as Lemon.[2] It concerned the constitutionality of the Higher Education Facilities Act of 1963 which provided Federal construction grants for sectarian colleges and universities. The Supreme Court upheld constitutionality of the Act in a 5-4 decision. The majority decision was announced by Chief Justice Burger, joined by Justices Harlan, Stewart and Blackmun. Justices Black, Douglas and Marshall dissented, saying:

> Religious teaching and secular teaching are so enmeshed in parochial schools that only the strictest supervision and surveillance would insure compliance with the condition. A parochial school operates on one budget. Money not spent for one purpose becomes available for others.[3]

Justice White concurred in the finding.

Johnson v. Sanders (1971) concerned the constitutionality of Connecticut's Nonpublic School Secular Education Act which authorized the State to contract with parochial elementary and secondary schools for purchase of secular educational services. A three-judge Federal District Court unanimously decided against the Act, holding that

> that law which authorized state to contract with parochial elementary and secondary schools for "purchase" by state of "secular education services" to be supplied to children was invalid under establishment clause.[4]

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2 Tilton v. Richardson, 403 U. S. 672 (1971).

3 Ibid., p. 693.

4 Johnson v. Sanders, Civ. A. No. 13432, 319 F. Supp. 421 (1970).

In a unanimous decision, without written opinion, the Supreme Court upheld the district court decision.[5]

Essex v. Wolman (1972) tested the constitutionality of an Ohio statute which authorized payment of a portion of the tuition as reimbursement to parents of children attending non-public schools. A three-judge Federal District Court of the Southern District of Ohio held the statute unconstitutional:

> that portion of Ohio educational grant statute authorizing grants to reimburse parents of non-public school children for a portion of tuition paid by them, though expressing a valid secular purpose, fails to provide any mechanism to insure that public monies provided to parents of parochial school children will not ultimately be used for religious purposes, as opposed to sectarian, nonsecular ends, and, as such, fosters an excessive government entanglement with religion by transferring public funds to religiously oriented private schools in violation of the establishment clause.[6]

On October 10, 1972, the Supreme Court affirmed the judgment of the district court in this case.[7]

Johnson v. New York State challenged the constitutionality of New York education laws which require that local school districts furnish textbooks free to students in grades 7 through 12, but which provide for free textbooks for children in grades 1 through 6 only upon a vote of the majority of the school district's eligible voters to assess a tax to provide necessary funding.[8]

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5 Sanders v. Johnson, 91 S. Ct. 2292 (1971).

6 Wolman v. Essex, Civ. A. No. 71-396, 342 F. Supp. 399 (1972).

7 Essex v. Wolman, 92 S. Ct. 1761 (1972).

8 Johnson v. New York State Education Department, 409 U. S. 75 (1972).

After certiorari was granted, voters of the respondent school district elected by majority vote to assess a tax for the purchase of textbooks for grades 1 through 6. On November 20, the Supreme Court remanded the case to the District Court for determination of whether or not the decision of the District Court had become moot.

Lemon v. Kurtzman (1973), known as Lemon II, was decided on April 2, 1973, as a sequel to Lemon I (1971).[9] Lemon II concerned payment of state funds for educational services performed before the date of the Supreme Court decision of Lemon I. The Court decision of Lemon I enjoined payment of state funds for educational services performed after the date of the decision (June 28, 1971), but did not prohibit such payments for services given before that date. Plaintiffs appealed to the Court to enjoin further payments of state funds. Five members of the Court, although not agreeing on an opinion, agreed that the judgment should be affirmed. Justices Douglas, Brennan and Stewart dissented on the grounds that there had been clear warning against such payments. Justice Thurgood Marshall did not participate in the decision.

On June 25, 1973, seven cases were decided which included three landmark decisions which were destined to have significant

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9 Alton J. Lemon et al. v. David H. Kurtzman, Etc. et al., 411 U. S. 192 (1973).

impact on future church-state activities. The three cases were:

1. Committee For Public Education and Religious Liberty et al. v. Nyquist, 413 U. S. 756 (1973).

2. Levitt v. Committee For Public Education and Religious Liberty et al., 413 U. S. 472 (1973).

3. Sloan v. Lemon et al., 413 U. S. 825 (1973).

These cases are discussed under Selected Cases later in this manuscript.

The other four cases decided June 25, 1973, were:

4. Kosydar v. Wolman et al., 353 F. Supp. 744, 93 S. Ct. 61 (1973). At issue was the constitutionality of an Ohio statute which authorized a tax credit to parents of children who attended non-public schools. The statute had been signed into law following the decision of Wolman v. Essex (1972) which outlawed the proposed parental reimbursement plan. The three-judge Federal District Court declared the tax credit statute unconstitutional based on the same arguments heard in Wolman. The Supreme Court upheld the decision of the District Court by a 6-3 majority vote.

5. Public Funds for Public Schools of New Jersey v. Marburger, 93 S. Ct. 2728 (1973). This case involved a New Jersey Nonpublic Elementary and Secondary Education Act. The Act provided state aid as reimbursement for the cost of secular, nonideological text books, instructional materials and supplies, with unused textbook funds to be diverted to other uses. Other uses included secular services, equipment and auxiliary services. The three-judge Federal District Court held the Act entirely

unconstitutional. The Supreme Court affirmed.

6. Richard W. Hunt v. Robert E. McNair et al., 413 U. S. 734 (1973). This case involved legal action against the South Carolina Educational Facilities Act which authorized issuance of revenue bonds for the benefit of the Baptist College at Charleston. The Supreme Court upheld the decision of the lower courts to permit issuance of the bonds under the three-part rule advanced in Lemon I.

7. Norwood et al. v. Harrison, Sr. et al., 413 U. S. 455 (1973). A class action suit had been initiated in Mississippi to enjoin public school officials from loaning state-owned textbooks to children attending racially segregated private schools in the state. In a 7-1 judgment, the Supreme Court held that a state's loaning textbooks to students attending racially discriminatory private schools is unconstitutional.

Wheeler v. Barrera concerned the legitimacy of channeling federal funds to parochial schools in Missouri.[10] The plaintiffs claimed that the defendants arbitrarily and illegally were approving Title I programs that deprived eligible nonpublic school children of services comparable to those offered eligible public school children. The Federal District Court denied relief, holding that the state had fulfilled its obligations under Title I. The United States Court of Appeals for the Eighth Circuit reversed (475 F. 2d. 1338). The Supreme Court upheld the ruling

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10 Wheeler et al. v. Anna Barrera et al., 417 U. S. 402 (1974).

of the Court of Appeals and directed proper implementation of Title I as pleaded. Mr. Justice Harry A. Blackmun delivered the 8-1 majority opinion of the Court:

> The Court of Appeals properly recognized, as we have noted, that petitioners failed to meet their broad obligation and commitment under the Act to provide comparable programs.[11]

Mr. Justice Hugo L. Black dissented, saying:

> Federal financing of an apparently nonsectarian aspect of parochial school activities, if allowed, is not even a subtle evasion of First Amendment prohibitions.[12]
>
> We should say so now, and save the endless hours and efforts which hopeful people will expend in an effort to constitutionalize what is impossible without a constitutional amendment.[13]

Three constitutional issues were raised in Wheeler:

1. Does Title I of the 1965 Elementary and Secondary Educational Act require the assignment of publicly employed teachers to provide remedial instruction to private schools attended by Title I eligible students?

2. Would the presence of Title I funded teachers in parochial schools constitute a violation of the establishment clause of the First Amendment?

3. Are other options feasible, such as neutral sites or summer programs to avoid on-the-premises conflict?

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11 Ibid., p. 420.

12 Ibid., p. 431.

13 Ibid., p. 432.

The Court did not decide the question of whether or not Title I required the assignment of publically employed teachers to teach "on the premises." Also, it was unnecessary for the Court of Appeals to reach the issue, in view of the fact that Title I does not obligate the state to provide such instruction but only to provide "comparable" (not identical) services. On remand, the District Court found

> that while most of the Title I funds allocated to public schools in Missouri were used "to employ teachers to instruct in remedial subject," the petitioners had refused "to approve any applications allocating money for teachers in parochial schools during regular school hours." The court did find that petitioners in some instances had approved the use of Title I money to "provide mobile educational services and equipment, visual aids, and educational radio and television in parochial schools. Teachers for after-school classes, weekend classes, and summer school classes have all been approved."[14]

The main contention lay in failure of the authorities to provide federally funded Title I teachers to teach in those schools during regular school hours.[15]

Mr. Justice Blackmun, in delivering the majority opinion of the Court in this case, held that "the mere fact that public school children are provided on-the-premises Title I instruction does not necessarily create an obligation to make identical provision for private school children.[16]

While the Court did not specify action required to assure

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14 Ibid., p. 409.

15 Ibid., p. 409.

16 Ibid., p. 421.

desirable distribution of Title I funds, least of all suggest that "on--the--premises" public school teachers be prescribed, Justice Blackmun suggested three broad alternatives:

1. Develop "comparable" instructional programs that would effectively exclude "on-the-premises" instruction;
2. Relegate all Title I programs to other means, such as a neutral site or a summer program.
3. Do not participate in the Title I program.

Faced with Missouri State Law which prohibits the use of state funds to support religious institutions, the parochial schools have initiated action

> to recover paid public school tax on the constitutional, theological and philosophical premises that the public schools teach a religion called "secular humanism" and that this violates the establishment clause of the First Amendment.[17]

There is recent evidence that this line of thought is gaining support.[18]

Marburger v. Public Fund (1974) concerned the legality of a New Jersey Statute which provided funds for reimbursement of parents of non-public school children for expenditures for textbooks, instructional materials and supplies.[19] A Federal

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17 Joseph E. Bryson, "Recent Developments in Church-State Issues," New Directions in School Law (NOLPE 21st Annual Convention, Colorado Springs, Colorado, November 11-13, 1975), pp. 31-40.

18 James J. Kilpatrick, "New Attack on Religion in the Classroom," The Progress-Index, 2 December 1977, p. 4.

19 Marburger, State Commissioner of Education et al. v. Public Funds for Public Schools of New Jersey et al., 94 S. Ct. 3163 (1974).

District Court declared the reimbursement plan unconstitutional. The Supreme Court upheld the decision 6-3 without written opinion.

Luetkemeyer v. Kaufmann (1974) tested the constitutionality of a Missouri statute which provided transportation for students to public schools but disallowed similar transportation to parochial schools.[20] The three-judge Federal District Court decided in favor of the statute. In a 6-3 decision, the Supreme Court affirmed the ruling of the district court. Chief Justice Burger and Justices White and Rehnquist dissented. There was no written Supreme Court opinion. The decision was analyzed as follows:

> In judicial summary, the United States Supreme Court in the above case plowed no significant new church-state ground; the case has considerably less constitutional importance than first seemed. In substance, the Supreme Court has simply affirmed Missouri statutes that provide public bus transportation to public schools and disallows public transportation to private and parochial schools. While church-state separatists can applaud a minor judicial victory, no serious damage to Everson and the "child benefit" theory can be detected.[21]

Franchise Tax Board v. United Americans for Public Schools (1974) concerned a California statute which authorized a tax credit for parents of parochial school children as reimbursement for a portion of tuition paid to the parochial schools.[22] The three-judge Federal District Court ruled against the statute.

20 Luetkemeyer v. Kaufmann, 95 S. Ct. 167 (1974).

21 Joseph E. Bryson, "Recent Church-State Litigation," Contemporary Legal Problems in Education (NOLPE 20th Annual Convention, Miami Beach, Florida, 1974), p. 248.

22 Franchise Tax Board of California v. United Americans for Public Schools, 95 S. Ct. 166 (1974).

In a 6-3 decision, the Supreme Court affirmed the ruling of the district court. Chief Justice Burger and Justices White and Rehnquist dissented "for the reasons stated in my dissent in Committee for Public Education & Religious Liberty v. Nyquist, 413 U. S. 756, 813-824, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973)."[23] The final paragraph of the dissent indicates the tone of Nyquist:

> At the very least I would not strike down these statutes on their face. The Court's opinion emphasizes a particular kind of parochial school, one restricted to students of particular religious beliefs and conditioning attendance on religious study. Concededly, there are many parochial schools that do not impose such restrictions. Where they do not, it is even more difficult for me to understand why the primary effect of these statutes is to advance religion.[24]

Meek v. Pittenger (1975) challenged the constitutionality of two Acts of the Pennsylvania Legislature:[25]

Act 194--An auxiliary service statute providing counseling, testing, psychological services, and speech and hearing therapy for parochial school children. The Act also provided teachers and other related services for exceptional children, for remedial students, and for educationally disadvantaged

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23 Franchise Tax Board v. United Americans, 419 U. S. 890 (1974).

24 Committee for Public Education & Religious Liberty v. Nyquist, 413 U. S. 756 at 824 (1973).

25 Sylvia Meek et al., v. John C. Pittenger, Etc., et al., 421 U. S. 349 (1975).

students. The Act also provided for "secular" services currently enjoyed by all public school children.

Act 195--Provided textbooks, instructional materials such as periodicals, photographs, maps, charts, sound recordings, films, and printed or published materials. Also provided projection equipment, recording equipment, and laboratory equipment be loaned to private and parochial schools.

A District Court ruling allowed all proposed services except those relating to the loan of instructional equipment which could be diverted to religious purposes. The Supreme Court struck down all but the textbook loan provisions of the Pennsylvania statutes in a 6-3 decision on May 19, 1975. Justice Potter Stewart announced the judgment of the Court and delivered an opinion which expressed the view of six members of the Court:

> This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that Act 194 violates the constitutional prohibition against laws respecting an establishment of religion.[26]

Justice William J. Brennan dissented with the majority ruling which permitted operation of the textbook loan program, as did Justices William O. Douglas and Thurgood Marshall. The voting pattern of the Court is tabulated in Table 4 and 5 on pages 93 and 94. Justice Brennan's dissent included the following comment:

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26 Ibid., p. 372.

> It is pure fantasy to treat the textbook program as a loan program. . . . The guidelines make crystal clear that the non-public school, not its pupils, is the motivating force behind the textbook loan, and that virtually the entire loan transaction is to be, and is in fact, conducted between officials of the non-public school, on the one hand, and officers of the State, on the other.[27]

On the other hand, Chief Justice Burger concurred with the Court majority opinion only insofar as it affirmed the judgment of the District Court:

> But this holding does more: it penalizes children--children who have the misfortune to have to cope with the learning process under extraordinarily heavy physical and psychological burdens, for the most part congenital. This penalty strikes them not because of any act of theirs but because of their parents' choice of religious exercise.[28]

Justices Rehnquist and White joined the judgment of the Court with regard to the textbook loan program but dissented insofar as the other aid programs were held to be unconstitutional. Quoting from Nyquist, Justice Rehnquist said:

> I remain convinced of the correctness of Mr. Justice White's statement in his dissenting opinion in Committee for Public Education & Religious Liberty v. Nyquist, 413 U. S. at 814-815,
>
> > "Positing an obligation on the State to educate its children, which every State acknowledges, it whould be wholly acceptable for the State to contribute to the secular education of children going to sectarian schools rather than to insist that if parents want to provide their children with religious as well as secular education, the State will refuse to contribute anything to their secular training."[29]

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27 Ibid., p. 379.

28 Ibid., p. 386.

29 Ibid., p. 395.

Roemer v. Board of Public Works tested the constitutionality of a Maryland statute which authorized non-categorical aid to state-accredited private colleges, including religiously affiliated institutions.[30] The grant program provided 15% of the state cost per pupil for secular studies, excluding religious programs. The action was initiated by four Maryland citizens and taxpayers challenging the constitutionality of the statute under the Establishment Clause of the First Amendment as applied to four Roman Catholic colleges. A three-judge Federal District Court in a 2-1 decision held the statute constitutional.

On certiorari, the Supreme Court affirmed the judgment of the district court. Justice Blackmun announced the decision of the court, divided 5-4:

> In reaching the conclusion that it did, the District Court gave dominant importance to the character of the aided institutions and to its finding that they are capable of separating secular and religious functions.[31]

Mr. Justice Brennan dissented, joined by Mr. Justice Marshall:

> Presently the Act is simply a blunderbuss discharge of public funds to a church-affiliated or church-related college.[32]

Mr. Justice Stewart dissented:

The findings in Tilton clearly established that the

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30 John C. Roemer, III, et al. v. Board of Public Works of Maryland, et al., 426 U. S. 736 (1976).

31 Ibid., p. 766.

32 Ibid., p. 770.

> federal building construction grants benefited academic institutions that made no attempt to inclucate the religious beliefs of the affiliated church. In the present case, by contrast, compulsory theology courses may be "devoted to deepening religious experiences in that particular faith."[33]

The majority decision was based on application of the three-part test of Lemon I which was based on cumulative criteria developed by the Court over many years:

1. First, the statute must have a secular legislative purpose.
2. Second, its principal or primary effect must be one that neither advances nor inhibits religion.
3. Finally, the statute must not foster an excessive entanglement with religion.[34]

> The first part of Lemon I's three-part test is not in issue: appellants do not challenge the District Court's finding that the purpose of Maryland's aid program is the secular one of supporting private higher education generally, as an economic alternative to a wholly public system. The focus of the debate is on the second and third parts.[35]

The majority opinion attempted to determine if the primary effect rule was violated. In order to advance religion, the funds must be channeled to religious efforts through a primarily religious organization. But the Court found the institutions concerned

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33 Ibid., p. 774.

34 Lemon v. Kurtzman, 403 U. S. at 612 (1971).

35 Roemer, p. 754.

as free of religious influence as other schools which had previously been authorized aid:

> The general picture that the District Court has painted of the appellee institutions (Notre Dame, Mount Saint Mary's, Loyola and Saint Joseph) is similar in almost all respects to that of the church-affiliated colleges considered in Tilton and Hunt.[36]

Therefore, the primary effect of aid to these colleges was not found to advance religion, as alleged by appellants.

The entanglement test was applied by comparison of the need for church-state interaction in Roemer with Tilton. It was decided that no more than annual supervision of college facilities would be needed to assure that funds were not diverted to religious purposes. Also, the secular and sectarian activities of the colleges were easily separable for occasional audit.

> They (the audits) and other contacts between the Council and the colleges are not likely to be any more entangling than the inspections and audits incident to the normal process of the colleges' accreditations by the State.[37]

The danger of political divisiveness foreseen in Lemon I was adjudged substantially less when the aided institution is not an elementary or secondary school, but a college whose student constituency is not local but diverse and widely dispersed.

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36. Ibid., p. 758.

37. Ibid., p. 764.

The major contention of the appellants in Roemer was that

> this case is controlled by previous cases in which the form of aid was similar (Lemon I, Nyquist, Levitt) rather than those in which the character of the aided institution was the same (Tilton, Hunt). We disagree.[38]

The Court held that aid to elementary and secondary schools struck down in Lemon I, Nyquist and Levitt concerned permanent, nonannual tax exemption of predictably expanding nature as the years go by. In Tilton the Court upheld a program for one-time, single-purpose construction grants, renewable annually.

Mr. Justice White, joined by Mr. Justice Rehnquist, concurred in the judgment based on the "secular legislative purpose" and the "primary effect" of the judicial test for constitutionality of state aid to non-public schools. Justice White expressed the opinion that the "entanglement" test was superfluous:

> I have never understood the constitutional foundation for this added element; it is at once both insolubly paradoxical . . . and -- as the Court has conceded from the outset -- a "blurred, indistinct and variable barrier"[39]

The fourth dissenting vote came from Mr. Justice Stevens:

> I would add emphasis to the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it. The disease of entanglement may infect a law discouraging wholesome religious activity as well as a law encouraging the propagation of a given faith.[40]

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38 Ibid., p. 766.

39 Ibid., p. 768.

40 Ibid., p. 775.

Wolman v. Walter (1977) challenged the constitutionality of an Ohio statute which authorized the following services to non-public school children:[41]

1. Secular textbooks;
2. Auxiliary services;
   a. Standardized tests and scoring services.
   b. Speech, hearing and psychological diagnostic services.
   c. Therapeutic, guidance and remedial services.
3. Instructional materials, such as projectors, tape recorders, maps, globes and science kits;
4. Transportation on field trips;
5. Dental and optical services.

A three-judge District Court held the statute constitutional in every respect. The majority opinion of the Court held the textbook and auxiliary services provisions of the statute constitutional but barred funds for instructional materials as violative of the "primary effect" clause of the Lemon I test and for field trip transportation as violative of the "entanglement" clause of the Lemon I test.

Mr. Justice Blackmun announced the opinion of the Court, using a complicated breakdown of the issues as shown in Table 1.

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41 Benson A. Wolman et al. v. Franklin B. Walter et al., U. S. (1977), 53 L. Ed. 2d., 714).

TABLE I

VOTING RECORD OF THE JUSTICES OF THE UNITED STATES SUPREME COURT

JUSTICES OF THE UNITED STATES SUPREME COURT
Date Confirmed

1969	1937	1939	1955	1956	1958	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion in Wolman v. Walter U. S. (1977).												Tot C
HELD CONSTITUTIONAL 1. Textbook provision and 2. Standardized testing service.												
C	X	X	X	D	C	C	D	C	C	C	D	6
HELD CONSTITUTIONAL 2. Speech, hearing and diagnostic services.												
C	X	X	X	D	C	C	C	C	C	C	C	8
HELD CONSTITUTIONAL 2. Therapeutic, guidance and remedial services.												
C	X	X	X	D	C	C	D	C	C	C	C	7
HELD UNCONSTITUTIONAL 3. Instructional materials and equipment.												
D	X	X	X	C	C	D	C	C	CD	D	C	6
HELD UNCONSTITUTIONAL 4. Transportation on field trips.												
D	X	X	X	C	C	D	C	C	D	D	C	5

LEGEND: C - Concur; D - Dissent; CD - Concur in part
X - Retired or absent N - Non participant

Textbook Provision and Standardized Testing

The procurement of secular textbooks and the granting of auxiliary services which included standardized testing and scoring procedures received the support of 6 members of the Court as constitutional. A striking resemblance was seen between the textbook loan provisions in this case and the Allen case. Appellants' arguments were based on a fear that substitutes would be authorized in lieu of books which would not be constitutionally acceptable. Justices Brennan, Marshall and Stevens dissented. Justice Brennan saw approval of any part of the statute as having potential political divisiveness, saying

> This subsidy to sectarian schools amounts to $88,800,000. . . This suffices without more to require the conclusion that the Ohio statute in its entirety offends the First Amendment prohibition against laws "respecting an establishment of religion."[42]

Justice Marshall blamed the decision in Allen for deterioration of the wall separating church and state, saying

> I am now convinced that Allen is largely responsible for reducing the "high and impregnable" wall between church and state erected by the First Amendment. . . to a "blurred, indistinct and variable barrier."[43]

Justice Stevens expressed the view that the First Amendment should be interpreted as prohibiting any state subsidy of sectarian schools, regardless of the form of the subsidy.

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42 Ibid., p. 736.

43 Ibid., p. 738.

Other Auxiliary Services

Speech, hearing and psychological diagnostic services received the support of 8 members of the Court. The Court held that the diagnostician would have so little time in contact with each child, unlike teachers or counselors, that there would be little risk of fostering ideological views.

> It follows that there is no need for excessive surveillance, and there will not be impermissible entanglement. We therefore hold that paragraphs 3317.06 (D) and (F) are constitutional.[44]

Justice Brennan registered a lone dissent due to potential political divisiveness previously mentioned.

Therapeutic, guidance and remedial services were sanctioned by 7 members of the Court, provided that such services were rendered to both public and non-public school students simultaneously in public schools, public centers or mobile units. Justice Brennan's blanket disapproval of all forms of aid to sectarian schools was reinforced by Mr. Justice Marshall who, having recorded a dissenting view with regard to textbook provisions, advocated overrule of Allen:

> By overruling Allen, we would free ourselves to draw a line between acceptable and unacceptable forms of aid that would be both capable of consistent application and responsive to the concerns discussed above. That line, I believe, should be placed between general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the programs' target populations and programs of educational assistance.[45]

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44 Ibid., p. 730.

45 Ibid., p. 739.

Instructional Materials and Equipment

The Court ruled 6-3 in declaring these provisions of the Ohio statute unconstitutional. Drawing on Meek v. Pittenger, the majority opinion announced by Justice Harry A. Blackmun said:

> Thus, even though the loan ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise.[46]

Appellees protested that loan of equipment was made to the pupil or his parent, not to the school itself. However, the Court would not exalt form over substance in this matter, holding that:

> Despite the technical change in legal bailee, the program in substance is the same as before: the equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the non-public school premises. In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools.[47]

Chief Justice Burger and Justices White and Rehnquist dissented as to this finding of the Court.

Transportation on Field Trips

The Court voted 5-4 in declaring these provisions of the Ohio statute unconstitutional. Appellees claimed this feature to be constitutionally indistinguishable from the bus trans-

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46 Ibid., p. 733.

47 Ibid., p. 734.

portation sanctioned by Everson. However, majority opinion of the Court held that

> First, the non-public school controls the timing of the trips and, within a certain range, their frequency and destination. Thus, the schools, rather than the children, truly are the recipients of the service and, as this Court has recognized, this fact alone may be sufficient to invalidate the program as impermissible direct aid.[48]

Chief Justice Burger and Justices White, Rehnquist and Powell dissented as to this finding of the Court. Justice Powell said:

> Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools.[49]

Overall Impact

The impact of this ruling was interpreted as easing the rules by which parochial school aid may be granted from public funds.[50] The resulting decision in Wolman is little different from that reached in Meek, where auxiliary services were not allowed due to potential entanglement caused by performance of such services by non-public school personnel on non-public school grounds. The voting pattern between the two cases shows some change in attitude toward state aid to non-public schools on the part of Justice Harry A. Blackmun.

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48 Ibid., p. 736.

49 Ibid., p. 741.

50 "Parochial School Aid Rules Eased," Richmond Times-Dispatch, 25 June 1977, p. A-2.

Justice Blackmun concurred in holding auxiliary services and materials and equipment grants of Meek unconstitutional, but in Wolman concurred in holding therapeutic guidance and remedial services constitutional. However, the facts of each case differ in that remedial services in Wolman were to be given in public facilities rather than private.

Justice W. O. Douglas retired from the Court between Meek and Wolman, having voted to declare all provisions of the Pennsylvania aid act unconstitutional. As replacement, Justice Stevens voted to hold all auxiliary services constitutional. Justice Potter Stewart also voted to uphold constitutionality of auxiliary services in Wolman, reversing from Meek due to the slightly different method of administering such services. Justice Marshall approved speech, hearing and diagnostic services portions of auxiliary services in Wolman, reversing from Meek. Justice Powell also supported auxiliary services during Wolman. Justices White and Rehnquist and Chief Justice Burger sustained the same position in both cases, upholding the constitutionality of auxiliary services to students whether administered within public or non-public school administrative areas. Justice Brennan remained opposed to state aid to non-public schools in any form.

The Supreme Court vote change from Meek (6-3) to Wolman (8-1) in an about-face on the issue of auxiliary services indicates that 5 Justices either found the facts of each case sufficiently different to warrant the change in vote or had a change of heart.

Selected Cases

Lemon v. Kurtzman and DiCenso v. Robinson is landmark in that the three-part test of the constitutionality of state aid to parochial schools was enhanced as the foundation for decisions in future cases involving aid to non-public schools.[51] As previously discussed, these cases tested the constitutionality of state statutes which authorized the issuance of funds to non-public schools. In Lemon, the statute in question was a Pennsylvania legislative action which provided financial support to non-public elementary and secondary schools which were church-related. This support consisted of reimbursement for the cost of teachers' salaries, textbooks and instructional materials. Schools had to pass the following eligibility tests:

1. Reimbursement was limited to courses presented in the curricula of the public schools.
2. Funds were limited solely to courses in the following secular subjects: mathematics, modern foreign languages, physical sciences, and physical education.
3. Textbooks and instructional materials included in the program must be approved by the state Superintendent of Public Instruction.
4. Reimbursement was prohibited for any course that contained any subject matter expressing religious teaching, or the morals or worship of any sect.

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51 Lemon v. Kurtzman and DiCenso v. Robinson, 403 U. S. 602 (1971).

In DiCenso the statute provided salary supplements to teachers of non-public schools up to 15% of regular salary, subject to several restrictions:

1. The recipient must teach in a non-public school at which the average per-pupil expenditure on secular education is less than the average in the State's public schools during a specified period.
2. Schools involved must submit financial information to enable separation of costs of secular education.
3. Teachers must teach only those subjects that are offered in the State's public schools.
4. Teachers must use only teaching materials which are used in the public schools.
5. Teachers applying for salary supplements must first agree, in writing, not to teach a course in religion for so long as or during such time as they receive any salary supplement under the Act.

A three-judge Federal Court was convened to try each case in respective jurisdictions. In the Lemon case, the district court held that the Act violated neither the Establishment nor the Free Exercise Clause. Lemon appealed to the Supreme Court.

In the DiCenso case, the district court concluded that the Act violated the Establishment Clause because it fostered excessive entanglement between government and religion. The voting pattern of the Court is given in Table 2.

TABLE 2

VOTING RECORD OF THE JUSTICES OF THE
UNITED STATES SUPREME COURT

JUSTICES OF THE UNITED STATES SUPREME COURT
Date Confirmed

1969	1937	1939	1955	1956	1958	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion												Tot C
Lemon v. Kurtzman, 403 U. S. 602 (1971). Pennsylvania salary reimbursement plan. HELD UNCONSTITUTIONAL												
C*	C	C	C	D	C	C	N	C	X	X	X	7
Early v. DiCenso, 403 U. S. 602 (1971). Rhode Island salary supplement plan. HELD UNCONSTITUTIONAL												
C*	C	C	C	C	C	D	C	C	X	X	X	8
Robinson v. DiCenso, 403 U. S. 602 (1971). Rhode Island salary supplement plan. HELD UNCONSTITUTIONAL												
C*	C	C	C	C	C	D	C	C	X	X	X	8

LEGEND: C - Concur; D - Dissent; N - Nonparticipant
X - Retired or not yet seated.
* - Announced decision.

The decision of the Court was announced by Chief Justice Burger. By a 7-1 vote the district court decision in Lemon was reversed. By an 8-1 vote the district court decision in DiCenso was affirmed. The constitutionality of both the Pennsylvania and Rhode Island statutes was denied.

In presenting the near-unanimous decision of the Court in these cases, Chief Justice Burger cited the need for guidelines by which to adjudicate allegations of First Amendment violations in the area of establishment of religion. This was necessary because:

> The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization.[52]

Therefore, the now-famous three-part test was composed with regard to constitutionality of legislative statutes which do not commit the constitutional offense.

1. The statute must have a secular legislative purpose.
2. Its primary effect must not be one that advances or inhibits religion.

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52 Ibid., p. 612.

3. It must not involve an excessive entanglement of government with religion.

The legislatures of Rhode Island and Pennsylvania concluded that secular and religious education are identifiable and separable, a concept with which the Court had no quarrel. The legislatures sought to create statutory restrictions designed to guarantee the separation between secular and religious functions and to ensure that State financial aid supports only the former. This was the conclusion upon which Allen was based:

> In Allen the Court acknowledged that secular and religious teachings were not necessarily so intertwined that secular textbooks furnished to students by the State were in fact instrumental in the teaching of religion.[53]

As in Allen, the Court found nothing that undermines the stated legislative intent to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. Furthermore, the Court did not feel constrained to rule on the basis of the "primary effect" test, because both cases involved an excessive degree of entanglement of government with religion and both State statutes were ruled unconstitutional on that account.

Excessive entanglement was found in both cases. The act of subsidizing teachers' salaries made it mandatory that certain

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53 Ibid., p. 613.

policing actions be taken to be sure that the teachers were living up to their end of the bargain by not teaching religious subjects or injecting religious ideology into their classroom teaching.

> As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship.[54]

Another factor was the provision of state aid directly to the church-related school:

> This factor distinguishes both Everson and Allen, for in both cases the Court was careful to point out that state aid was provided to the parents--not to the church-related school.[55]

The potential of political divisiveness was discussed in the opinion of the Court:

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.[56]

Also, the need for continuing annual appropriation was deemed to seriously aggravate political divisiveness related to religious belief and practice, as was the likelihood of larger and larger demands as costs and populations grow. The parochial school systems found themselves in deepening financial crises due to the need to replace lower paid teachers with lay teachers.

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54 Ibid., p. 620.

55 Ibid., p. 621.

56 Ibid., p. 622.

The judicial cornerstones were laid in Lemon for a wide variety of cases to come. These include the following:

1. Direct aid to religious schools is forbidden.
2. Direct intermingling of public school teachers with parochial school pupils in the parochial schools is forbidden.
3. No tax, large or small, can be levied to support any religious activities or institutions.
4. Aid which benefits all school children, public or private, is constitutional.
5. Public funds spent in support of religious schools are released subject to restraints on the normal customs of the school and the teachers which may have the effect of denial of freedom to worship.

The three cases decided on June 25, 1973, for which discussion was deferred until this section contributed further to the basis for jurisprudence laid in Lemon I.

Committee For Public Education v. Nyquist[57] concerned a New York statute which authorized reimbursement of non-public schools for expenses of services for various purposes:[58]

1. Direct money grants for maintenance and repair of school facilities.
2. Tuition reimbursement plan for parents who had annual taxable income below $5,000.

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57 Committee For Public Education and Religious Liberty v. Nyquist, 413 U. S. 756, 798, 813 (1973).

58 Ibid., p. 762.

3. Tax relief for parents who fail to qualify for tuition reimbursement.

A three-judge District Court for the Southern District of New York held that maintenance and repair grants and tuition reimbursement provisions were invalid, but that statutory system of providing income tax benefits to parents of children attending New York non-public schools did not violate the establishment clause. Mr. Justice Powell announced the decision of the Court which held that each of New York's aid provisions had the primary effect which advanced religion and offended constitutional provision against laws respecting the establishment of religion.[59]

Application of the three-part test of Lemon I resulted in identification of the test which the New York statute failed:

> Because we have found that the challenged sections have the impermissible effect of advancing religion, we need not consider whether such aid would result in entanglement of the State with religion in the sense of "(a) continuing, discriminating and comprehensive state surveillance."[60]

Mr. Justice Rehnquist wrote the dissenting opinion which culminated in the following statement:

> The increasing difficulties faced by private schools in our country are no reason at all for this Court to readjust the admittedly rough-hewn limits on governmental involvement with religion found in the First and Fourteenth Amend.[61]

59 Ibid., p. 798.

60 Ibid., p. 794.

61 Ibid., p. 813.

TABLE 3

VOTING RECORD OF THE JUSTICES OF THE
UNITED STATES SUPREME COURT

JUSTICES OF THE UNITED STATES SUPREME COURT
Date Confirmed

1969	1937	1939	1955	1956	1958	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion Committee for Public Education and Religious Liberty v. Nyquist												
1. Direct money grants for maintenance and repair. HELD UNCONSTITUTIONAL												Tot C
C	X	C	X	C	C	C	C	C	C*	C	X	9
2. Tuition reimbursement plan for low income families. HELD UNCONSTITUTIONAL												
D	X	C	X	C	C	D	C	C	C	D	X	6
3. Tax relief for parents not qualified for reimbursement. HELD UNCONSTITUTIONAL												
D	X	C	X	C	C	D	C	C	C	D	X	6

LEGEND: C - Concur; D - Dissent; X - Retired or not yet seated
* - Announced decision.

Once again, a shift in the voting pattern of the Justices occurred from Lemon I to Nyquist. Comparing Table 3, the voting pattern of Nyquist, with Table 2, the voting pattern of Lemon I, it can be seen that in both cases involving direct aid statutes, all of which were declared unconstitutional by the Court, some change was seen in Chief Justice Burger's vote in Nyquist. The Chief Justice dissented in Nyquist with the ruling of the Court which held tax relief and tuition reimbursement plans unconstitutional. Justice Byron R. White maintained a consistent position in both cases, thereby supporting Pennsylvania's and Rhode Island's salary supplement plan and New York's tuition reimbursement and tax relief plan. Justice Rehnquist sided with the Chief Justice as a comparative newcomer to the Court, while Justice Powell maintained a solid concurrence with the majority decision.

The net change from Lemon I to Nyquist in voting strength against direct aid to non-public schools was a reduction of two concurring votes, considerably increasing the odds of future approval of direct aid statutes.

Levitt v. Committee For Public Education was decided the same day as Nyquist.[62] This case tested the constitutionality of New York statute which authorized reimbursement of non-public schools for expenses of services for pupil testing. Services included educational administration activities such as grading, compiling

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62 Levitt v. Committee For Public Education and Religious Liberty et al., 413 U. S. 472 (1973).

and reporting test results. A three-judge Federal District Court determined that the overwhelming majority of testing in non-public schools was of the type drafted by school teachers for the purpose of measuring the pupils' progress in subjects required to be taught under state law. The District Court made findings that the Commissioner of Education had construed and applied the Act to include as permissible schools which

1. Imposed religious restrictions on admissions;
2. Require attendance of pupils at religious activities;
3. Require obedience by students to the doctrines and dogmas of a particular faith;
4. Require pupils to attend instruction in the theology or doctrine of a particular faith;
5. Are an integral part of the religious mission of the church sponsoring it;
6. Have as a substantial purpose the inculcation of religious values;
7. Impose religious restrictions on faculty appointments;
8. Impose religious restrictions on what or how the faculty may teach.[63]

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63 Committee For Public Education v. Levitt, 342 F. Supp. at 440-441 (1972).

The district court held the Act unconstitutional and enjoined Comptroller Levitt from enforcement of the Act, concluding that this case was controlled by the Supreme Court decision in Lemon I.

In an 8-1 decision, the Supreme Court affirmed the decision of the district court. Mr. Chief Justice Warren Burger announced the majority decision, saying:

> We hold that the lump-sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial, function.[64]

Mr. Justice Byron R. White recorded the lone dissent without written opinion.

Two flaws were found in the New York Act:

> However, the Act contains no provision authorizing state audits of school financial records to determine whether a school's actual costs in complying with the mandated services are less than the annual lump sum payment. Nor does the Act require a school to return to the State moneys received in excess of its actual expenses.[65]

An additional flaw was noted:

> Yet, despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.[66]

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64. Levitt v. Committee, 413 U. S. 472 at 482.

65 Ibid., p. 477.

66 Ibid., p. 480.

In the Court decision in Levitt the cornerstone laid in Lemon I forbade direct aid to religious schools. The New York statute was found infirm under the Establishment Clause of the First Amendment for failing to provide safeguards against the possible use of tax funds to promote religious activities of the private religious schools benefited by the Act. Chief Justice Burger and Justice Rehnquist drew a line between authorizing aid to parents in Nyquist, which drew dissenting votes and showed favor for such aid, and authorizing direct aid to religious schools.

Finally, the Court decision in Sloan v. Lemon concerned the permissibility of direct aid to parents under a Pennsylvania Act.[67] The Act provided reimbursement of tuition paid by parents who send their children to non-public schools. A three-judge District Court held that the law violated the Establishment Clause and was therefore unconstitutional. In a 6-3 decision, the Supreme Court upheld the judgment of the district court. Mr. Justice Powell delivered the opinion of the Court, saying:

> We certainly do not question now, any more than we did two Terms ago in Lemon v. Kurtzman, the reality and legitimacy of Pennsylvania's secular purposes.[68]

However, the legislative Act was found to have the impermissible effect of advancing religion, as did the Act disputed in Nyquist.[69]

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67 Sloan v. Lemon et al., 413 U. S. 825 (1973).

68 Ibid., p. 829.

69 Ibid., p. 830.

Justice Powell maintained that the Pennsylvania Statute could not be differentiated from the New York Statute on the basis that Pennsylvania law did not restrict benefits to low-income families, saying:

> Our decision is not dependent upon any such speculation. Instead we look to the substance of the program, and no matter how it is characterized its effect remains the same. The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequences is to preserve and support religion-oriented institutions.[70]

Another point of difference between the Pennsylvania and New York statutes was the severability clause, which stated:

> If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.[71]

Justice Powell commented on this point:

> Although the Act contained a severability clause, the court reasoned that, in view of the fact that so substantial a majority of the law's designated beneficiaries were affiliated with religious organizations, it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools.[72]

Therefore, the Court decision held that aid to the nonsectarian

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70 Ibid., p. 832.

71 Pennsylvania, Parent Education Act for Nonpublic Education, (1971) Act 92.

72 Sloan v. Lemon, p. 833.

school could not be severed from aid to the sectarian.[73]

Trends of Court Decisions In Church-State Issues

This chapter has reviewed church-state cases which have been decided during the period from 1969 through 1977. The landmark decision of Lemon I in 1971 provided the groundwork in jurisprudence for all subsequent Court decisions.

During this nine year period, 17 cases have reached the Supreme Court. Lemon I (1971) was followed immediately by Tilton and Sanders where a distinction was made between the constitutionality of state aid to religious institutions at college and at elementary school level. State aid at the elementary level was denied unanimously, while at college level the vote was split 5-4 in favor of such aid to sectarian colleges. In 1972 Essex and Johnson unanimously overthrew an Ohio tuition reimbursement plan and remanded a free textbook plan for grades 1 through 6 for determination of mootness. But in 1973, following retirement of Justices Hugo L. Black and John M. Harlan from the bench, the Lemon II case showed the development of serious splits in the opinion of the Court. These cases are reviewed for voting pattern in Table 4 on page 93.

The split vote continued to dominate cases tried in 1973,

73 Ibid., p. 834.

as shown in Table 5 on page 94. Three public school cases, Wolman v. Kosydar, Sloan v. Lemon, and Norwood v. Harrison resulted in Court decisions which held tax credits, tuition reimbursement and loaning of textbooks to racially discriminatory schools unconstitutional. A 1973 case involving state support of Baptist College was held constitutional in Hunt v. McNair, following the precedent set by Tilton. In 1974 a New Jersey statute granting cost of secular textbooks and supplies to sectarian schools was ruled unconstitutional in Marburger v. Public Funds. The significant characteristic of these decisions is that all except one were decided by a 6-3 split decision of the Court.

The Nyquist decision of 1973 has already been reviewed, with voting patterns as shown in Table 3 on page 84. Decisions holding certain Acts of the legislature unconstitutional were of the 6-3 variety, with Chief Justice Burger, Justice White and Justice Rehnquist providing the dissenting votes.

The same voting pattern held steady in 1974 decisions shown in Table 6 on page 95. In 1975 votes were similarly recorded holding Pennsylvania auxiliary services and instructional materials and equipment grants unconstitutional. Decisions in which Federal Title I funds to aid parochial schools in Missouri were held constitutional and where a Missouri statute upholding reservation of public transportation to public schools only was held constitutional were given a firmer vote.

A final case involving Maryland state aid to sectarian and non-sectarian colleges was approved by a low 5-4 vote, as shown

in Table 7 on page 96.

The Wolman v. Walter case treated earlier was summarized as a separate Table 1 on page 70 due to the many-faceted nature of the decision. Upon examination of the vote against constitutionality of instructional materials and equipment and transportation on field trips, low majority votes of 6-3 and 5-4 are seen. On the other hand, auxiliary services were approved 8-1 and 7-2. Standardized testing service was approved 6-3, as was the provision of textbooks for sectarian school children.

The trend of Court decisions in Church-State issues appears on the surface to be becoming more and more liberal where aid to elementary and secondary schools is concerned. However, this may be only a surface effect. Where the majority of the Court feels that direct aid is not given to non-public schools without adequate safeguards against establishment of religion by improper use of this aid, the aid stands a better chance of approval by the Court. The skill of legislators in drafting acceptable statutes giving state aid to sectarian or other private schools seems to be the most important ingredient in the success of such an effort.

TABLE 4

VOTING RECORD OF THE JUSTICES OF THE
UNITED STATES SUPREME COURT

JUSTICES OF THE UNITED STATES SUPREME COURT
Date Confirmed

1969	1937	1939	1955	1956	1958	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion												Tot C
Tilton v. Richardson, 403 U. S. 602 (1971). Federal construction grants for sectarian and non-sectarian colleges. HELD CONSTITUTIONAL												
C	DP	DP	C	D	C	C	DP	C	X	X	X	5
Sanders v. Johnson, 403 U. S.955 (1971). Connecticut, purchase of secular educational services. HELD UNCONSTITUTIONAL.												
C	C	N	C	C	C	C	C	C	X	X	X	8
Essex v. Wolman, 92 S. Ct. 1961 (1972). Ohio tuition reimbursement plan. HELD UNCONSTITUTIONAL.												
C	C	C	C	C	C	C	C	C	X	X	X	9
Johnson v. New York State Education Dept (1972). Free textbooks to grades 1 through 6. REMANDED FOR MOOTNESS												
C	C	C	C	C	C	C	C*	C	X	X	X	9
Alton J. Lemon v. David H. Kurtzman (Lemon II) Payment for educational services before June 28, 1971 decision (Lemon I) HELD CONSTITUTIONAL												
C	X	D	X	D	D	C	N	C	C	C	X	5

LEGEND: C - Concur; D - Dissent; DP - Dissent in Part
N - Nonparticipant; X - Retired or not yet seated.
* - Announced decision.

TABLE 5

VOTING RECORD OF THE JUSTICES OF THE UNITED STATES SUPREME COURT

JUSTICES OF THE UNITED STATES SUPREME COURT
Date Confirmed

1969	1937	1939	1955	1956	1953	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion												Tot C
Wolman v. Kosydar 93 S. Ct 61 (1973). Ohio tax credit statute. HELD UNCONSTITUTIONAL												
C	X	D	X	D	D	C	C	C	C	C	X	6
Sloan v. Lemon, 413 U. S. 825 (1973). Pennsylvania tuition reimbursement. HELD UNCONSTITUTIONAL												
D	X	C	X	C	C	D	C	C	C*	D	X	6
Marburger v. Public Funds, 417 U. S. 961 (1974). New Jersey statute granting cost of secular textbooks and supplies. HELD UNCONSTITUTIONAL												
D	X	C	X	C	C	D	C	C	C	D	X	6
Hunt v. McNair, 413 U. S. 734 (1973). Bonds for Baptist College, S. C. HELD CONSTITUTIONAL												
C	X	D	X	D	D	C	C	C	C	C	X	6
Norwood v. Harrison, 413 U. S. 455 (1973). Loan of textbooks to racially discriminatory private school. HELD UNCONSTITUTIONAL												
C*	X	C	X	C	C	C	C	C	C	C	X	9

LEGEND: C - Concur; D - Dissent; X - Retired or not yet seated.
* - Announced decision.

TABLE 6

VOTING RECORD OF THE JUSTICES OF THE UNITED STATES SUPREME COURT

JUSTICES OF THE UNITED STATES SUPREME COURT
Date Confirmed

1969	1937	1939	1955	1956	1958	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion												Tot C
Wheeler v. Barrera, 417 U. S. 402 (1974). Federal Title I funds to aid parochial schools (Missouri). HELD CONSTITUTIONAL												
C	X	D	X	C	C	C	C	C*	C	C	X	8
Luetkemeyer v. Kaufmann, 419 U. S. 888 (1974). Missouri statute allowing public school transportation to public schools only. HELD CONSTITUTIONAL												
D	X	C	X	C	C	D	C	C	C	C	X	7
Franchise Tax Board of California v. United Americans 419 U. S. 890 (1974). Tax credit for parents. HELD UNCONSTITUTIONAL												
D	X	C	X	C	C	D	C	C	C	D	X	6
Meek v. Pittenger 421 U. S. 349 (1975) Pennsylvania Act 194 authorizing auxiliary services HELD UNCONSTITUTIONAL												
D	X	C	X	C	C*	D	C	C	C	D	X	6
Pennsylvania Act 195 authorizing instructional materials and equipment. HELD UNCONSTITUTIONAL												
D	X	C	X	C	C*	D	C	C	C	D	X	6

LEGEND: C - Concur; D - Dissent; X - Retired or not yet seated.
* - Announced decision

TABLE 7

VOTING RECORD OF THE JUSTICES OF THE UNITED STATES SUPREME COURT

JUSTICES OF THE UNITED STATES SUPREME COURT
Date Confirmed

1969	1937	1939	1955	1956	1958	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion												Tot C
Meek v. Pittenger, 421 U. S. 349 (1975). Act 195 authorizing textbook loan. HELD CONSTITUTIONAL												
C	X	D	X	D	C*	C	D	C	C	C	X	6
Roemer v. Board of Public Works, 426 U. S. 736 (1976). Maryland state aid to sectarian and nonsectarian colleges. HELD CONSTITUTIONAL												
C	X	X	X	D	D	C	D	C*	C	C	D	5

LEGEND: C - Concur; D - Dissent; X - Retired or not yet seated.
* - Announced decision.

CHAPTER IV

DESEGREGATION

Introduction

A legacy of freedom and equality of educational opportunity bequeathed to minority races by the Warren Court in the 1954 Brown I decision encountered resistance during the implementation phase following Brown II which rose to a crescendo during the period from 1969 to 1977. The Brown I decision held that

> Segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities, in contravention of the Equal Protection Clause of the Fourteenth Amendment.[1]

The Fourteenth Amendment provides the constitutional guarantee that no person shall be deprived of the equal protection of the laws. Almost all cases involving desegregation have turned on the equal protection clause of the Fourteenth Amendment, with the exception of Bolling v. Sharpe (1954), which was decided on the due process clause of the Fifth Amendment.

> Under the principle that state-imposed segregation by race in public schools denies equal protection of the laws, the objective is to eliminate from the public schools all vestiges of state-imposed segregation, and

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1 Brown et al. v. Board of Education of Topeka, Shawnee County, Kansas , et al., 347 U. S. 483 (1954).

> school authorities are clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination will be eliminated root and branch.[2]

As previously pointed out in Chapter II, equality before the law implies no separation of students by schools according to race so that all laws anywhere equally apply to all students regardless of race. Such a purpose can not be served by segregated schools.

> The segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of minority group of equal educational opportunities, and amounts to a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.[3]

However, the Supreme Court has realized that education is primarily a state and local responsibility. The initiative has almost always fallen to local school boards to prepare desegregation plans consistent with court decisions. Where local boards failed to assume the responsibility for desegregation, the District Courts have been empowered to act as school administrators.

Beginning with Green, the tempo of desegregation efforts quickened and the dictum of the Brown decision, "all deliberate speed," became more urgent:

> The burden on a school board today is to come forward

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2 Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971), 29 L. Ed. 2d., p. 556, Headnote: Civil Rights, par. 6, 12.5 - schools - racial segregation.

3 Brown v. Board of Education of Topeka, Shawnee County, Kansas, 347 U. S. 483 (1954), 74 Supreme Court Reporter, p. 686, Headnote: Constitutional Law, 220.

> with a plan that promises realistically to work, and promises realistically to work now.[4]

The mandate of the Supreme Court during recent years has been to abolish "de jure" segregation. This edict means that all governmental bodies, of which the public school is one, may make no school laws which tend to polarize races into schools which may be characterized as "white" or "black" by any criterion. However, absolute proportioning of races according to the local population is not mandated, as will be seen in the review of the Swann decision. On the other hand, proportioning of faculties by race is recognized as a legitimate desegregation tool. Busing of school children is also permitted as an aid to desegregation efforts.

As the years have passed following the Brown I decision, it is still possible to find schools in which the student population is nearly all white or nearly all black. So long as the situation exists without active or passive encouragement by state agencies, the desegregation mandate is not violated. This situation may be referred to by some as "de facto" segregation, not without bitterness.

During the period from 1969 through 1977, the Court decided 19 desegregation cases which originated in 10 different states.

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4 Green v. County School Board, 391 U. S. 430 (1968).

Six additional cases involving applications for stay of desegregation orders were settled by individual Justices in Circuit Justice capacities.

Cases Decided in Circuit Courts

As pointed out in Chapter I, the purpose of Circuit Courts of Appeal is to screen cases for referral to the Supreme Court. In the process of screening, the individual Justice acts as surrogate for the entire Court. These cases are reviewed in following sections.

Dr. J. W. Edgar v. United States (1971) concerned application for a stay, pending certiorari, of a District Court order which directed comprehensive desegregation steps.[5] Texas education officials were brought under the threat of withholding funds and accreditation for school districts which failed to meet their constitutional obligation to eliminate remaining vestiges of the dual school system. Mr. Justice Hugo L. Black, as Circuit Justice for the Fifth Circuit Court of Appeals, denied the stay on the basis of Green and Swann decisions, saying that

> It would be very difficult for me to suspend the order of the District Court that, in my view, does no more than endeavor to realize the directive of the Fourteenth Amendment and the decisions of this Court that racial discrimination in the public schools must be eliminated root and branch.[6]

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5 Dr. J. W. Edgar v. United States, 404 U. S. 1206 (1971).

6 Ibid., p. 1207.

Corpus Christi School District v. Cisneros (1971) followed Edgar closely in time and presented Mr. Justice Hugo L. Black with another opportunity to stay a desegregation plan.[7] The stay had first been ordered by the United States District Court for the Southern District of Texas against a judgment entered by another District Court in a desegregation suit. As can be surmised from this complicated situation, Justice Black acted to uphold the stay, saying:

> The case was in an undesirable state of confusion and presented questions which had not been previously passed on by the full Court, but which should be.[8]

Winston-Salem v. Scott (1971) concerned an application for a stay of District Court desegregation orders in August, 1971, for the Winston-Salem, North Carolina school district.[9] Mr. Chief Justice Warren E. Burger, as Circuit Justice for the Fourth Circuit Court of Appeals, denied the stay. Supporting decisions from Swann, Davis, McDaniel and North Carolina State Board were referred to by the Chief Justice in support of denial of the stay. All of the referred cases had been decided on April 20, 1971.

Gomperts v. Chase (1971) originated when a preliminary injunction was sought against a school board's plan for voluntary integration of certain California schools.[10]

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7 Corpus Christi School District v. Jose Cisneros, 404 U. S. 1211 (1971).

8 Ibid., p. 1211.

9 Winston-Salem/Forsyth County Board of Education v. Catherine Scott, 404 U. S. 1221 (1971).

10 Robert Gomperts v. Charles E. Chase, 404 U. S. 1237 (1971).

Mr. Chief Justice William O. Douglas, as Circuit Justice for the Ninth Circuit Court of Appeals, denied the application, saying:

> If this were the classical de jure school segregation, the injunction plainly should be granted. But the precise contours of de jure segregation have not been drawn by the Court.[11]

Drummond v. Acree (1972) concerned a desegregation plan which was to begin operation in Augusta, Georgia.[12] State statutes forbade busing to achieve racial balance until all appeals had been exhausted. Mr. Justice Lewis F. Powell, as Circuit Justice for the Fifth Circuit Court of Appeals, denied the application for a stay, saying:

> I accept the holding of the courts below that the order was entered to accomplish desegregation of a school system in accordance with the mandate of Swann and not for the purpose of achieving a racial balance. The stay application must, therefore, be denied.[13]

Pasadena v. Spangler (1975) dealt with a California school board decision to return students assigned to a new school to their original classrooms.[14] The action had been ordered by the District Court. An appeal for a stay in the order was granted by Mr. Justice William H. Rehnquist, as Circuit Justice for the Ninth Circuit Court of Appeals. Stay was granted pending action under certiorari to review the Pasadena issues.

11 Ibid., p. 1238.

12 Ann Gunter Drummond v. Robert L. Acree, 409 U. S. 1228 (1972).

13 Ibid., p. 1231.

14 Pasadena City Board of Education v. Nancy Anne Spangler, 423 U. S. 1335 (1975).

Cases Decided Prior to Swann

Five cases were decided by the full Court during 1969 and 1970 prior to the landmark decision of Swann (1971).[15] All cases involved implementation of desegregation plans, and all decisions were announced with the unanimous vote of the Court.

Alexander v. Holmes County (1969) involved a Fifth Circuit Court of Appeals order suspending plans for desegregation of 33 Mississippi school districts.[16] The Court of Appeals postponed the date for submission of desegregation plans

> upon motion of the Department of Justice and the recommendation of the Secretary of Health, Education and Welfare, the position taken being that time was too short to accomplish a complete and orderly implementation of the desegregation plans for the coming year.[17]

On certiorari, the Supreme Court vacated the suspension order of the Court of Appeals and remanded the case

> for the issuance of an order, effective immediately, declaring that each of the school districts involved may no longer operate a dual school system based on race or color, and directing that the school districts begin immediately to operate as a unitary school system within which no person is to be effectively excluded from any school because of race or color.[18]

Carter v. West Feliciana Parish (1969) combined three cases seeking desegregation of Louisiana school districts.[19]

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15 Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971).

16 Alexander v. Holmes County Board of Education, 396 U. S. 19 (1969).

17 Ibid., p. 19.

18 Ibid., p. 19.

19 Carter v. West Feliciana Parish School Board, 396 U.S. 226 (1969).

United States District Courts rejected terminal desegregation plans submitted by the Department of Health, Education and Welfare for the 1969-1970 school year. The Fifth Circuit Court of Appeals reversed the orders of the district courts and ordered the school boards to desegregate faculties completely and adopt plans for conversion to unitary school systems by February 1, 1970. The Fifth Circuit Court of Appeals authorized a delay in pupil desegregation until September, 1970. The Supreme Court, in a per curiam opinion, granted a preliminary injunctive order requiring the school boards to prepare for complete student desegregation by February 1, 1970. The Court vacated that portion of the decision of the Court of Appeals pertaining to delay in implementation of student desegregation plans.

Dowell v. Board pertained to an order of the United States District Court for the Western District of Oklahoma which approved a school board's proposal for furthering desegregation of Oklahoma City schools by revising school attendance boundaries effective at the start of the 1969-1970 school year.[20] The Tenth Circuit Court of Appeals vacated the order. On certiorari, the United States Supreme Court ruled unanimously that

> the Court of Appeals erred in vacating the lower court's approval of the boundary changes, and the Court of Appeals should have permitted implementation of the desegregation measures pending decision of the appeal.[21]

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20. Dowell v. Board of Education of the Oklahoma City Public Schools, 396 U. S. 269 (1969).

21 Ibid., p. 269.

Carter v. West Feliciana (1970) was a further treatment of the delay previously authorized in Carter (1969) by the Fifth Circuit Court of Appeals in desegregation plans for Louisiana school districts.[22] The Supreme Court fully reversed the judgments of the Court of Appeals, holding that

> insofar as the Court of Appeals had authorized deferral of student desegregation beyond February 1, 1970, it had misconstrued the holding in Alexander v. Holmes County Board of Education, 396 U. S. 19, as to the obligation of every school district to terminate dual school systems at once and to operate now and hereafter only unitary schools.[23]

Finally, Northcross v. Board (1970) concerned a petition which requested modification of a desegregation plan developed for schools of Memphis, Tennessee, which

> permitted unrestricted free transfers, and petitioners desired a plan without such a provision, and one that would also provide among other things for a complete faculty desegregation.[24]

The 1966 plan permitted unrestricted free transfers. Petitioners to the District Court desired a plan without free transfer provisions and one that would also provide among other things for complete faculty desegregation. Upon denial of this petition, the case was taken to the Sixth Circuit Court of Appeals where petitions were filed for summary reversal of the desegregation

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22 Carter v. West Feliciana Parish School Board, 396 U. S. 290 (1970).

23 Ibid., p. 290.

24 Northcross v. Board of Education of the Memphis, Tennessee, City Schools, 397 U. S. 232 (1970).

plan and for adoption of a unitary system now. Both motions were denied by the Court of Appeals, which said that

> the Court of Appeals is satisfied that the respondent Board of Education of Memphis is not now operating a "dual school system" and has, subject to complying with the present commands of the District Judge, converted its pre-Brown dual system into a unitary system "within which no person is to be effectively excluded because of race or color."[25]

Petitioners then filed a petition for certiorari, which was granted by the Supreme Court on the basis of following facts:

1. The finding by the District Court that the state-imposed dual system had not been dismantled and did not have real prospects for dismantlement "at the earliest possible date."
2. The premature decision of the Court of Appeals relative to the effectiveness of a desegregation plan not properly brought before the court.

The Court ruled 6-0 (Mr. Justice Thurgood Marshall did not participate) to affirm the judgment of the Circuit Court calling for remand of the case to the District Court for consideration of issues before it consistent with the Alexander case.

In concurring with the majority opinion in Northcross, Chief Justice Burger stated that

> the time has come to clear up what seems to be a confusion, genuine or simulated, concerning this Court's prior

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25 Ibid., p. 234.

> mandates. These school cases present widely varying factors; some records reveal plans for desegregating schools, others have no plans or only partial plans; some records reflect rezoning of school districts, others do not; some use traditional bus transportation . . .others use school bus transportation for a different purpose. . . . As soon as possible, however, we ought to resolve some of the basic practical problems when they are appropriately presented including whether, as a constitutional matter, any particular racial balance must be achieved in the schools; to what extent school districts and zones may or must be altered as a constitutional matter; and to what extent transportation may or must be provided to achieve the ends sought by prior holdings of the Court.[26]

All five cases discussed in this section refer to the attempt of desegregationist forces to break down the passive restraints of custom and tradition and expedite the establishment of truly integrated public schools all over the country. The burden of establishing acceptable and workable desegregation plans was placed directly on the school boards. Heroic efforts were made by school boards to develop satisfactory desegregation plans. Guidelines for practical desegregative efforts were badly needed as a palliative for the widespread disorder engendered by Green in 1968, particularly in metropolitan neighborhoods wherein large populations of various ethnic backgrounds lived in close proximity.

The first major landmark case came in 1971 and concerned the desegregation of the school district of the city of Charlotte and Mecklenburg County in North Carolina.

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26 Ibid., p. 237.

The Swann Case[27]

The Charlotte-Mecklenburg Board of Education had been in a state of continuous litigation since Green (1968) and had taken many steps to implement a unitary school system, including:

1. Closing schools and reassigning pupils with a specific purpose of increasing pupil integration;
2. Adjusting attendance zones to promote integration;
3. Merging white and black athletic programs;
4. Fostering white and black organizations of parents, teachers and students;
5. Adjusting school bus routes to foster desegregation;
6. Dampening the effects of free pupil transfer plans;
7. Integrating all faculties and administrative staffs.

However, the efficacy of these measures was disputed:

> The Charlotte-Mecklenburg school system, the 43rd largest in the nation, encompasses the city of Charlotte and surrounding Mecklenburg County, North Carolina. The area is large--550 square miles--spanning roughly 22 miles east-west and 36 miles north-south. During the 1968-1969 school year the system served more than 84,000 pupils in 107 schools. Approximately 71% of the pupils were found to be white and 29% Negro. As of June, 1969, there were approximately 24,000 Negro students in the system, of whom 21,000 attended schools within the city of Charlotte. Two-thirds of those 21,000--approximately 14,000 Negro students--attended 21 schools which were either totally Negro or more than 99% Negro.[28]

Therefore, litigation was initiated in the United States District Court for the Western District of North Carolina for the

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27 Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971).

28 Ibid., p. 6.

purpose of requiring the defendant school board to cease maintaining a racially segregated, dual public school system. The District Court ordered the school board to come forward with a plan for both faculty and student desegregation.[29] Following submission of a partially completed plan in November, 1969, the District Court held that the board's submission was unacceptable and appointed an expert in administration, Dr. John Finger, to prepare a desegregation plan. In February, 1970, the District Court was presented with the two alternative plans.[30]

The Board Plan

This plan closed seven schools and reassigned their pupils. School attendance zones were restructured to achieve greater racial balance. However, the plan maintained existing grade structures and rejected such techniques as pairing and clustering. It created a single athletic league, eliminated the previously racial basis of the school bus system, provided racially mixed faculties and administrative staffs, and modified its free-transfer plan into an optional majority--to--minority transfer system.[31]

Proposed attendance zones were pie-shaped, affording the residents of the central city access to suburban schools. Considerable racial imbalance remained in elementary, junior high, and high schools. More than half of the Negro elementary pupils were left in nine schools that were 86% to 100% Negro.[32]

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29 Ibid., p. 7.
30 Ibid., p. 8.
31 Ibid., p. 8.
32 Ibid., p. 9.

The Finger Plan

This plan adopted the school board zoning plan for senior high schools, calling for additional busing to overcome the low ratio of Negroe attendance at Independence High School. Junior high schools combined the rezoning plan of the board with the creation of nine "satellite" zones. A satellite zone is an area which is not contiguous with the main attendance zones surrounding the school.

Elementary schools relied on zoning, pairing and grouping techniques, with the result that student bodies throughout the system would range from 9% to 38% Negro.[33]

Action by the District Court

The District Court selected the Finger plan for the following reasons:

> Like the board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools with one black inner city school; by transporting black students from grades one through four to outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school.[34]

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33 Ibid., p. 9.

34 Ibid., p. 9.

On February 5, 1970, the District Court adopted the board plan, as modified by Dr. Finger, for the junior and senior high schools. The court rejected the board elementary school plan and adopted the Finger plan as presented.[35]

Action by the Fifth Circuit Court of Appeals

On appeal, the Court of Appeals affirmed the District Court's order as to faculty desegregation and the secondary school plans, but vacated the order respecting elementary schools.

> While agreeing that the District Court properly disapproved the board plan concerning these schools, the Court of Appeals feared that the pairing and grouping of elementary schools would place an unreasonable burden on the board and the system's pupils.[36]

The case was remanded to the District Court for reconsideration and submission of further plans.[37]

Further Action by the District Court

Two new plans were considered by the District Court:

1. A plan prepared by the United States Department of Health, Education and Welfare (the H. E. W. plan) based on contiguous grouping and zoning of schools.
2. A plan prepared by four members of the nine-member school board (the minority plan) achieving substantially the same results as the Finger plan but apparently with less

35 Ibid., p. 10.
36 Ibid., p. 10.
37 Ibid., p. 10.

transportation.[38]

After some debate, the school board indicated that it would accept the Finger plan, reiterating that it felt the plan was unreasonable. The District Court, by order dated August 7, 1970, directed that the Finger plan remain in effect.[39]

Action by the Supreme Court

On April 20, 1971, the Supreme Court unanimously affirmed the Court of Appeals' judgment to the extent that the Court of Appeals had affirmed the District Court's judgment, and the Supreme Court affirmed the District Court's order reinstating the Finger plan for elementary school students.

In announcing the decision of the Court, Chief Justice Burger said:

> The central issue in this case is that of student assignment, and there are essentially four problem areas:
> (1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;
> (2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;
> (3) what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and
> (4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation.[40]

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38 Ibid., p. 11.

39 Ibid., p. 11.

40 Ibid., p. 22.

In answer to these questions, Mr. Chief Justice Burger said:

> The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.[41]
> In the light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law.[42]
> We hold that the pairing and grouping of noncontinguous school zones is a permissible tool, and such action is to be considered in the light of the objectives sought.[43]
> In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus trasnportation as one tool of school desegregation.[44]

Although the central issue in the Swann case was that of student assignment, the issue of busing was high-lighted by the decision of the Court of Appeals which vacated the busing provision of the District Court order. The Court of Appeals held that the amount of additional busing would be unnecessarily extensive and therefore "unreasonable."

However, the District Court had found that the school system would have to employ 138 more buses than it had previously operated. But 105 of those buses were already available and the others could easily be obtained. Additionally,

> it should be noted that North Carolina requires provision of transportation for all students who are assigned to schools more than one and one-half miles from their homes.[45]

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41 Ibid., p. 24.

42 Ibid., p. 26.

43 Ibid., p. 28.

44 Ibid., p. 30.

45 Ibid., p. 30.

The Court noted that the trips for elementary school pupils averaged about seven miles under the desegregation plan recommended by the District Court and that they would take "not more than 35 minutes at the most."[46] The previous transportation plan operating in Charlotte transported 23,600 students on all grade levels an average of 15 miles one way for an average trip requiring over an hour.[47] In discussing the matter of busing, the Court said:

> An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process.[48]

The substance of these remarks was to be quoted in later cases involving substantial busing of students.

The Court also recorded an important statement for future litigation of desegregation issues:

> It does not follow that the communities served by such (unitary) school systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustment of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.[49]

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46 Ibid., p. 30.

47 Ibid., p. 30.

48 Ibid., p. 30.

49 Ibid., p. 31.

In summary, the Supreme Court decision in Swann provided necessary guidelines for the practical implementation of future desegregation efforts and provided a basis of precedent for many litigations to come.

Cases Following Swann

Four desegregation suits were decided by the Court on the same day as Swann, on April 20, 1971. All of these cases were decided by unanimous vote of the Court.

Davis v. Board was a suit to compel the school board of Mobile County, Alabama, to cease operating a racially segregated dual public school system.[50] The metropolitan area of the county was divided by a major north-south highway, and most of the Negro elementary school children in the metropolitan area lived on the east side of the highway and attended all-Negro or nearly all-Negro schools. A desegregation plan was approved by the Federal District Court, but the Court of Appeals for the Fifth Circuit held the plan deficient in faculty and staff desegregation and in student assignment. The Court of Appeals directed reassignment of faculty and staff members to achieve a ratio of Negro and white substantially the same as for the entire school system. The Court of Appeals further ordered additional desegregation of students but required no busing of students, with the result that more than 90% of the students in each of nine elementary schools

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50 Davis v. Board of School Commissioners of Mobile County, 402 U. S. 33 (1971).

in the eastern part of the metropolitan area would be Negro.

The Supreme Court affirmed the decision of the Court of Appeals in part but remanded for additional consideration as to the possible use of bus transportation and split zoning to improve the desegregation plan.

McDaniel v. Barresi concerned the operation of a Georgia county school board's desegregation plan for public elementary schools.[51] The plan created new school attendance zones and required busing to achieve 20% to 50% Negro population of students in each school. The Superior Court denied injunctive relief sought against operation of the plan, but the Georgia Supreme Court reversed.[52]

The Georgia Supreme Court reversed on the basis that the plan violated two legal codes:

1. The equal protection clause of the Fourteenth Amendment, which was offended when the school board treated students differently because of their race in attempts to achieve a racial balance under the board's plan;
2. The Federal Civil Rights Act of 1964, which opposed the assignment and busing of students to achieve racial balance.

On certiorari, the Supreme Court reversed the decision of the

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51 Charles McDaniel et al., v. Joseph Barresi, Jr, et al., 402 U. S. 39 (1971).

52 226 Ga 456, 175 S. E. 2d. 649.

Georgia Supreme Court. The unanimous decision of the Court was announced by Chief Justice Warren E. Burger, holding that

1. The county school board, as part of its affirmative duty to disestablish a dual school system, properly took into account the race of its elementary school children in drawing attendance lines;[53]
2. The Civil Rights Act of 1964 did not restrict state school authorities in the exercise of their discretionary powers to assign students within their school systems.[54]

North Carolina State Board v. Swann tested the legality of a North Carolina statute known as the Anti-Busing Law.[55] In part, the law read as follows:

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.[56]

A three-judge District Court held this statute unconstitutional and enjoined its enforcement.[57]

The Supreme Court affirmed the judgment of the District Court. The opinion of the Court was announced by Chief Justice Burger, reading in part:

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53 Ibid.

54 Ibid.

55 North Carolina State Board of Education v. James E. Swann, 402 U. S. 43 (1971).

56 Ibid., p. 43.

57 Ibid., p. 43.

> . . . the statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of Brown v. Board of Education, 347 U. S. 483 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy.[58]

The Supreme Court also concluded that the statute would unduly hamper desegregation efforts:

> We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "for the purpose of creating a balance or ratio," will similarly hamper the ability of local authorities to effectively remedy constitutional violations.[59]

Finally, Moore v. Charlotte-Mecklenburg Board challenged the constitutionality of the North Carolina anti-busing statute.[60]

> Both parties argued to the three-judge court that the anti-busing law was constitutional and urged that the order of the District Court adopting the Finger plan should be set aside.[61]

The three-judge Federal District Court declared a portion of the North Carolina anti-busing statute unconstitutional and enjoined its enforcement. In a per curiam decision, the Supreme Court dismissed the appeal, holding that there existed no case or controversy within the meaning of Article III of the Constitution.[62]

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58 Ibid., p. 46.

59 Ibid., p. 46.

60 Mrs. Robert Lee Moore et al. v. Charlotte-Mecklenburg Board of Education et al., 402 U. S. 47 (1971).

61 Ibid., p. 47.

62 Ibid., p. 48.

The Winston-Salem Case[63]

While this case was not considered by the full Court, it is considered worthy of further exploration because of the important part played in its final solution by the Swann case. Mr. Chief Justice Warren E. Burger, as Circuit Justice of the Fourth Circuit Court of Appeals, declined to overrule an order of the United States District Court for the Middle District of North Carolina which approved a revised plan to achieve a fixed racial balance in the schools through a substantial increase in pupil busing.

The District Court had approved a modified plan for desegregation of certain North Carolina schools, and appeals were pending in the Fourth Circuit Court of Appeals when the Supreme Court decided Swann on April 20, 1971. As a result of the Swann decision, the Court of Appeals remanded the case with instructions to the District Court to meet the requirements of the Swann decision. (444 F. 2d., 99).

Mr. Chief Justice Burger reviewed the background of the case as important:

> Respondents, who are Negro pupils and parents in the school system, commenced action alleging that the School Board was operating a dual school system, and seeking appropriate relief. . . . The District Court found that in December, 1969, there were 67 schools in the system with approximately 50,000 students. The total student

63 Winston-Salem/Forsyth County Board of Education v. Catherine Scott, 404 U. S. 1221 (1971).

population was 72.5% white and 27.5% Negro. Of the schools, 15 were all-Negro and seven were all-white. Of the remaining schools, 31 had less than 5% of the minority race. The school system was operated under a geographical attendance zone system, with freedom-of-choice transfer provisions for all students regardless of race.[64]

Two plans had been submitted originally for approval of the District Court:

1. The Larsen Plan

Prior to the Supreme Court's holding in Swann, the plaintiffs submitted a plan which was designed to achieve

> as closely as possible a mathematical racial balance in all of the schools of the system equal to that of the system as a whole. It employed satellite zoning and extensive cross-busing. The District Court rejected the plan as not constitutionally required and unduly burdensome.[65]

2. The School Board Plan

This plan retained geographic zoning and freedom-of-choice transfer provisions,

> but with certain modifications allowing priority to majority-to-minority transfers and increasing the racial "balance" of several schools. The District Court in 1970 approved the Board's plan, subject to alterations which prevented minority-to-majority transfers, made changes affecting three attendance zones, and added a requirement that the Board create "innovative" programs designed to increase racial contact of the students.[66]

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64 Ibid., p. 1222.

65 Ibid., p. 1222.

66 Ibid., p. 1223.

In rejecting the Larsen plan and approving the modified Board plan, the District Court found that

1. The boundaries of the attendance zones had been drawn in good faith and without regard to racial considerations;
2. Pupils attended the schools nearest their home;
3. The racial concentration of Negroes was not caused by public or private discrimination or state action, but by economic factors and the desire of Negroes to live in their own neighborhoods rather than in predominantly white neighborhoods.[67]

The decision of the District Court was appealed to the Fourth Circuit Court of Appeals by all parties. Meanwhile, the Swann decision was reached by the Supreme Court, and the Court of Appeals by per curiam opinion en banc remanded the Winston-Salem case and several others to their respective district courts

> with instruction to receive from the school boards new plans "which will give effect to Swann and Davis." 444 F. 2d. 99,100 (1971).[68]

The District Court understood the remand to require "the greatest possible degree of actual desegregation."[69]

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67 Ibid., p. 1223.

68 Ibid., p. 1224.

69 Ibid., p. 1225.

The District Court concluded that

> Despite the substantial difference between the findings of this Court, which formed the predicate for this Court's June 25, 1970, opinion in this case, and the findings which form the predicate of the decision of the District Court in Swann, it is apparent that it is as "practicable" to desegregate all the public schools in the Winston-Salem/Forsyth County system as in the Charlotte-Mecklenburg system and that the appellate courts will accept no less. Consequently, this Court can approve no less. . .[70]

The District Court then ordered the School Board to comply with the time schedule set by the Court of Appeals in submitting the required plan. The school authorities, declaring that they considered themselves required to do so, adopted a revised plan

> which was expressly designed "to achieve a racial balance throughout the system which will be acceptable to the Court." (Emphasis added.) Prior to the adoption of the revised plan, the school system transported about 18,000 pupils per day in about 216 buses. The drafters of the revised plan estimated that it would require at a minimum, with use of staggered school openings, 157 additional buses to transport approximately 16,000 additional pupils.[71]

The School Board submitted the plan as required, but with the statement that "it is not a sound or desirable plan, and should not be required. . . ." appended.

> On July 26, 1971, the District Court accepted the plan, noting that it was "strikingly similar" to the Larsen plan which it had previously refused to implement as not constitutionally required.[72]

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70 Ibid., p. 1225.

71 Ibid., p. 1225.

72 Ibid., p. 1226.

In rendering the decision in this case, Mr. Chief Justice Burger quoted extensively from the Court decision in Swann. Although expressing concern about the thinking of the District Court in requiring that the racial ratios in schools must correspond to the racial ratios in the community as a whole, the Chief Justice said:

> On the record now before me it is not possible to conclude with any assurance that the District Court in its order dated July 26, 1971, and the Court of Appeals in its remand dated June 10, 1971, did or did not correctly read this Court's holding in Swann and particularly the explicit language as to a requirement of fixed mathematical ratios or racial quotas and the limits suggested as to transportation of students. The record being inadequate to evaluate these issues, even preliminarily for the limited purposes of a stay order, and the heavy burden for making out a case for such extraordinary relief being on the moving parties, I am unwilling to disturb the order of the District Court dated July 26, 1971, made pursuant to the remand order of the Court of Appeals which is sought to be reviewed here.[73]

In summary, the Court allowed the District Judge wide latitude in interpreting the decisions of Swann which implied exact racial quotas as the "ideal" and which sanctioned significant busing toward achievement of the ideal desegregation plan. Although this action was brought only to stay the desegregation order of the district court, pending an application for certiorari, the immediate and continuing effect was to initiate the plan.

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73 Ibid., p. 1231.

Creation of New School Districts

Two cases were decided by the Supreme Court on June 22, 1972. Both cases concerned alleged attempts to avoid desegregation of public school systems through creation of new school districts. The first case, Wright v. Council, invoked the first split decision of the Court in deciding a desegregation issue since Brown I.

Wright concerned the creation of a new school district in Emporia, Virginia.[74] The United States District Court for the Eastern District of Virginia entered an order requiring the desegregation of a dual, racially segregated county school system consisting of 34% white students and 66% Negro students. The City of Emporia then undertook creation of a separate school district which would consist of 48% white students and 52% Negro students and would leave the surrounding county's public schools with 28% white students and 72% Negro students. The District Court enjoined creation of the separate city school district on the basis that dismantling of the existing dual school system would be impeded.

The Fourth Circuit Court of Appeals reversed, holding that the city's purpose in creating a separate school district was not shown to have been to perpetuate segregation.[75] However, the mandate of the Circuit Court was stayed pending action on a petition for certiorari.[76]

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74 Pecola Annette Wright et al., v. Council of the City of Emporia et al., 407 U. S. 451 (1972).

75 Ibid., p. 458.

76 Ibid., p. 459

In a 5-4 split decision, the Supreme Court reversed the judgment of the Court of Appeals. Mr. Justice Potter Stewart announced the majority opinion of the Court:

> We hold only that a new school district may not be created where its effect would be to impede the process of dismantling a dual system.[77]

Dissenting opinion was expressed by Mr. Chief Justice Warren E. Burger, with whom Justices Blackmun, Powell and Rehnquist joined:

> The District Court and the petitioners have placed great emphasis on the estimated six-percent increase in the proportion of Negro students in the county schools that would result from Emporia's withdrawal. I do not see how a difference of one or two children per class would even be noticed, let alone how it would render a school part of a dual system.[78]

United States v. Scotland Neck concerned the city of Scotland Neck, North Carolina.[79] Following the issuance of a desegregation plan by the State Department of Public Instruction, the State legislature enacted a bill to authorize creation of a new school district bounded by the city limits of Scotland Neck, upon approval by a majority of the city's voters. Following voter approval, steps were taken toward beginning a separate school system in the fall of 1961. The District Court enjoined implementation of the Act, finding

> the Act in its application creates a refuge for white

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77 Ibid., p. 470.

78 Ibid., p. 473.

79 United States v. Scotland Neck City Board of Education et al., 407 U. S. 484 (1972).

> students and promotes segregated schools in Halifax County, and further that "the Act impedes and defeats the Halifax County Board of Education from implementing its plan to completely desegregate all of the public schools in Halifax County by the opening of the school year 1969-70"[80]

The Fourth Circuit Court of Appeals reversed:

> The Court of Appeals did not believe that the separation of Scotland Neck from the Halifax County system should be viewed as an alternative plan for desegregating the county system because the "severance was not part of a desegregation plan proposed by the school board but was instead an action by the Legislature redefining the boundaries of local governmental units." 442 F. 2d. at 583.[81]

In a unanimous decision, the Supreme Court upheld the ruling of the District Court by reversing the decision of the Court of Appeals. Mr. Justice Potter Stewart announced the opinion of the Court:

> . . . we cannot but conclude that the implementation of Chapter 31 would have the effect of impeding the disestablishment of the dual school system that existed in Halifax County.[82]

Concurring opinion was expressed by Mr. Chief Justice Warren E. Burger, with whom Justices Blackmun, Powell and Rehnquist joined:

> . . . the new system was designed to minimize the number of Negro children attending school with the white children residing in Scotland Neck.[83]

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80 Ibid., p. 487.

81 Ibid., p. 488.

82 Ibid., p. 490.

83 Ibid., p. 492.

The decisions in Wright and Scotland Neck made clear the following mandates:

1. The Court will not allow redistricting of schools for the purpose of perpetuating racial segregation;
2. Even cities which are permitted by State Constitutions to redistrict are forbidden to do so if such action would impede the dismantling of an historically segregated dual school system;
3. State statutes must fall if they permit counties to form cities for the purpose of maintaining segregated schools.

Inter-District Desegregation Plans

The Richmond case involved desegregation of public schools of Richmond, Virginia, and the adjacent Henrico and Chesterfield Counties.[84] A suit was originated in 1961 by 11 Negro parents and guardians against the School Board of the city of Richmond as a class action under the Civil Rights Act of 1871 to desegregate the public schools. On March 16, 1964, after extended consideration, the District Court approved a "freedom of choice" plan by which every pupil was permitted to attend the school of the pupil's or the parents' choice. A second "freedom of choice" plan was approved on March 30, 1966, under which the Board of Education undertook to eliminate a dual school system in the assignment of pupils.[85]

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84 School Board of the City of Richmond, Virginia, et al., v. State Board of Education of the Commonwealth of Virginia et al., 412 U. S. 92 (1973).

85 Carolyn Bradley et al., v. School Board of City of Richmond et al., 416 U. S. 696 at 705.(1974).

While the 1964 plan was in effect, Green (1968) was decided in which a "freedom of choice" plan was not acceptable where methods promising speedier and more effective conversion to a unitary system were reasonably available. On March 10, 1970, petitioners filed with the District Court a motion for further relief.

> Specifically, petitioners asked that the court "require the defendant school board forthwith to put into effect" a plan that would "promptly and realistically convert the public schools of the City of Richmond into a unitary, non-racial system," and that the court "award a reasonable fee to (petitioners') counsel.[86]

Following a hearing, the District Court, on April 1, 1970, entered a formal order vacating its order of March 39, 1966, and enjoining the defendants to "disestablish the existing dual system" and to replace it "with a unitary system."[87]

Three plans were offered by the Board of Education:[88]

1. The initial plan, co-authored by The Department of Health, Education and Welfare, was held unacceptable because it failed to consider residential patterns in determining school zones, racial factors in zoning and the use of busing.
2. The second plan was held unsatisfactory, although it was adopted by the District Court as an interim plan for the 1970-71 school year, which was to begin in two weeks.

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86 Ibid., p. 701.

87 Ibid., p. 702.

88 Ibid., p. 703.

> The interim plan included contiguous and satellite zoning, pairing, and some public transportation, principally of those pupils who were indigent. Still, a large number of elementary school pupils would attend schools that were over 90% Negro. Also, four elementary schools would remain all white, and two high schools and certain secondary schools would continue to be racially identifiable.

After hearing three more plans, the District Court adopted the third plan. This plan, adopted April 5, 1971, called for extensive busing of students, proximal geographic zoning, clusters, satellites and faculty racial balance. In addition, the elementary, middle and high schools were to have a minority-majority ratio of students under which each group's projected enrollment in a particular school was to be at least half of the group's projected city-wide ratio.[89]

Meanwhile, legal moves were initiated to join the City of Richmond school board with those of Henrico and Chesterfield Counties. On January 10, 1972, the District Court ordered into effect a plan for the integration of the Richmond schools with those of the outlying counties of Henrico, which surrounds the city of Richmond, and Chesterfield, which forms the south border.[90]

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89 Ibid., p. 703, footnote 5.

90 Ibid., p. 705.

On appeal, the Fourth Circuit Court of Appeals, sitting en banc, reversed, holding that

> state-imposed segregation had been "completely removed" in the Richmond school district and that the consolidation was not justified in the absence of a showing of some constitutional violation in the establishment and maintenance of these adjoining and separate school districts.[91]

After argument, the Supreme Court affirmed the decision of the Court of Appeals by an equally divided vote, in which Mr. Justice Lewis F. Powell took no part.[92] Justice Powell had previously been a member of the Richmond School Board and the Virginia State Department of Public Instruction.

The subject of the later Bradley case (1974) in which much of the Richmond case (1973) is reviewed was the award of attorney fees to the plaintiffs after a long and protracted court fight.[93]

> After initial submission of the case to the Court of Appeals, but prior to its decision, the Education Amendments of 1972, of which paragraph 718 of Title VII of the Emergency School Aid Act is a part, became law. Section 718 . . . grants authority to a federal court to award a reasonable attorney's fee when appropriate in a school desegregation case.[94]

The Supreme Court decided in favor of awarding attorney's fees to plaintiffs in the Richmond case prior to enactment of paragraph 718. Announcing the unanimous decision of the Court, Mr. Justice

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91 Ibid., p. 705.

92 Ibid.

93 Ibid.

94 Ibid., p. 709.

Blackmun said:

> If forced to bear the burden of attorneys' fees, few aggrieved persons would be in a position to secure their and the public's interests in a nondiscriminatory public school system.[95]

In summary, the Richmond desegregation case marked an unwillingness of the Court to interfere with local school district lines without a showing of racial reasons for establishment of district boundaries. Had Justice Powell participated in this decision, the result might have gone either way. However, future cases would show that the crossing of school district boundaries so as to involve more than one district in desegregation efforts would be supported only if the offense to the Constitution were shared by those districts.

Keyes v. School District (1973) was decided on June 21, 1973, about one month after the Richmond case had been decided.[96] Suit was brought by parents of Denver school children in the United States District Court for the District of Colorado. The District Court found that the Denver school board had engaged in a policy of deliberate racial discrimination with respect to schools in the Park Hill area for almost a decade.[97] The District Court found

1. Segregated core city schools were educationally inferior

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95 Ibid., p. 708.

96 Wilfred Keyes v. School District No. 1, 413 U. S. 189 (1973).

97 Ibid., p. 413.

to those in the predominantly white schools in other parts of Denver.

2. Plaintiffs failed to show "de jure" segregation in other areas of the city.

Therefore, the District Court ordered a remedial plan for the core city schools, short of an all-out desegregation plan. The court also ordered desegregation of the Park Hill schools.[98]

On appeal, the Tenth Circuit Court of Appeals reversed as to the core city schools and affirmed as to the Park Hill schools.

Plaintiffs then appealed to the Supreme Court on the issue of core city school remedial action. The Supreme Court vacated the ruling of the Circuit Court in a 7-1 decision, with Justice White not participating. The case was remanded to the District Court for a determination of the proper status of the Park Hill suburb schools as part of a dual school system and to plan appropriate desegregation efforts under the law.[99]

Mr. Justice William O. Douglas declared that there was no difference between de jure and de facto school segregation in joining the Court's opinion. Justice Lewis F. Powell concurred in part and dissented in part on the ground that the distinction between de jure and de facto segregation should be abolished in favor of a constitutional rule requiring genuinely integrated public school systems.[100]

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98 Ibid., p. 413.

99 Ibid.

100 Ibid.

Mr. Justice William H. Rehnquist dissented on the ground that unconstitutional segregation in the Park Hill area did not prove that the entire district was unconstitutionally segregated.

A Review of the Voting Record of The Supreme Court 1971 - 1973

The voting record of Supreme Court Justices is given in Tables 8, 9 and 10, which follow.

Table 8 shows unanimous vote of all Justices during the 1969-1970 period when implementation of desegregation plans was being litigated.

Table 9 shows unanimous vote of all Justices on the five cases decided on April 20, 1971, when the full Court voted on implementation of desegregation plans.

Table 10 shows a breaking down of Court unanimity after the retirement of Justices Hugo L. Black and John M. Harlan and the appointments of Justice Lewis F. Powell and William H. Rehnquist. Action to invalidate the formation of a new city school district in Virginia for the purpose of evading desegregation efforts was supported by the barest margin of 5-4. However, unanimity was once more regained in a similar case in North Carolina. The North Carolina case was to be the last case through 1977 in which the Court attained unanimity of decision in segregation cases. The Richmond case called for extending desegregation procedures over three school districts, which failed in a 4-4 decision. Finally, the Denver case drew a 7-1 decision to compel remedial action in Denver, Colorado schools.

TABLE 8

VOTING RECORD OF THE JUSTICES OF THE
UNITED STATES SUPREME COURT
IN DESEGREGATION CASES
1969 - 1970

JUSTICES OF THE UNITED STATES SUPREME COURT
Date Confirmed

1969	1937	1939	1955	1956	1958	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion All Per Curiam Decisions												Tot C
Alexander v. Holmes County Board of Education, 396 U. S. 19 (1969). Implementation ordered of Mississippi desegration plans on 10/29/69.												
C	C	C	C	C	C	C	C	X	X	X	X	8
Carter v. West Feliciana Parish School Board, 396 U. S. 226 (1969). Injunctive order issued to prepare for desegregation of Louisiana school districts on 12/13/69												
C	C	C	C	C	C	C	C	X	X	X	X	8
Dowell v. Board of Education of the Oklahoma City Public Schools, 396 U. S. 269 (1969). Boundary changes approved 12/15/69												
C	C	C	C	C	C	C	C	X	X	X	X	8
Carter v. West Feliciana Parish School Board, 396 U. S. 290 (1970). Full reversal of delay in desegregation of Louisiana school districts on 1/14/70.												
C	C	C	C	C	C	C	C	X	X	X	X	8
Northcross v. Board of Education of the Memphis, Tennessee City Schools, 397 U. S. 232 (1970). Modification of a desegregation plan remanded (per Alexander) on 2/9/70.												
C	C	X	C	C	C	C	N	X	X	X	X	7

LEGEND: C - Concur; D - Dissent; N - Nonparticipant
X - Retired or not yet seated.

TABLE 9

VOTING RECORD OF THE JUSTICES OF THE UNITED STATES SUPREME COURT IN DESEGREGATION CASES

JUSTICES OF THE UNITED STATES SUPREME COURT
Date Confirmed

1969	1937	1939	1955	1956	1958	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion Cases Decided April 20, 1971												Tot C
Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971). Implementation of desegregation plan.												
C*	C	C	C	C	C	C	C	C	X	X	X	9
Davis v. Board of School Commissioners of Mobile County, 402 U. S. 33 (1971). Implementation of desegregation plan.												
C*	C	C	C	C	C	C	C	C	X	X	X	9
Charles McDaniel v. Joseph Barresi et al., 402 U. S. 39 (1971). Georgia case barring desegregation efforts, reversed.												
C*	C	C	C	C	C	C	C	C	X	X	X	9
North Carolina State Board of Education v. James E. Swann, 402 U. S. 43 (1971). Statute barring quotas and busing for racial desegregation HELD UNCONSTITUTIONAL												
C*	C	C	C	C	C	C	C	C	X	X	X	9
Mrs. Robert Lee Moore et al. v. Charlotte-Mecklenburg Board of Education 402 U. S. 43 (1971). Remanded due to no controversy.												
C	C	C	C	C	C	C	C	C	X	X	X	9

LEGEND: C - Concur; D - Dissent; X - Retired or not yet seated.
* - Announced decision.

TABLE 10

VOTING RECORD OF THE JUSTICES OF THE UNITED STATES SUPREME COURT IN DESEGREGATION CASES 1972- 1973

JUSTICES OF THE UNITED STATES SUPREME COURT
Date Confirmed

1969	1937	1939	1955	1956	1958	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion												Tot C
Wright v. Council of the City of Emporia, 407 U. S. 451 (1972) Action to strike down formation of a new city school district to perpetuate a dual school system 6/22/72												
C	X	C	X	C	C*	C	C	D	D	D	X	5
United States v. Scotland Neck City Board of Education et al 407 U. S. 484 (1972). Action to strike down formation of a new city school district to perpetuate segregation 6/22/72												
C	X	C	X	C	C*	C	C	C	C	C	X	9
School Board of the City of Richmond, Virginia v. State Board of Education, 412 U. S. 92 (1973). Appeal to unite school boards to aid desegregation refused. 5/21/73												
	X		X						N		X	4
Wilfred Keyes v. School District No. 1, 413 U. S. 189 (1973) Suit to compel desegregation of Denver city schools and remedial action in core city schools. Remanded 6/21/73												
C	X	C	X	C	C	N	C	C	C/D	D	X	7

LEGEND: C - Concur; D - Dissent; C/D Concur in part;
N - Nonparticipant; X - Retired or not yet seated.
* - Announced decision.

Milliken I [101]

Milliken I is known by the surname of the then-Governor of the State of Michigan, William G. Milliken. Plaintiffs in this case were Negro citizens of the city of Detroit, Michigan, whose public schools were, in many instances, 75 to 95% black. Plaintiffs sued in United States District Court for the Eastern District of Michigan for desegregation of Detroit public schools.

The District Court found that

1. the defendants had engaged in unconstitutional activities for which the state was responsible and which had resulted in de jure segregation in the city school district;
2. it could properly consider relief in the form of an inter-district, metropolitan desegregation plan involving 53 suburban school districts, even though there was no showing (nor was it originally alleged) that the suburban school districts had committed any constitutional violations;
3. proposed "Detroit-only" desegregation plans were inadequate and would only accentuate the racial identifiability of the city school system as a black system;
4. school district lines were simply matters of political convenience, and to effectively desegregate Detroit public schools it was necessary to develop a metropolitan plan to include the 53 suburban school districts and Detroit.

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101 Milliken v. Bradley, 418 U. S. 717 (1974).

5. A specified number of school buses should be obtained to provide transportation under an interim plan to be developed for the coming school year.[102]

The Sixth Circuit Court of Appeals remanded the case for joinder of all suburban districts that might be affected by the metropolitan remedy, finding that:

1. de jure segregation existed in the Detroit school district;
2. a metropolitan desegregation plan was proper and necessary;
3. the State was responsible for the de jure segregation in Detroit schools;
4. the State had authority to control local school districts.[103]

On certiorari, the Supreme Court reversed and remanded for the formulation of a decree restricted to the city of Detroit.[104] Mr. Chief Justice Burger, expressing the views of five members of the Court, held that:

1. a federal court could not properly impose a multi-district remedy to a single district de jure segregation problem, unless it was first established that unconstitutional racially discriminatory acts of the other districts had caused inter-district segregation, or that district lines had been deliberately drawn on the basis of race.
2. The remedy must be limited to the Detroit school district only;

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102 Ibid., p. 734.
103 Ibid., p. 734.
104 Ibid., p. 757.

3. the record established de jure segregation in the city schools only;

4. a metropolitan remedy might seriously disrupt the state's structure of public education and would give rise to many problems due to large-scale busing of students, financing and administration.[105]

Justices Douglas, White, Brennan and Marshall dissented.

Mr. Justice William O. Douglas held that:

1. a metropolitan remedy was proper in the instant case, since under Michigan law education is a state project with very little local control;[106]

2. by various devices, including creation of school districts, selection of school building sites and dispersal of public funds to build racial ghettos, the state had created black school districts and white school districts;

3. the Court's ruling against a metropolitan remedy meant that there could be no violation of the equal protection clause even though the schools were separated by race and the black schools were not only "separate" but also "inferior."

4. there was no difference between de facto and de jure segregation, the creation of school districts in metropolitan Detroit either maintaining existing segregation or causing additional segregation.

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105 Ibid., p. 757.

106 Ibid., p. 758-761.

Milliken II (1977) derived from Milliken I in that the District Court mandate to "make desegregation work" resulted in the inclusion of remedial reading programs and in-service training for teachers and administrators.[107] Four educational components were identified in which remedial education would go forward:

1. Reading - to eradicate the effects of past discrimination;
2. In-Service Training - to train teachers, administrators, professional and instructional personnel to cope with the desegregation process in Detroit;
3. Testing - to develop tests to measure pupil progress which were culturally unbiased;
4. Counseling and Career Guidance - to deal with normal tensions arising during the conversion from a dual system to a unitary system.

The cost of this program was determined to be about $11,600,000 with half of the cost charged to the State and half to the local school board.

On appeal, the Sixth Circuit Court of Appeals affirmed the action by the District Court to assess costs against the State for the remedial program. On certiorari, the Supreme Court affirmed in a unanimous decision which restored Court cohesiveness on the segregation issue. Mr. Chief Justice Burger announced the opinion of the Court, saying:

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107 Milliken v. Bradley, U. S. (1977).

> The "condition" offending the Constitution is Detroit's de jure segregated school system, which was so pervasive and persistently segregated that the District Court found that the need for the educational components flowed directly from constitutional violations by both state and local officials. These specific educational remedies, although normally left to the discretion of the elected school board and professional educators, were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these components been provided in a nondiscriminatory manner in a school system free from pervasive de jure racial discrimination.[108]

Cases Following Milliken I

Pasadena v. Spangler (1976) concerned the legality of a Federal District Court order for desegregation of the Pasadena Unified School District in 1970.[109] The order required that there be no school "with a majority of any minority students." On appeal, the Ninth Circuit Court of Appeals affirmed the District Court action.

On certiorari, the Supreme Court vacated the Court of Appeals' judgment and remanded the case for further proceedings. The Court, divided 6-2 with Justice Stevens not participating, issued the opinion as announced by Justice William H. Rehnquist:

> Because the case is to be returned to the Court of Appeals, that court will have the opportunity to reconsider its decision in the light of our observations regarding the appropriate scope of equitable relief in this case.[110]

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108 Ibid.

109 Pasadena City Board of Education v. Nancy Anne Spangler, 427 U. S. 424 (1976).

110 Ibid., p. 440.

The District Court had included the proviso that there would be no school "with a majority of any minority students" in the 1970 desegregation order under the "Pasadena Plan." Literal compliance with this requirement had occurred only in the initial year of the plan's operation. This non-compliance was brought about by shifting of population through routine entry and exit of citizens, not caused by school officials.

The Pasadena City Board of Education felt required to alter school attendance zones annually in response to demographic changes within the Pasadena Unified School District and sought relief from the necessity for this action. Petitioners sought

1. that the District Court's 1970 order should in all respects be dissolved;
2. that the District Court's jurisdiction over the Pasadena Unified School District should be terminated;
3. that petitioners' plan should be accepted as an alternative to the present plan.

By remanding the case for further proceedings as to appropriate scope of equitable relief in this case, the Supreme Court thought it unnecessary to consider other contentions of petitioners.

Justices William J. Brennan and Thurgood Marshall dissented on the basis that the original desegregation plan, following the initial success of the first year, had not taken substantial hold and should be repeated as an affirmative duty to desegregate the Pasadena school system.

Austin v. United States (1977) concerned the legality of a lower court order to begin massive busing of students in the Austin, Texas, Independent School District to achieve racial balance.[111] The case was appealed from decision of the Fifth Circuit Court of Appeals which had affirmed in part, reversed, and remanded in part a decision of the United States District Court for the Western District of Texas.[112]

The district court had considered this school desegregation case earlier:

> This school desegregation case was filed in August, 1970, by the United States against the Texas Education Agency and seven school districts, including the AISD. The complaint alleged that (1) historically, the defendants had operated a dual system based on race, and continued to do so, and (2) the defendants discriminatorily assigned Mexican-Americans to schools identifiable as Mexican-American schools or as schools intended for blacks and Mexican-Americans.[113]

The district court found no de jure discrimination against Mexican-Americans and afforded them no relief. It then held that

> "the vestiges of a dual system continue to exist with respect to blacks" and adopted, with minor modifications, the AISD plan for establishing a unitary school system in Austin. The high schools and junior high schools were to be desegregated primarily by busing about 2200 blacks to previously predominantly white schools. The elementary schools were "clustered" into groups of six schools each. One week per month the students of each cluster were to meet together to engage in certain planned activities.[114]

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111 Austin Independent School District, v. United States, 429 U. S. 990 (1976).

112 United States v. Texas Education Agency, 532 F. 2d. 380 (5th Cir. 1976).

113 Ibid., p. 384.

114 Ibid.

The Fifth Circuit Court of Appeals, sitting en banc, reversed and remanded the case to the district court with directions to eliminate the unconstitutional segregation of Mexican-American and black students "at once." The Court itemized a hierarchy of desegregation tools that the district court should consider using.

The district court then called for submission of a single desegregation plan by parties concerned. Plans were submitted by the Austin Independent School District and the black intervenors.

The AISD Plan

The school district plan would establish six sixth grade centers that would draw all sixth-graders in the school district.[115] Students in grades K to 5 would be assigned to the schools closest to their homes.[116] The new desegregation plan required busing of about 1900 students in connection with Sixth Grade Center Plan implementation, but it left untouched the students in grades K-5 and 7-12.[117]

The Finger Plan

The Mexican-American intervenors submitted a desegregation plan prepared by Dr. John A. Finger, Jr., a professor of education at Rhode Island College.[118] The "Finger" plan would convert the school system to a 4-4-4 grade structure; that is, elementary

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115 Ibid., p. 385.
116 Ibid., p. 394.
117 Ibid., p. 393.
118 Ibid., p. 395.

schools would contain grades K to 4, middle schools would contain grades 5 to 8, and high schools would continue to operate grades 9 to 12.

> The practical effect of the Plan is that kindergarten-to-fourth-grade students in East Austin would be bused to West Austin and fifth-to-eighth-grade students in West Austin would be bused to East Austin. Elementary and junior high schools that are between 50 and 90 percent Anglo are defined as "naturally desegregated" and would remain unchanged. When changing demographic patterns cause any of these schools to fall outside the "naturally desegregated" range, the schools would be brought within the Finger Plan 4-4-4 system. The high schools would be integrated by selecting, for each high school, feeder schools that would maximize the integration of that high school. Dr. Finger estimates that 18,659 (the AISD says 25,000) of Austin's public school students would be bused under his plan.[119]

The district court adopted, with minor modifications, the AISD's plan for establishing an integrated school system, holding that

> the AISD had successfully rebutted this prima facie case (of intentional segregation of blacks) by demonstrating that its racial policies had been unrelated to its treatment of Mexican-Americans and that there was an absence of segregative intent toward Mexican-Americans.[120]

The court, relying on Keyes v. School District No. 1, Denver, Colorado, held that it would therefore be improper to order "all-out desegregation" of Mexican-Americans.[121]

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119 Ibid.

120 Ibid., p. 386.

121 Ibid.

The Fifth Circuit Court of Appeals reversed the judgment of the district court, holding that

> school authorities may not constitutionally use a neighborhood assignment policy that creates segregated schools in a district with ethnically segregated residential patterns. When this policy is used, we may infer that the school authorities have acted with segregative intent.
>
> The segregation is de jure and unconstitutional because it is the result of school board action taken with the obvious (though not necessarily predominant) intent to create or maintain segregated schools.[122]

In a 7-2 decision, the Supreme Court vacated the judgment of the Fifth Circuit Court of Appeals. In a Memorandum Decision issued December 6, 1976, Mr. Justice Lewis F. Powell was joined by Chief Justice Warren E. Burger and Mr. Justice William H. Rehnquist in a concurring opinion which stated that

> the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified. That court also seems to have erred in ordering in scope a desegregation plan far exceeding in scope any identifiable violations of constitutional rights.[123]

The majority opinion of the Court explained the equitable standard involved:

> I do not suggest that transportation of pupils is never a permissible means of implementing desegregation. I merely emphasize the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation. . . .[124]

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122 Ibid., p. 392.

123 Austin Independent School District v. United States, 429 U. S. 990 (1976), 50 L. Ed. 2d. at 604.

124 Ibid., p. 605.

The "triggering" condition of the Finger plan, under which cross-town busing of students would occur as a result of changing demographic patterns, was interpreted by the Court as an attempt to achieve some predetermined racial and ethnic balance in the schools rather than to remedy the constitutional violations committed by the school authorities.[125] This plan was considered impermissible in view of the Court's holding in Pasadena Board of Education v. Spangler (1976). Also, the Court could not draw a comparison between the Austin case and the Swann case, in which high percentages of students were to be bused to and from school, because the Charlotte-Mecklenburg system covered a large area (550 square miles) and included rural areas wherein busing was necessary apart from desegregative efforts.[126]

Dissent was expressed by Justices William Brennan and Thurgood Marshall on the basis that the Court of Appeals correctly interpreted and applied the relevant decisions of the Supreme Court.[127] Keyes required proof of segregative intent as a prerequisite to a decree to desegregate a de facto system in Denver, Colorado. The Fifth Circuit Court of Appeals found evidence of such intent in that establishment of neighborhood school systems within racially segregated areas.[128]

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125 Ibid., p. 604, footnote 3.

126 Ibid., p. 605, footnote 4.

127 Ibid., p. 603.

128 United States v. Texas Education Agency, 532 F. 2d. 380 (5th Cir. 1976), p. 388.

Dayton v. Brinkman (1977) concerned the allegation that there had been a violation of the equal protection clause in the operation of public schools in Dayton, Ohio. After the lawsuit was begun for remedial action, the District Court filed its original decision on February 7, 1973.[129] Plaintiffs, students in the public school system, asked the court to restructure the administration of that system.[130]

The District Court findings were:

1. the teaching staff of the Dayton public schools became and still remains substantially integrated;
2. there was no evidence of racial discrimination in the establishment or alteration of attendance boundaries or in the site selection and construction of new schools and school additions;
3. there was no evidence that the District's "freedom of enrollment" policy had been unfairly operated or that black students had been denied transfers because of race.

However, the District Court's ultimate finding was that

> the racially imbalanced schools, optional attendance zones, and recent Board action . . . are cumulatively a violation of the Equal Protection Clause.[131]

The District Court called for plans for correcting the condition.

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129 Dayton Board of Education et al., v. Mark Brinkman et al., ___ U. S. ___ (1977), 97 Sup. Ct. 2766, 53 L. Ed. 2d. 851.

130 Ibid.

131 Ibid.

A district-wide racial distribution plan was approved by the District Court which would bring the racial content of every school to within 15% of the black-white population ratio of Dayton. The Sixth Circuit Court of Appeals approved the plan.

On certiorari, the Supreme Court reversed and remanded. In a 8-0 decision, with Mr. Justice Thurgood Marshall not participating, it was held that

1. the constitutional violations found by the District Court did not justify the broad district-wide remedy imposed; and
2. the case must be remanded to the District Court for the making of more specific findings and if necessary, the taking of additional evidence.

Mr. Justice William H. Rehnquist announced the decision of the Court, saying that

> It is clear from the findings of the District Court that Dayton is a racially mixed community, and that many of its schools are either predominantly white or predominantly black. This fact without more, of course, does not offend the Constitution.[132]

The District Court plan, which mandated extensive busing of students, was in effect when the Supreme Court decision was announced.

> . . . it is undisputed that it has been in effect in the Dayton school system during the present year without creating serious problems. . . we think that the plan should remain in effect for the coming school year. . . .[133]

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132 Ibid.

133 Ibid.

School District of Omaha v. United States (1977) concerned a considerable racial imbalance in school attendance patterns in Omaha, Nebraska.[134] The District Court decision concluded that "the respondent had not carried the burden of proving a deliberate policy of racial segregation."[135] Therefore, the District Court approved a desegregation plan involving the system-wide transportation of pupils. The Eighth Circuit Court of Appeals affirmed, concluding that

> . . . the evidence justified a presumption that segregative intent permeated defendants' policies concerning faculty assignment, student transfers, optional attendance zones, school construction, and the deterioration of 96% black Tech High School.[136]

The Supreme Court, in a 6-3 decision, vacated the judgment of the Court of Appeals based on recent decisions which disavow that

> . . . a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.[137]

The case was remanded to the Court of Appeals for reconsideration in the light of Village of Arlington Heights and Dayton. Justices Brennan, Marshall and Stevens dissented.

In summary, the Court cases since Milliken I (1974) have evidenced a reunification of opinion among Justices of the Court, as summarized in Table 11 on page 151. Primary dissenters remain Justices White, Marshall and Brennan.

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134 School District of Omaha et al. v. United States et al., ___ U. S. ___ (1977), 53 L. Ed. 2d. 1039.

135 Ibid.

136 Ibid.

137 Washington v. Davis, 426 U. S. 229, 239 (1976).

TABLE 11

VOTING RECORD OF THE JUSTICES OF THE UNITED STATES SUPREME COURT IN DESEGREGATION CASES 1974 - 1977

JUSTICES OF THE UNITED STATES SUPREME COURT

Date Confirmed

1969	1937	1939	1955	1956	1958	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion												Tot C
Carolyn Bradley et al. v. School Board of the City of Richmond et al., 416 U. S. 696 (1974). Award of attorneys' fees for litigants backdated. 5/15/74												
C	X	C	X	C	C	C	N	C*	N	C	X	7
Milliken v. Bradley, 418 U. S. 717 (1974). Milliken I Interdistrict desegregation plan disapproved.												
C*	X	D	X	D	C	D	D	C	C	C	X	5
Pasadena City Board of Education v. Nancy Anne Spangler Annual adjustments to maintain racial quotas disapproved. 6/28/76												
C	X	X	X	D	C	C	D	C	C	C*	N	6
Milliken v. Bradley, U. S. (1977). Milliken II. State must bear half of costs of remedial education to overcome effects of de jure segregation.												
C*	X	X	X	C	C	C	C	C	C	C	C	9
Dayton Board of Education v. Brinkman, U. S. (1977). Plan to correct racial balance by busing disapproved.												
C	X	X	X	C	C	C	N	C	C	C	C	8

LEGEND: C - Concur; D - Dissent; N - Nonparticipant
X - Retired or not yet seated.
* - Announced decision.

TABLE 11
(Continued)

VOTING RECORD OF THE JUSTICES OF THE
UNITED STATES SUPREME COURT
IN DESEGREGATION CASES
1974 - 1977

JUSTICES OF THE UNITED STATES SUPREME COURT
Date Confirmed

1969	1937	1939	1955	1956	1958	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion												Tot C
Austin Independent School District v. United States 429 U.S. 990 (1976). Desegregation plan disapproved.												
C	X	X	X	D	C	C	D	C	C*	C	C	7
School District of Omaha v. United States, ____ U.S. ____ (1977). Desegregation plan disapproved.												
C	X	X	X	D	C	C	D	C	C	C	D	6

LEGEND: C - Concur; D - Dissent; N - Nonparticipant;
X - Retired or not yet seated;
* - Announced decision.

CHAPTER V

FREEDOMS GUARANTEED BY THE CONSTITUTION

Introduction

The Constitution of the United States provides safeguards to human rights through the first ten amendments, referred to as the Bill of Rights. As previously mentioned in Chapter I, the great majority of cases involving education issues are related to the provisions of the First Amendment and Fourteenth Amendment safeguards.

These amendments are as follows:

> Article I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[1]

> Article XIV. Sect. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[2]

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1 U. S., Constitution, amend I.

2 U. S., Constitution, amend. XIV, sec. 1.

Certain provisions of these Amendments have been cited by litigants in suing for reinstatement of public employment denied them by virtue of state and local laws. The most frequently cited in this event is the "due process" clause of the Fourteenth Amendment. Another is the "freedom of speech" provision of the First Amendment which has been alleged violated in loyalty oath cases. The "free exercise" of religion has been claimed violated by State statutes which require compulsory school attendance. The "equal protection" clause has been cited in support of contentions against the equitability of the property tax as a method of school finance.

This chapter reviews those cases decided by the Burger Court from its inception on June 23, 1969, through the end of the June, 1977, term. These cases included loyalty oath requirements for public employment, administrative rules and procedures involving teacher dismissals or other restrictions on public employment, student suspensions and expulsions, school finance and compulsory school attendance.

Loyalty Oath

The Constitution of the United States prescribes an oath to be taken by the President[3] and provides that the officers of the federal and state governments shall be bound by oath or affirmation to support the Constitution.[4]

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3 U. S. Constitution, Art. II, sec. 1.

4 U. S. Constitution, Art. VI.

However, the requirement of an oath as a condition of public employment has expanded in scope as federal government programs have proliferated. Following the rise of Communism prior to World War II, loyalty and security programs became increasingly prevalent as government sought to guard against subversion. The execution of a loyalty oath has become a means of insuring that only loyal persons should occupy positions of public trust and influence. Loyalty in this context means fidelity to the national, state or local government and its laws and forms.[5]

> Because the concept of loyalty encompasses elements of belief, expression, and association, as well as overt acts, every challenge to a loyalty oath must be supposed to raise at least a potential issue as to undue infringement of freedoms protected by the First Amendment to the Federal Constitution.[6]

Since the early 1950's the Supreme Court has been called upon to weigh the constitutionality of many loyalty oath requirements. It has never ruled that such oaths are unconstitutional per se.[7]

> The Supreme Court has examined such loyalty oath provisions, particularly those relating to past conduct or association, to determine whether they constituted bills of attainder or ex post facto laws prohibited by the Constitution. In no recent case has the court invalidated an oath requirement on these grounds.[8]

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5 Whitehill v. Elkins, 389 U. S. 54 (1967), 19 L. Ed. 2d. 1333 annotation, "Validity of governmental requirement of oath of allegiance or loyalty."

6 Ibid., par. 5.

7 Ibid., par. 3.

8 Ibid., par. 2.

The Court has condemned loyalty oath provisions susceptible of resulting in penalty for guiltless knowing behavior.[9] Many state and municipal loyalty programs required of public employees, and especially of teachers, require a disavowal of membership in subversive organizations. The Supreme Court adopted a knowing-conduct standard as a measure of the constitutional validity of such requirements,

> under the view that deprivation of employment or other penalty for innocent association would be a denial of due process.[10]

The Court has held unconstitutional those loyalty oath requirements which suffer vagueness and overbreadth. The Court has also condemned as oversweeping oath requirements which, although unambiguous in their terms, have concerned themselves with too wide a range of conduct and association.[11]

The Court has held freedom of speech violated by a state statute which required every teacher to swear a loyalty oath, thereby infringing academic freedom:

> The Supreme Court found that such a teacher, with conscientious regard for the solemnity of an oath and sensitive to the perils posed by the oath's indefinite language, could avoid the risk of loss of employment and perhaps profession only by restricting his conduct to that which was unquestionably safe . . . .[12]

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9 Ibid., par. 6(a).

10 Ibid., par. 6(a).

11 Ibid., par. 2.

12 Ibid., par. 6(b).

Connell v. Higginbotham (1971) concerned dismissal of a teacher for refusing to sign a loyalty oath.[13] The oath consisted of 5 parts and applied to public employees of the State of Florida, as follows:

1. I will support the Constitution of the United States and of the State of Florida;
2. I am not a member of the Communist Party;
3. I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party;
4. I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence;
5. I am not a member of any organization or party which believes in or teaches directly or indirectly, the overthrow of the Government of the United States or Florida by force or violence.[14]

The teacher brought action to challenge the constitutionality of the Florida statute and the loyalty oath upon which the plaintiffs action was conditioned.

The three-judge District Court declared parts 2, 3 and 5 of

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13 Stella Connell v. James M. Higginbotham et al., 403 U. S. 207 (1971).

14 Joseph E. Bryson, Legality of Loyalty Oath and Non-Oath Requirements for Public School Teachers, (Boone, North Carolina: The Miller Printing Company, 1963), p. 62.

the oath unconstitutional but upheld the constitutionality of parts 1 and 4.

> The three-judge U. S. District Court declared three of the five clauses contained in the oaths to be unconstitutional, and enjoined the State from conditioning employment on the taking of an oath including the language declared unconstitutional.[15]

On appeal, the Supreme Court upheld the constitutionality of part 1 by unanimous vote:

> The first section of the oath upheld by the District Court requiring all applicants to pledge to support the Constitution of the United States and of the State of Florida demands no more of Florida public employees than is required of all state and federal officers. U. S. Const., Art VI, cl. 3. The validity of this section of the oath would appear settled.[16]

However, the constitutionality of part 4, which was upheld by the District Court, was reversed by eight members of the Court, with Justice Potter Steward dissenting:

> The second portion of the oath, approved by the District Court, falls within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process. Slochower v. Board . . . That portion of the oath, therefore, cannot stand.[17]

Mr. Justice Marshall, with whom Mr. Justice Douglas and Mr. Justice Brennan joined, concurred in the result:

> But in my view it simply does not matter what kind of evidence a State can muster to show that a job applicant "believes in the overthrow." For state action injurious to an individual cannot be justified on account of the nature of the individual's beliefs, whether he "believes in the overthrow" or has any other sort of belief.[17]

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15 Ibid., p. 297.

16 Ibid., p. 208.

17 Ibid., p. 209.

Teacher Employment

Four cases were decided by the Supreme Court during the period from June 29, 1972 to June 17, 1976, which involved adjudication of rules and regulations governing employment of teachers. The first two cases concerned the rights of the nontenured teacher to procedural due process of law when denied continuing employment. The third case concerned employment regulations of two school boards with regard to pregnant teachers. The fourth case involved the legality of dismissal of teachers who were on strike.

Board of Regents v. Roth (1972) concerned a teacher who was denied reappointment as an assistant professor at Wisconsin State State University-Oshkosh.[18] The teacher alleged that the decision not to rehire him was an attempt to punish him for certain statements he had made which were critical of the university administration. Under Wisconsin law a state university teacher without tenure is entitled to nothing beyone his one-year appointment.[19] There are no statutory administrative standards defining eligibility for re-employment. State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials.[20]

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18 The Board of Regents of State Colleges et al. v. David F. Roth, Etc., 408 U. S. 564 (1972).

19 Ibid., p. 566.

20 Ibid., p. 567.

Roth brought action in Federal District Court alleging that the decision not to rehire him for the next year infringed his Fourteenth Amendment rights. Specific allegations were:

1. The true reason for the decision was to punish him for certain statements critical of the University administration, and that it therefore violated his right to freedom of speech.
2. The failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law.[21]

The District Court granted summary judgment for the teacher on the procedural issue, ordering the University officials to provide him with reasons and a hearing.

The Seventh Circuit Court of Appeals affirmed the decision of the District Court for partial judgment.

On certiorari, the Supreme Court considered the question of

> whether the respondent had a constitutional right to a statement of reasons and a hearing on the University's decision not to rehire him for another year.[22]

In a 5-4 decision, the Court decided that Roth did not have such a right. Mr. Justice Stewart delivered the opinion of the Court:

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21 Ibid., p. 568.

22 Ibid., p. 569.

> Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it.[23]

Justices Douglas, Brennan and Marshall dissented. Mr. Justice William O. Douglas said:

> When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution. . . .
>
> In the case of teachers whose contracts are not renewed, tenure is not the critical issue. In the Sweezy case, the teacher, whose First Amendment rights we honored, had no tenure but was only a guest lecturer. In the Keyishian case, one of the petitioners (Keyishian himself) had only a "one-year-term contract" that was not renewed.[24]

Mr. Justice Thurgood Marshall held that individuals have a property right in their employment, whether public or private:

> In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the "property" right that I believe is protected by the Fourteenth Amendment and that cannot be denied "without due process of law." And it is also liberty - liberty to work - which is the "very essence of the personal freedom and opportunity" secured by the Fourteenth Amendment.[25]

But the majority opinion refuted this philosophy, saying:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it.[26]

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23 Ibid., p. 578.

24 Ibid., p. 582.

25 Ibid., p. 588.

26 Ibid., p. 577.

Perry v. Sindermann (1972) was a companion case to Roth.[27] Robert Sindermann was a teacher in the state college system of the state of Texas. He was employed for ten successive years within the state college system, the last four under a series of one-year written contracts.[28] As president of the Texas Junior College Teachers Association, he testified before committees of the Texas Legislature, and he became involved in public disagreements with the policies of the college's Board of Regents. Finally, in May of 1969, the teacher's one-year employment contract expired, and the Board of Regents voted not be offer him a new contract for the next academic year.[29]

Sindermann brought action in Federal District Court, alleging that the Regents' decision not to rehire him was based on his public criticism of the policies of the college administration and thus infringed his right to freedom of speech. He also alleged that their failure to provide him an opportunity for a hearing violated the guarantee of due process under the Fourteenth Amendment.[30]

The District Court granted summary judgment for the Board of Regents, concluding that the respondent had "no cause of action against the petitioners since his contract of employment terminated

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27 Charles R. Perry et al. v. Robert P. Sindermann, etc., 408 U. S. 593 (1972).

28 Ibid., p. 594.

29 Ibid., p. 595.

30 Ibid., p. 595.

May 31, 1969, and Odessa Junior College has not adopted the tenure system."[31]

The Fifth Circuit Court of Appeals reversed the judgment of the District Court, holding that:

1. Despite the respondent's lack of tenure, the nonrenewal of his contract would violate the Fourteenth Amendment if it in fact was based on his protected free speech.
2. Despite the respondent's lack of tenure, the failure to allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if the respondent had an "expectancy" of re-employment.

On certiorari, the Supreme Court considered the question of

> whether the respondent's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments.[31]

In a 5-4 decision, the Court decided that lack of tenure did not defeat Sindermann's claim. Mr. Justice Potter Stewart delivered the majority opinion of the court:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . .[32]

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31 Ibid., p. 596.

32 Ibid., p. 597.

The Court further affirmed the judgment of the Court of Appeals in remanding the case to the District Court for a hearing by the college board.[33]

Mr. Chief Justice Warren E. Burger concurred in the judgment:

> I concur in the Court's judgments and opinions in Perry and Roth, but there is one central point in both decisions that I would like to underscore since it may have been obscured in the comprehensive discussion of the cases. That point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law. The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract.[33]

Justices Douglas, Brennan and Marshall dissented. Mr. Justice Thurgood Marshall said:

> For reasons stated in my dissenting opinion in Board of Regents v. Roth, ... I would modify the judgment of the Court of Appeals to direct the District Court to enter summary judgment for respondent entitling him to a statement of reasons why his contract was not renewed and a hearing on disputed issues of fact.[34]

The Roth and Sindermann cases clarified the rights of non-tenured teachers to due process when denied continued employment:

> The nontenured teacher does not have a constitutional right to public employment. Once employed, however, he acquires not only contractual rights but also constitutional rights which could include the right to due process.[35]

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33 Ibid., p. 603.

34 Ibid., p. 605.

35 Marilyn Henderson, "Roth and Sindermann: Which Direction Now?" New Directions in School Law (NOLPE 21st Annual Convention, Colorado Springs, Colorado, 1975), p. 178.

Mt. Healthy School District v. Doyle (1977) concerned the failure of a school board to rehire a non-tenured teacher.[36] Fred Doyle brought action in Federal District Court for the Southern District of Ohio, alleging that the school board's decision not to rehire him for the coming year was based on several incidents in which he had exercised First Amendment rights to free speech and Fourteenth Amendment rights to due process. The district court ruled for the teacher, directing reinstatement with back pay. The Sixth Circuit Court of Appeals affirmed.

In a unanimous decision, the Supreme Court vacated the Court of Appeals' judgment and remanded the case for determination of school board action had certain incidents not occurred which affected the teacher's exercise of free speech. Justice William H. Rehnquist announced the decision of the Court.

> We are thus brought to the issue whether, even if that were the case, the fact that protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.[37]

The Court opinion focussed on the effect that presence or absence of specific conduct on the part of the teacher would have on board decisions to rehire or not to rehire.

> A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct.[38]

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36 Mt. Healthy City School District Board of Education v. Fred Doyle, 429 U.S. 274 (1977).

37 Ibid., p. 285.

38 Ibid., p. 286.

Cleveland Board v. LaFleur (1974) challenged the constitutionality of school regulations dealing with maternity leaves of teachers.[39] Two cases were joined for decision:

1. A suit was brought in the United States District Court for the Northern District of Ohio challenging the legality of a maternity leave rule of the Board of Education of Cleveland, Ohio. The rule provided mandatory starting of leave beginning 5 months before the expected birth of her child. Employment could commence at the beginning of the next school semester after her child was 3 months old.
2. A suit was brought in the United States District Court for the Northern District of Virginia challenging the legality of a maternity leave rule of the School Board of Chesterfield County, Virginia. The rule provided 6-month notice and 4-month mandatory termination before the expected birth of her child. Employment could commence after determination of physical fitness examination guaranteed no later than the first day of the school year following the physical examination and certificate of health.

In the Cleveland case, the District Court found against the teachers.[40] In the Virginia case, the District Court found for

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39 Cleveland Board of Education et al. v. Jo Carol LaFleur et al., 414 U. S. 632 (1974).

40 Ibid., p. 636.

teachers, holding that the school board regulation violated the Equal Protection Clause.[41]

On appeal, the Sixth Circuit Court of Appeals reversed the finding of the District Court in the Cleveland case. The Fourth Circuit Court of Appeals reversed the finding of the District Court in the Virginia case.

Both cases were then reviewed by the Supreme Court in order to resolve the conflict between the Courts of Appeal regarding the constitutionality of such mandatory maternity leave rules for public school teachers.

The Court reviewed the reasons for establishing a cut-off date for teacher employment prior to termination of pregnancy. In a 7-2 decision, the Court decided that the mandatory rule was unconstitutional. Justice Potter Stewart expressed the majority opinion of 5 members of the Court, saying:

> Thus, while the advance-notice provisions in the Cleveland and Chesterfield County rules are wholly rational and may well be necessary to serve the objective of continuity of instruction, the absolute requirements of termination at the end of the fourth or fifth month of pregnancy are not.[42]

The rules were judged to permit permanent, irrebuttable presumptions about the capability of individual teachers to perform classroom work at different stages of pregnancy, presumptions which the Court would not permit.

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41 Ibid., p. 637.

42 Ibid., p. 642.

With regard to the re-employment regulations, the Court decision was split between the Cleveland situation and the Virginia situation:

> We conclude that the Cleveland return rule, insofar as it embodies the three-month age provision, is wholly arbitrary and irrational, and hence violates the Due Process Clause of the Fourteenth Amendment. The age limitation serves no legitimate state interest, and unnecessarily penalizes the female teacher for asserting her right to bear children.
>
> The Chesterfield County rule manages to serve the legitimate state interests here without employing unnecessary presumptions that broadly burden the exercise of protected constitutional liberty.[43]

Accordingly, the decision of the Court of Appeals in the Cleveland case was affirmed by the Court. By this action, the Court struck down the maternity leave rule of the Board of Education of Cleveland, Ohio.

The decision of the Court of Appeals in the Virginia case was reversed and remanded for further proceedings. The Court struck down only the mandatory termination provision of the Chesterfield County School Board maternity leave rule.

Chief Justice Warren E. Burger and Justice William H. Rehnquist dissented on the grounds that the majority's reliance on the invalidity of irrebuttable presumptions endangered the

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43 Ibid., p. 650.

validity of countless state and federal statutes, and that if any generally applicable rule concerning mandatory termination of employment was permissible, the rules in the instant case were not valid. Mr. Justice Rehnquist said:

> Since this right to pursue an occupation is presumably on the same lofty footing as the right of choice in matters of family life, the Court will have to strain valiantly in order to avoid having today's opinion lead to the invalidation of mandatory retirement statutes for governmental employees.[44]

Hortonville School District v. Hortonville Education Association alleged noncompliance by the Board of Education with due process requirements in the dismissal of teachers.[45] The teachers in this Wisconsin school district went on strike on March 18, 1974, in direct violation of Wisconsin law.[46] The district superintendant contacted all striking teachers and invited them to return to work. On April 1, most of the striking teachers appeared before the Board with counsel to demand collective bargaining of grievances which led them to strike. On April 3, the Board voted to terminate the employment of striking teachers and advised them by letter to that effect. [47]

The teachers then brought suit in the Circuit Court, Outagamie County, Wisconsin, against members of the Board of Education. The Circuit Court rejected teachers' claim that they were denied

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44 Ibid., p. 659.

45 Hortonville Joint School District No. 1 et al. v Hortonville Education Association et al., 426 U. S. 482 (1976).

46 Ibid., p. 484.

47 Ibid., p. 485.

due process, since the teachers admitted they were on strike after receiving adequate notice and a hearing, including the warning that they were in violation of Wisconsin law.

On appeal, the Wisconsin Supreme Court reversed, holding that

> although the teachers had admitted being on strike, and although the strike violated Wisconsin law, the Board had available other remedies than dismissal, including an injunction prohibiting the strike, a call for mediation, or continued bargaining.[48]

The Wisconsin Supreme Court also held that the Board was not sufficiently impartial to make this choice of remedy.

On certiorari, the Supreme Court considered

> . . . whether the Due Process Clause of the Fourteenth Amendment prohibits this School Board from making the decision to dismiss teachers admittedly engaged in a strike and persistently refusing to return to their duties.[49]

In a 6-3 decision, the Supreme Court reversed the judgment of the Wisconsin Supreme Court and remanded the case. Mr. Chief Justice Warren E. Burger announced the majority opinion of the Court:

> Respondents have failed to demonstrate that the decision to terminate their employment was infected by the sort of bias that we have held to disqualify other decisionmakers as a matter of due process. . . Accordingly, we hold that the Due Process Clause of the Fourteenth Amendment did not guarantee respondents that the decision to terminate their employment would be made or reviewed by a body other than the School Board.[50]

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48 Ibid., p. 486.

49 Ibid., p. 488.

50 Ibid., p. 497.

Justice Potter Stewart, joined by Justices William J. Brennan and Thurgood Marshall, dissented:

> I would therefore remand this case to the Wisconsin Supreme Court for it to determine whether, on the one hand, the School Board is charged with considering the reasonableness of the strike in the light of its own actions, or is, on the other, wholly free, as the Court today assumes, to exercise its discretion in deciding whether to discharge the teachers.[51]

The voting pattern of the Supreme Court Justices in cases involving teacher employment is summarized in Table 12 on page 173. The decisions of Roth and Sindermann (1972) were decided by a majority of 5-3, with one non-participant. The decision of Cleveland (1974) decided by a firmer 7-2 vote. The Hortonville (1976) case marked the entrance of Justice John P. Stevens to the Court and the retirement of Justice William O. Douglas. Finally, the Mt. Healthy case (1977) was decided by unanimous vote of the Court.

Since 1972 the various federal appellate courts have cited Roth and Sindermann numerous times during litigation on rights of non-tenured teachers.[52] Issues which were clarified in subsequent cases included the following:

1. Government employment was a privilege and not a right;
2. A teacher's tenure status was irrelevant when he was denied substantive rights;
3. Without proof of denial of substantive rights, a non-tenured teacher needed to prove denial of liberty or property to be entitled to procedural due process;

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51 Ibid., p. 498.

52 Henderson, "Roth and Sindermann," p. 188.

4. Simple nonretention in a position did not constitute denial of due process;
5. Longevity in a teaching position alone did not support a claim of denial of property.

Substantive due process involves protections specifically listed in the Constitution and the Bill of Rights. Such rights as freedom of speech, freedom of association and religious freedom are protected by substantive due process. Procedural due process involves the right to a fair procedure to determine the necessity for depriving an individual of substantive rights, life, liberty, or property.[53]

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53 Ibid., p. 179.

TABLE 12

VOTING RECORD OF THE JUSTICES OF THE UNITED STATES SUPREME COURT ON TEACHER EMPLOYMENT

JUSTICES OF THE UNITED STATES SUPREME COURT
Date Confirmed

1969	1937	1939	1955	1956	1958	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion												Tot C
The Board of Regents of State Colleges et al. v. David F. Roth, Etc., 408 U. S. 564 (1972). Non-tenured Teacher reemployment rights and due process denied. 6/29/72												
C	X	D	C	D	C*	C	D	C	M	X	X	5
Charles R. Perry et al. v. Robert P. Sindermann, etc., 408 U. S. 593 (1972). Non-tenured teacher reemployment rights, due process awarded. 6/29/72.												
C	X	D	C	D	C*	C	D	C	N	X	X	5
Cleveland Board of Education et al. v. Jo Carol La Fleur et al., 414 U. S. 632 (1974). Regulations regarding teacher pregnancy termination and reemployment UNCONSTITUTIONAL 1/21/74												
D	X	C	X	C	C*	C	C	C	C	D	X	7
Hortonville Joint School District No. 1 et al. v. Hortonville Education Association et al., 426 U. S. 482 (1976). Striking teachers legally terminated. 6/17/76.												
C	X	X	X	D	D	C	D	C	C	C	C	6
Mt. Healthy School District Board of Education v. Fred Doyle 429 U. S. 274 (1977). Non-tenured teacher reemployment rights, remanded for determination of reasons.												
C	X	X	X	C	C	C	C	C	C	C*	C	9

LEGEND: C - Concur; D - Dissent; N - Nonparticipant
X - Retired or not yet seated.
* - announced majority opinion.

Student Suspensions

Five cases were decided by the Supreme Court during the period from June 23, 1969 through June 29, 1977, in which student suspensions were litigated. As will be seen in following sections, students said that substantive rights were denied by school authorities, and in one case damages were awarded to students for the action of school authorities in suspending the students from school.

Jones v. State Board (1970) involved suspension of a university student for distributing leaflets urging a boycott against registration at the university.[54] Jones was suspended indefinitely as a student of A. & I. State University at Tennessee in the summer of 1967. Charges against him were specified, evidence taken, and findings made after a hearing in September, 1967. Jones and others brought suit in the Federal District Court to set aside the suspension on First Amendment and due process grounds.

The District Court granted judgment for the defendants on the merits. The Sixth Circuit Court of Appeals affirmed.[55]

On certiorari, the Supreme Court examined the record of the case and found that Jones' indefinite suspension was based in part on a finding that he lied at the hearing on the charges

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54 Kenneth R. Jones v. State Board of Education of and for the State of Tennessee et al., 397 U. S. 31 (1970).

55 Ibid., p. 32.

against him. Therefore, the writ of certiorari was dismissed as improvidently granted.

Papish v. Board (1973) involved the expulsion of a student for distributing a newspaper which contained allegedly indecent articles.[56] The student sought declaratory and injunctive relief in the United States District Court for the Western District of Missouri on the grounds that the expulsion was improperly premised on activities protected by the First Amendment. The District Court denied relief, and the Eighth Circuit Court of Appeals affirmed.

On certiorari, the Supreme Court, in a 6-3 decision, reversed the judgment of the Court of Appeals. The majority of the Court held that:

1. The university's regulation of the content of speech was not immune from the First Amendment;
2. Neither the political cartoon nor the article could be labeled constitutionally obscene or otherwise unprotected;
3. The university was required to reinstate the student unless she was barred from reinstatement for valid academic reasons.

Chief Justice Burger and Justices Rehnquist and Blackmun dissented on the grounds that the case was not squarely governed by prior Supreme Court decisions.

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56 Barbara Susan Papish v. The Board of Curators of the University of Missouri, et al., 410 U. S. 667 (1973).

Goss v. Lopez (1975) challenged the constitutionality of an Ohio statute which empowered the principal of an Ohio public school to suspend a pupil for up to 10 days or to expel him, subject to notification of parents concerned as to the reasons for such action within 24 hours.[57] Nine students, each of whom alleged that he or she had been suspended from public high school in Columbus, Ohio, for up to 10 days without a hearing pursuant to the Ohio code, filed an action against the Columbus Board of Education and others.[58]

The District Court determined that suspensions occurred during a period of student unrest during February and March, 1971, and that plaintiffs Lopez and others were denied due process of law because they were "suspended without hearing prior to suspension or within a reasonable time thereafter," and that the Ohio Rev. Code Ann. par 3313.66 (1972) and regulations issued pursuant thereto were unconstitutional in permitting such suspensions.[59]

The school administrators appealed to the Supreme Court. In a 5-4 decision, the Supreme Court affirmed the judgment of the District Court. Mr. Justice Byron R. White announced the decision of the Court:

Although Ohio may not be constitutionally obligated to

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57 Norval Goss et al. v. Eileen Lopez et al., 419 U. S. 565 (1975), at 567.

58 Ibid., p. 568.

59 Ibid., p. 571.

> establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not "shed their constitutional rights" at the schoolhouse door. Tinker v. DesMoines School District, 393 U. S. 503 (1969).[60]

The majority decision of the Court claimed that deprivation of education for 10 days constituted what was severe enough to serve as a basis for complaint:

> The Due Process Clause also forbids arbitrary deprivations of liberty. "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him," the minimal requirements of the Clause must be satisfied.[61]

The decision of the Court identified two interests of the students which are entitled to constitutional protection:

1. The first is the "property" interest in a public school education. Turning aside arguments that the Constitution does not guarantee a public education and, therefore, there can be no protection from suspension and expulsion, the Court held that, having extended that right, Ohio may not withdraw it on grounds of misconduct without fundamentally fair procedures to determine whether or not the misconduct has occurred.
2. The second is the "liberty" interest, wherein the Court concluded that suspensions for up to 10 days could

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60 Ibid., p. 574.

61 Ibid.

> seriously damage the students' standing with fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.

The Court then outlined the minimum procedures required by the Due Process Clause of the Fourteenth Amendment:

> At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.[62]

The Court then mentioned some types of situations wherein prior notice of suspension would not be practical due to students whose presence on the school grounds poses a continuing threat to persons or property.[63] In that case, the hearing should follow, even in rudimentary form, as soon as practicable.

The Court did not construe the Due Process Clause to require a formal hearing in every instance of student misconduct:

> We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.[64]

Chief Justice Warren E. Burger and Justices Blackmun, Powell and Rehquist dissented. Mr. Justice Powell wrote the dissenting opinion:

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62 Ibid., p. 579.

63 Ibid., p. 582.

64 Ibid., p. 583.

> The Ohio statute allows no serious or significant infringement of education. It authorizes only a maximum suspension of eight school days, less than 5% of the normal 180-day school year. Absences of such limited duration will rarely affect a pupil's opportunity to learn or his scholastic advancement.[65]

Speaking of the necessity for school discipline and the need to permit school authorities a free hand in running the schools, Justice Powell said:

> The State's generalized interest in maintaining an orderly school system is not incompatible with the individual interest of the student. Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto.[66]

Justice Powell expressed anxiety over the formalization of relationships between student and teacher:

> In its rush to mandate a constitutional rule, the Court appears to give no weight to the practical manner in which suspension problems normally would be worked out under Ohio law. One must doubt, then, whether the constitutionalization of the student-teacher relationship, with all of its attendant doctrinal and practical difficulties, will assure in any meaningful sense greater protection than that already afforded under Ohio law.[67]

Board v. Jacobs (1975) challenged the constitutionality of laws which interfered or threatened to interfere with publication of a student newspaper.[68] The Board of Commissioners of the City of Indianapolis, Indiana, or their subordinates, were accused

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65 Ibid., p. 588.

66 Ibid., p. 592.

67 Ibid., p. 596.

68 The Board of School Commissioners of the City of Indianapolis et al. v. Jeff Jacobs et al., 420 U. S. 128 (1975).

of taking certain actions toward interfering or threatening to interfere with the publication and distribution of the newspaper which was prepared by high school students. Six named plaintiffs brought action in District Court to have declared unconstitutional certain regulations and rules promulgated by the Board, as well as expunction from their records of certain information and compensatory and punitive damages against the Board.

The United States District Court for the Southern District of Indiana decided for the students in declaring such regulations in violation of First Amendment and Fourteenth Amendment rights. The District Court denied the petition for damages and expunction. The Seventh Circuit Court of Appeals affirmed.[69]

On certiorari, the Supreme Court was informed that all of the named plaintiffs in the action had graduated from the Indianapolis school system. The Court ruled 8-1 that a case or controversy no longer existed and that the case was therefore moot. The Court found inadequate compliance with Rule 23(c)(3) of Federal Rules of Civil Procedure which required proper definition of the plaintiffs as a class. Therefore, the Court said:

> Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint.[70]

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69 Ibid., p. 129.

70 Ibid., p. 130.

Mr. Justice William O. Douglas dissented, saying that

> the absence of such a written order (formally certifying the class) is too slender a reed to support a holding of mootness, particularly in the face of the incontrovertible evidence that certification was intended and did, in fact, take place.[71]

Since the Jacobs case was decided on February 18, 1975, two cases reached the appellate courts in which First Amendment rights of free speech conflicted with school board regulations regarding school publications.

> Since Jacobs was held moot on February 18, 1975, and, for lack of the nationally controlling case law which Jacobs might have supplied, it is not surprising that at least two appellate court cases have been decided with holdings that have prompted little dancing in the streets by school officials in Baltimore County or Los Angeles City. Apparently, neither case had as yet been standardly reported, although the Nitzberg opinion was by Justice Tom Clark, Retired Supreme Court Justice, sitting by designation.
>
> Apparently both Nitzberg and Bright were prior-restraint problems with the courts being unable to blink the carefully couched and official board regulations and procedures that were found wanting. . . .[72]

No subsequent case to Jacobs has reached the Supreme Court which applies the weight of Court decision toward the resolution of student publication conflicts with school board regulations. The question which remains unanswered is whether or not freedom of the press applies to school newspapers in the same way that it applies to publications in general.

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71 Ibid., p. 131.

72 Robert M. Shaw, "Student Publications: After Jacobs, What Next?" New Directions in School Law (NOLPE 21st Annual Convention, Colorado Springs, Colorado, 1975), p. 63.

Wood v. Strickland (1975) concerned an improper expulsion of two high school students.[73] Two tenth-grade students, Peggy Strickland and Virginia Crain, were expelled from school for allegedly "spiking" the punch served at an extracurricular meeting of parents, students and teachers. Prompted by the spreading of talk about the incident, the students were asked by the teacher involved in the extracurricular activity to report their role in the incident to the school principal. The principal suspended the students from school for a maximum two-week period, subject to the decision of the school board.[74] That night, the school board voted to expel the students from school for the remainder of the semester, a period of approximately three months. Two weeks later, the board reviewed the facts of the case and confirmed the expulsion order.[75]

The students then brought suit against individual members of the school board, claiming damages and injunctive and declaratory relief, alleging that their federal constitutional rights to due process were infringed by their expulsions.[76] The jury failed to reach a verdict, and the District Court found "as a matter of law" that there was no evidence from which malice (on the part of the school board in expelling the students) could be inferred.[77]

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73 John P. Wood et al. v. Peggy Strickland, 420 U. S. 308 (1975).

74 Ibid., p. 312.

75 Ibid., p. 313.

76 Ibid., p. 310.

77 Ibid., p. 314.

The Eighth Circuit Court of Appeals, however, viewed both the instruction of the District Court as to the necessity for a finding of malice on the part of the school board members in this matter and the decision of the District Court as erroneous.

> Specific intent to harm wrongfully, it held, was not a requirement for the recovery of damages. Instead, "it need only be established that the defendants did not, in the light of all the circumstances, act in good faith. The test is an objective, rather than a subjective, one."[78]

On appeal by the school board to the Supreme Court, the board members asserted an absolute immunity from liability under Section 1983 of the federal Civil Rights Act of 1871 and sought reinstatement of the judgment of the District Court.

In a 5-4 decision, the Supreme Court vacated the decision of the Court of Appeals. Mr. Justice Byron R. White announced the majority decision of the Court. The majority opinion favored extension of a <u>qualified</u> good-faith immunity to school board members from liability for damages under Section 1983:

> Liability for damages for every action which is found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would unfairly impose upon the school decision-maker the burder of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties.
>
> The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constituional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.[79]

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78 Ibid., p. 314.

79 Ibid., p. 319.

The Court remanded the case to the Court of Appeals for consideration of whether procedural due process had been violated and for further proceedings consistent with the opinion.

Mr. Justice Lewis F. Powell dissented from the majority finding of the Court on the immunity issue, joined by the Chief Justice and Justices Blackmun and Rehnquist:

> The holding of the Court. . . would impose personal liability on a school official who acted sincerely and in the utmost good faith, but who was found--after the fact--to have acted in "ignorance . . . of settled, indisputable law."[80]
>
> These officials will now act at the peril of some judge or jury subsequently finding that a good--faith belief as to the applicable law was mistaken and hence actionable. . . . Consider, for example, the recent five--to--four decision in Goss v. Lopez, 419 U. S. 565, holding that a junior high school pupil routinely suspended for as much as a single day is entitled to due process. I suggest that most lawyers and judges would have thought, prior to that decision, that the law to the contrary was settled, indisputable, and unquestioned.[81]
>
> In view of today's decision significantly enhancing the possibility of personal liability, one must wonder whether qualified persons will continue in the desired numbers to volunteer for services in public education.[82]

On remand, the Court of Appeals later found a violation of constitutional rights--a violation that was not excused by the good -faith immunity possessed by the school board.[83] The case was then sent back to determine damages that should be awarded.

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80 Ibid., p. 327.

81 Ibid., p. 329.

82 Ibid., p. 331.

83 Robert E. Phay, "1975 Student Discipline Decisions by The United States Supreme Court," New Directions in School Law (NOLPE 21st Annual Convention, Colorado Springs, Colorado, 1975), p. 74.

VOTING RECORD OF THE JUSTICES OF THE UNITED STATES SUPREME COURT STUDENT SUSPENSIONS

JUSTICES OF THE UNITED STATES SUPREME COURT
Date Confirmed

1969	1937	1939	1955	1956	1958	1962	1967	1970	1972	1972	1975	
Ch. J. Warren E. Burger	J. Hugo L. Black	J. William O. Douglas	J. John M. Harlan	J. William J. Brennan	J. Potter Stewart	J. Byron R. White	J. Thurgood Marshall	J. Harry A. Blackmun	J. Lewis F. Powell	J. William H. Rehnquist	J. John P. Stevens	
Voting Record Relative to the Majority Opinion												
Kenneth R. Jones v. State Board of Education of and for the State of Tennessee et al., 397 U. S. 31 (1970). Appeal for certiorari set aside, suspension stands. 2/24/70.												
C	C	D	C	D	C	C	C	C	X	X	X	7
Barbara Susan Papish v. The Board of Curators of the University of Missouri et al., 410 U. S. 667 (1973). 3/19/73 University rule against student publication UNCONSTITUTIONAL												
D	X	C	X	C	C	C	C	D	C	D	X	6
Norval Goss et al. v. Eileen Lopez et al., 419 U. S. 565 (1975). Ohio statute permitting up to 10 day suspension without hearing or notice held UNCONSTITUTIONAL. 1/22/75												
D	X	C	X	C	C	C*	C	D	D	D	X	5
The Board of School Commissioners of the City of Indianapolis et al. v. Jeff Jacobs et al., 420 U. S. 667 (1973). Student publication prohibitions held moot. 2/18/75.												
C	X	D	X	C	C	C	C	C	C	C	X	8
John P. Wood et al. v. Peggy Strickland, 420 U. S. 308 (1975). School board members hold a qualified immunity against lawsuits for damages by suspended students. 2/25/75												
D	X	X	X	C	C	C*	C	D	D	D	C	5

LEGEND: C - Concur; D - Dissent; N - Nonparticipant.
X - Retired or not yet seated.
* - Announced decision

School Finance

The Rodriguez case (1973) contested the constitutionality of the ad valorem tax authorized by the State of Texas for financial support of public education.[84] A class action suit was brought by Mexican-American parents whose children attended the elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas.[85] This school district had a low property tax base compared with eleven other San Antonio school districts.[86]

> The (Edgewood) district is situated in the core-city of San Antonio in a residential neighborhood that has little commercial or industrial property. The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is $5,960--the lowest in the metropolitan area. . . The Foundation Program contributed $222 per pupil for a state-local total of $248. Federal funds added another $108 for a total of $356 per pupil.[87]
>
> Alamo Heights is the most affluent school district in San Antonio. . . Supplemented by a $36 grant from federal sources, Alamo Heights spent $594 per pupil.[88]

These disparities were largely attributable to differences in the amounts of money collected through local property taxation.[89]

In December, 1971, a three-judge District Court decided that the Texas school finance system was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment but stayed

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84 San Antonio Independent School District et al. v. Demetrio P. Rodriguez et al., 411 U. S. 1 (1973).

85 Ibid., p. 4.

86 Ibid., p. 137., APPENDIX IV TO OPINION OF MARSHALL, T., DISSENTING.

87 Ibid., p. 12.

88 Ibid., p. 13.

89 Ibid., p. 16.

its mandate for two years to provide Texas an opportunity to remedy the inequities found in its financing program.[90] The District Court based its finding on rulings that

1. Wealth was a suspect classification, and education was a fundamental interest, thus requiring the state to show, under the strict judicial scrutiny test, a compelling state interest for its system, which the state had failed to do, and
2. In any event, the state had failed to establish even a reasonable basis for its system.[91]

On direct appeal, the Supreme Court reversed the decision of the District Court in a 5-4 decision which was announced by Mr. Justice Lewis F. Powell. The issue to be decided was:

> First, whether the Texas system of financing public education operates to the disadvantage of some suspected class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judical scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.[92]

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90 Ibid., p. 6.

91 Rodriguez v. San Antonio Independent School District, 337 F. Supp. 280 (1971).

92 Ibid., p. 17.

Disadvantaging of Suspect Class

The majority opinion held that a simplistic process of analysis relied upon by other states to identify wealth discrimination

> . . . largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged "poor" cannot be identified or defined in customary equal protection terms, and whether the relative--rather than absolute--nature of the asserted deprivation is of significant consequence.[93]

The Court pointed out that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."[94] Failing to define the offending party in this case as a "suspect class," the Court ruled that there was no showing that any definable category of "poor" persons was discriminated against, that any children were suffering an absolute deprivation of public education or that there was any comparative discrimination based on relative family income within districts.[95]

Education Not a Fundamental Interest

The majority opinion of the Court held that

> . . . the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[96]

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93 Ibid., p. 19.

94 Ibid., p. 24.

95 Ibid., p. 28.

96 Ibid., p. 33.

The Court failed to find an affirmative answer to this question, although the following qualifying statement was added:

> Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right (to debate and to vote), we have no indication that the present levels of educational expenditure in Texas provide an education that falls short.[97]

More explicitly, the Court emphasized the holding with respect to education:

> Since the Court now suggests that only interests guaranteed by the Constitution are fundamental for the purpose of equal protection, and since it rejects the contention that public education is fundamental, it follows that the Court concludes that public education is not constitutionally guaranteed.[98]

Following the above logic, the Court concluded that the right of children to an education is not a fundamental right because it is not specifically guaranteed by the Constitution.

Legitimate State Purpose Furthered

The Court held that the state's financing system had a rational relationship to legitimate state purpose:

> Every step leading to the establishment of the system Texas utilizes today--including the decisions permitting localities to tax and expend locally, and creating and continuously expanding state aid--was implemented in an effort to extend public education and to improve its quality. Of course, every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory.[99]

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97 Ibid., p. 36.

98 Ibid., p. 110.

99 Ibid., p. 39.

Justice William O. Douglas joined Justice Thurgood Marshall in dissent, expressing the view that:

1. The Texas financing scheme discriminated from a constitutional perspective against the identifiable class of school children residing in property-poor districts;
2. Strict judicial scrutiny should depend on the constitutional importance of the interest adversely affected;
3. The Texas financing system discriminated on the basis of district or group wealth and created a suspect class;
4. The Court should scrutinize the reasonableness of the means by which the state sought to advance its interest in universal quality education;
5. Local control of education did not justify the Texas system's discrimination in educational opportunity;
6. Wide disparities in taxable district property wealth inherent in the local property tax element of the Texas system rendered the system violative of the equal protection clause in view of the denial to children in property-poor districts of equal educational opportunities.

Justices Brennan and White dissented on much the same grounds. However, the narrow majority vote of the Supreme Court removed a threat to the legality of the property tax as a means of raising funds with which to finance public schools.

Compulsory School Attendance

In State of Wisconsin v. Yoder (1972) the constitutionality of Wisconsin school attendance laws was challenged by members of the Amish religious sect.[100] The laws required school attendance from age eight to age sixteen. As in a preceding case, Pierce v. Society of Sisters (1925), the Amish declined to send their children, ages 14 and 15, to public school after they completed the eighth grade.[101] The reasoning of the Amish was that continued public education after the eighth grade exposed Amish children to conflicting influences which would seriously interfere with their future relationship to the Amish community.

> Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life.[102]

The trial court found the Amish parents in violation of Wisconsin law and imposed fines. The Wisconsin Circuit Court affirmed the convictions, but the Wisconsin Supreme Court reversed the convictions and sustained the defendants' claims that their First Amendment right to free exercise of religion had been violated.[103]

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100 State of Wisconsin v. Jonas Yoder et al., 406 U. S. 205 (1972).

101 Ibid., p. 207.

102 Ibid., p. 211.

103 Ibid., p. 213.

On certiorari, the Supreme Court affirmed the judgment of the Wisconsin Supreme Court upholding Amish right to withdraw their children from public schools after completion of the eighth grade. In a 6-1 decision, Justices Powell and Rehnquist not participating, the Court opinion, delivered by Mr. Chief Justice Warren E. Burger, held that:

1. In sum, the unchallenged testimony of acknowledged experts in education and religious history, . . . and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.[104]

2. In these terms, Wisconsin's interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attendance for children generally.[105]

3. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent.[106]

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104 Ibid., p. 218.

105 Ibid., p. 219.

106 Ibid., p. 230.

In further defense of parents' rights, the Court majority opinion said:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[107]

Mr. Justice William O. Douglas dissented, saying:

> I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone.[108]

Where the judgment was proper as to one of the defendants, Frieda Yoder, who testified that her own religious views are opposed to high-school education, Justice Douglas felt that the other children, Vernon Yutzy and Barbara Miller, may not hold the same views; therefore, the judgment in the latter cases was not proper.

Legal scholars have indicated that this is the first time in the history of America that compulsory education laws have been successfully challenged.[109] Although early reaction to the Supreme Court decision envisioned similar suits by other religious groups, the special nature of the case has served to preserve it as an exception that proves the rule. Few, if any, religious groups are anxious to disavail their children of the benefits of

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107 Ibid., p. 233.

108 Ibid., p. 241.

109 Joe Wittmer, "The Amish and the Supreme Court Ruling," Phi Delta Kappan, LIV (September, 1972), p. 50.

a public education system which is supported by the efforts of all citizens. Education is a very expensive undertaking, requiring upwards of $1000 per pupil per year expenditure of public funds. Most religious orders are more concerned about acquiring their fair share of public funds without sacrificing religious training objectives than undercutting the vast system of public education which has served so many millions of Americans so well.

Student Discipline

Baker v. Owen (1975) concerned possible violation of a child's Fourteenth Amendment rights by corporal punishment administered by school officials.[110] Plaintiffs brought suit in District Court against W. C. Owen and other school personnel who were involved in paddling their child, thereby depriving him of procedural due process guaranteed by the Fourteenth Amendment. The North Carolina General Statutes, paragraphs 115-146, gives teachers and principals authority to use reasonable force in exercising lawful authority to restrain or correct pupils and maintain order. The lawsuit challenged the constitutionality of this statute.[111]

The District Court for the Middle District of North Carolina held that the Fourteenth Amendment liberty rights embrace the right of parents to control means of discipline of their children,

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110 Virginia Baker and Russell Carl Baker, Appellants v. W. C. Owen, etc., et al., 423 U. S. 907 (1975).

111 Baker v. Owen, No. C-74-46-G, 395 F. Supp. 294 (1975), p. 296.

but the state has a countervailing interest in the maintenance or order in the schools sufficient to sustain the right of teachers and school officials to administer reasonable corporal punishment for disciplinary purposes. The Court further held that

1. Teachers and school officials must accord students minimal procedural due process in the course of inflicting such punishment;

2. The spanking of the student in question did not amount to cruel and unusual punishment.[112]

The school authorities argued that school officials can corporally punish pupils over parental objections and without antecedent procedural safeguards.[113] On the other hand, the District Court held that a rational and legitimate state interest in maintaining disciple and order in the public schools counteracted the Fourteenth Amendment concept of liberty which embraces the right of a parent to determine and choose between means of discipline of children:

> We reject Mrs. Baker's suggestion that this right is fundamental, and that the state can punish her child corporally only if it shows a compelling interest that outweighs her parental right. We do not read Meyer and Pierce to enshrine parental rights so high in the hierarchy of constitutional values. In each case the parental right prevailed not because the Court termed it fundamental and the state's interest uncompelling, but because the Court considered the state's action to be arbitrary, without reasonable relation to an end legitimately within its power.[114]

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112 Ibid.

113 Ibid., p. 297.

114 Ibid., p. 299.

The District Court prescribed minimal procedures in use of force to maintain order in the public schools:

1. corporal punishment may never be used unless the student is informed beforehand that specific misbehavior could occasion its use;
2. a teacher or principal must punish corporally in the presence of a second school official, who must be informed beforehand and in the student's presence of the reason for the punishment;
3. finally, an official who has administered such punishment must provide the child's parent, upon request, a written explanation of his reasons and the name of the second official who was present.[115]

In summary, the District Court held that

1. North Carolina General Statutes, paragraphs 115-146, constitutional;
2. To implement the statute without recognition of students' procedural due process would be a violation of the Fourteenth Amendment;
3. Punishment contested was not cruel and unusual within the meaning of the Eighth Amendment.[116]

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115 Ibid., p. 302.

116 Ibid., p. 303.

On October 20, 1975, the Supreme Court affirmed the judgment of the District Court in a Memorandum decision.[117]

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117 Baker v. Owen, Memorandum Case No. 75-279, 423 U. S. 907 (1975).

CHAPTER VI

CONCLUDING SUMMARY

The purpose of this study was to examine and analyze public school cases decided by the Supreme Court since Warren E. Burger became Chief Justice on June 23, 1969, up to the end of the June, 1977, term. This was achieved through a study of cases in the following three subject areas:

Religion 20 cases.

Desegregation 20 cases.

Academic Freedom 13 cases.

Religion

All of the 20 cases litigated during the designated time period were initiated to challenge state statutes which permitted the allocation of public funds to aid private sectarian and non-sectarian schools. With legal precedent based on Cochran (1930), Everson (1947) and Allen (1968), the Court has successfully widened the scope of constitutional state aid beyond textbook loan and bus service to include standardized testing services, diagnostic services, therapeutic, and guidance services authorized in Wolman (1977).

Higher education constructional grant programs were affirmed in Tilton (1971) and Roemer (1976). Bonds to benefit a Baptist college were legitimized in Hunt (1973).

The Lemon I (1971) decision resulted in the development of a four-part test of litigated aid to nonpublic schools:

1. Legislation awarding such aid must have a secular purpose, but no case failed on this account.
2. Legislation must not have the primary effect of advancing religion, which test was failed by Nyquist (1973) due to provision for direct money grants for maintenance and repair, and Lemon II (1973) tuition reimbursement plan.
3. Legislation must not promote "excessive entanglement" of church and state, which test was failed by Wolman (1971), Kosydar (1972), and Marburger (1973). The "insoluble paradox" expressed by Mr. Justice William J. Brennan in dissent over the Lemon I decision made it impossible for sectarian schools to accept public aid without accepting monitoring of how the money was spend, thereby creating the forbidden entanglement.
4. Legislation must not cause political divisiveness due to the necessity of appropriating increasingly more money from the public treasury to aid sectarian schools. The threat of such divisiveness caused Mr. Justice Brennan to vote against every parochial aid statute from Lemon I on.

The erosion of the "wall separating Church and State" was reviewed in the light of Court decisions and dissenting opinions of Justices Brennan and Marshall in Wolman (1977). These Justices favor recission of decisions in Allen and previous cases which

legitimized free textbook and free busing programs for nonpublic school children

However, the Chief Justice and a majority of other Justices favor aid to nonpublic school children, as opposed to their parents or to the sectarian school. The "child benefit theory" first advanced in Cochran (1930) appears to have won a more dominant position in the decisions of the Burger court.

Review of the 20 cases litigated by the Burger court reveals an increasing inclination among certain Justices to permit aid to nonpublic schools. Justice Byron R. White dissented in the opinion rendered in Lemon I (1971) which denied all salary reimbursement provisions of Pennsylvania and Rhode Island plans for parochial school aid. In 1973, Justice White was joined by the Chief Justice and Justice Rehnquist in dissent with regard to the Court decision in Nyquist (1973) which denied tuition reimbursement and tax credit for parents of parochial students under a New York statute. The trend toward liberalization of Court attitudes toward aid to parochial schools culminated in the Wolman (1977) decision which permitted textbook loan, testing services, diagnostic, and therapeutic services for nonpublic school children. Whether this trend will continue or not is yet to be seen.

Despite the fall of constitutional constraints against aid to parochial schools, certain reaffirmations of legal precedent in such cases are evident:

1. The direct disbursement of funds from the public treasury to any parochial or otherwise denominational school is prohibited;
2. The child attending a private or parochial school can be the legitimate recipient of textbooks purchased from tax funds;
3. Reimbursement of parents for transportation of their children to private religious schools is constitutional;
4. The allocation of federal funds to private colleges for construction purposes is legitimate, even though the religious purpose and curriculum of the colleges is significant;
5. Aid to private schools which practice segregation in hiring or enrollment policies is unconstitutional.

Desegregation

The legacy of freedom and equality of educational opportunity bestowed by the Court in Brown I and Brown II encountered many problems of implementation. These problems included the operation of "freedom of choice" and "free transfer" student enrollment plans which served to perpetuate segregation of school facilities until the Green decision (1968) and companion cases declared such tactics unconstitutional. The Green mandate to desegregate immediately led to much activity on the part of school boards in the various states to implement necessary desegregation plans. Some order was restored in the frantic effort to desegregate when the Swann decision (1971) was announced.

Swann decided the following issues:

1. Racial quotas;
2. Existence of all-Negro and all-White schools;
3. Rearrangement of school boundaries;
4. Busing.

Racial quotas were sanctioned as a starting point for the development of desegregation plans. It was recognized that some all-Negro and all-white schools, or nearly so, would exist as a result of some desegregation plans. Rearrangement of school boundaries to facilitate desegregation of public schools was sanctioned, even in extreme forms. Finally, busing to achieve desegregation results was sanctioned when historic operation of dual school systems in the district concerned was proven.

Desegregation by reassignment of faculty was sanctioned by Swann and other cases. Creation of new school districts to avoid integration of schools was not permitted by the Court.

Beginning in 1973, a series of desegregation cases arose in which one-district and multi-district desegregation plans were not approved by the Court because one of the following factors was missing which, if present, would otherwise compel acceptance of the desegregation plans:

1. There must be evidence of de jure segregation, or segregation of school facilities sanctioned by law or caused by legislation with regard to school boundaries, residential patterns, etc., which had the intent of segregating the races;

2. Where multi-district remedies are sought, there must be proven an offense to the Constitution involving each of the districts concerned.

The Denver school district case in Keyes (1973) involved a western school district in which no prior de jure segregation was evident, such as prior maintenance of a dual school system. The remedy was confined to the core city problem in that case. The Detroit case in Milliken I (1974) involved 53 outlying school districts and the core City of Detroit school district which could at best achieve only 64% Negro students in each school. Again, the remedy was confined to the core city, although Milliken II (1977) granted funds to Detroit public schools to provide remedial services to disadvantaged students. The Pasadena case (1976) resulted in disapproval of annual adjustment of school attendance zones to maintain racial balance in the schools. The Austin case (1976) brought disapproval of cross-town busing as too extensive a remedy in light of lack of intent on the part of school officials to segregate the school children by race. Busing plans in Dayton (1977) and Omaha (1977) were disapproved on the same basis.

Efforts have begun anew by the Executive Department, through the Department of Health, Education, and Welfare, to force colleges and universities to admit Negro and other minority students on a ratio basis. However, in 1978 the Court termed the H. E. W. threat to withhold federal funds unconstitutional in a Maryland case. It seems that other avenues of approach

are favored by desegregationist forces today over access to the judicial process.

It appears that many of the original objectives of civil rights groups pertaining to desegregation of public school facilities and integration of the races have fallen short of expected achievement. Mandates of the United States Supreme Court have been consistently directed toward the elimination of de jure segregation; that is, segregation fostered by law. While much progress has been made in obtaining equal protection under the Fourteenth Amendment for minority students, more progress remains to be made.

Freedoms Guaranteed by the Constitution

The Constitution of the United States of America provides safeguards to human rights which enjoin any governmental body from causing loss of these rights. These rights are both substantive and procedural. In the field of public education, institutional authorities assume the role of governmental bodies which have the same legal impact as elected governmental officials.

During the period studied, several cases arose in the field of public education which involved alleged violation of both substantive and procedural rights guaranteed by the Constitution. The Connell case (1971) challenged the constitutionality of a state oath as a condition of employment. The Roth and Sindermann cases (1972) sought to establish property rights of non-tenured teachers. Cleveland (1973) tested the validity of state statutes which governed the treatment of pregnant teachers before and after termination. The Hortonville case tested the teachers right to

strike without fear of dismissal. The Court established the following principles in deciding these cases:

1. The oath requirement is a legitimate prerequisite to public employment;
2. Nontenured teachers do not have a property right in their positions unless they have a "reasonable expectancy" of being rehired, in which case procedural rights are protected;
3. Due process does not extend to protection of striking teachers by disallowing lawful termination procedures which are initiated by the school board;
4. The rule that teachers must leave their jobs by any arbitrary date prior to termination of pregnancies is unconstitutional, and the rule that teachers must return to their jobs by any arbitrary rule will not stand.

Several cases arose in the area of student suspensions. The Jones case (1970) involved the suspension of a student for distribution of leaflets critical of the university officials. The Papish case (1973) involved expulsion of a student for publishing allegedly obscene material. The Jacobs case (1975) tested the constitutionality of school board actions which threatened to interfere with publication of a student newspaper. The Goss case (1975) involved property interests of students who had been unlawfully suspended by school board members. The Strickland case (1975) involved award of damages for unlawful suspension of students.

The Court established the following precedents in deciding these cases:

1. Although employment by the State is still regarded as a privilege rather than a right by most members of the Court, three Justices expressed the opinion that any State job may be claimed as a right by any citizen unless some reason can be found for denying that right;
2. Although a teacher who is untenured according to the laws of the State may not claim property rights by virtue of tenure, circumstances may be such that implied tenure exists and deprivation of the right to employment may not be permissible constitutionally without due process;
3. Students may not be prevented from free expression which may violate certain standards of decency under threat of expulsion;
4. Students are entitled to due process in spite of State statutes legislating summary suspension without a hearing of any kind, and such legislation will be found unconstitutional by the Court;
5. School board members are not completely immune from suits for damages by students for violation of students' rights to due process.

One case arose in the area of school finance. The Rodriguez case (1973) established the legitimacy of the property tax as a means of providing public funds for support of schools.

One case arose in the area of compulsory school attendance. The Yoder case established the right of parents to take their children out of public schools after the eighth grade and enter them into an informal program of vocational training not approved or supervised by the state.

There is a reluctance on the part of the Court to interfere with normal operations of local and state governments unless deprivation of fundamental individual freedoms is involved. There is a trend to discourage the use of federal courts to decide issues which may conflict with State constitutional provisions. There is a trend toward pursual of civil rights cases in State courts where judgments are localized in impact and further appeal to federal courts may be relied upon in the event of an unfavorable ruling.

The Court continues to extend to all citizens the protection of substantive and procedural rights guaranteed by the Constitution.

TABLE 14

LISTING OF UNITED STATES SUPREME COURT CASES
INVOLVING CHURCH-STATE ISSUES
1970-1977

Lemon v. Kurtzman, Earley v. DiCenso, Robinson v. DiCenso, 403 U. S. 602 (1971).

Tilton v. Richardson, 403 U. S. 672 (1971).

Sanders v. Johnson, 403 U. S. 965 (1971).

Essex v. Wolman, 406 U. S. 912 (1972).

Johnson v. New York State Education Department, 409 U. S. 75 (1972).

Alton J. Lemon v. David H. Kurtzman, Etc., 411 U. S. 192 (1973).

Dolores Norwood et al. v. D. L. Harrison, Sr., et al, 413 U. S. 455 (1973).

Levitt v. Committee For Public Education and Religious Liberty et al., 413 U. S. 472 (1973).

Richard W. Hunt v. Robert E. McNair et al., 413 U. S. 734 (1973).

Committee For Public Education and Religious Liberty et al. v. Ewald B. Nyquist, 413 U. S. 756, 798, 813 (1973).

Public Funds for Public Schools of New Jersey v. Marburger, 93 S. Ct. 2728 (1973).

Kosydar v. Wolman et al., 353 F. Supp. 744 (1972).

Sloan v. Lemon et al., 413 U. S. 825 (1973).

Wheeler v. Barrera, 417 U. S. 402 (1974).

Luetkemeyer v. Kaufmann, 95 S. Ct. 167 (1974).

Franchise Tax Board of California v. United Americans for Public Schools, 95 S. Ct. 166 (1974).

Marburger v. Public Funds For Public Schools of New Jersey, 417 U. S. 961 (1974).

Sylvia Meek et al. v. John C. Pittenger, Etc., et al., 421 U. S. 349 (1975).

John C. Roemer, III, et al. v. Board of Public Works of Maryland et al., 426 U. S. 736 (1976).

TABLE 14 (continued)

LISTING OF UNITED STATES SUPREME COURT CASES
INVOLVING CHURCH-STATE ISSUES
1970-1977

Benson A. Wolman et al. v. Franklin B. Walter et al., U. S. , (1977).

TABLE 15

LISTING OF UNITED STATES SUPREME COURT CASES
INVOLVING DESEGREGATION ISSUES
1969-1977

Cases Decided By Individual Justices
As Circuit Court Justices

Dr. J. W. Edgar v. United States, 404 U. S. 1206 (1971).

Corpus Christi School District v. Jose Cisneros, 404 U. S. 1211 (1971).

Winston-Salem/Forsyth County Board of Education v. Catherine Scott, 404 U. S. 1221 (1971).

Robert Gomperts v. Charles E. Chase, 404 U. S. 1237 (1971).

Ann Gunter Drummond v. Robert L. Acree, 409 U. S. 1228 (1972).

Pasadena City Board of Education v. Nancy Anne Spangler, 423 U. S. 1335 (1975).

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Alexander v. Holmes County Board of Education, 396 U. S. 19 (1969).

Carter v. West Feliciana Parish School Board, 396 U. S. 226 (1969).

Dowell v. Board of Education of the Oklahoma City Public Schools, 396 U. S. 269 (1969).

Carter v. West Feliciana Parish School Board, 396 U. S. 290 (1970).

Northcross v. Board of Education of the Memphis, Tennessee, City Schools, 397 U. S. 232 (1970).

Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971).

Davis v. Board of School Commissioners of Mobile County, 402 U. S. 33 (1971).

Charles McDaniel et al. v. Joseph Barresi, Jr., et al., 402 U. S. 39 (1971).

North Carolina State Board of Education v. James E. Swann, 402 U. S. 43 (1971).

Mrs. Robert Lee Moore et al. v. Charlotte-Mecklenburg Board of Education et al., 402 U. S. 47 (1971).

TABLE 15 (continued)

LISTING OF UNITED STATES SUPREME COURT CASES
INVOLVING DESEGREGATION ISSUES
1969-1977

Pecola Annette Wright et al. v. Council of the City of Emporia et al., 407 U. S. 451 (1972).

United States v. Scotland Neck City Board of Education et al., 407 U. S. 484 (1972).

School Board of the City of Richmond, Virginia, et al. v. State Board of Education of the Commonwealth of Virginia et al., 412 U. S. 92 (1973).

Wilfred Keyes v. School District No. 1, 413 U. S. 189 (1973).

Carolyn Bradley et al. v. School Board of City of Richmond et al., 416 U. S. 696 (1974).

Milliken v. Bradley, 418 U. S. 717 (1974).

Milliken v. Bradley, U. S. (1977).

Pasadena City Board of Education v. Nancy Anne Spangler, U. S. (1976).

Dayton Board of Education et al. v. Mark Brinkman et al., U. S. (1977).

School District of Omaha v. United States, U. S. (1977).

TABLE 16

LISTING OF UNITED STATES SUPREME COURT CASES
INVOLVING INDIVIDUAL FREEDOM
1969-1977

Loyalty Oath

Stella Connell v. James M. Higginbotham et al., 403 U. S. 207 (1971).

Teacher Employment

The Board of Regents of State Colleges et al. v. David F. Roth, Etc., 408 U. S. 564 (1972).

Charles R. Perry et al. v. Robert P. Sindermann, etc., 408 U. S. 593 (1972).

Cleveland Board of Education et al. v. Jo Carol LaFleur et al., 414 U. S. 632 (1974).

Hortonville Joint School District No. 1 et al. v. Hortonville Education Association et al., 426 U. S. 482 (1976).

Student Suspensions

Kenneth R. Jones v. State Board of Education of and for the State of Tennessee et al., 397 U. S. 31 (1970).

Barbara Susan Papish v. The Board of Curators of the University of Missouri et al., 410 U. S. 667 (1973).

Norval Goss et al. v. Eileen Lopez et al., 419 U. S. 565 (1975).

The Board of School Commissioners of the City of Indianapolis et al. v. Jeff Jacobs et al., 420 U. S. 128 (1975).

John P. Wood et al. v. Peggy Strickland, 420 U. S. 308 (1975).

Compulsory School Attendance

State of Wisconsin v. Jonas Yoder et al., 406 U. S. 205 (1972).

School Finance

San Antonio Independent School District et al. v. Demetrio P. Rodriguez et al., 411 U. S. 1 (1973).

TABLE 16 (continued)

LISTING OF UNITED STATES SUPREME COURT CASES
INVOLVING INDIVIDUAL FREEDOM
1969-1977

Student Discipline

Virginia Baker and Russell Carl Baker, Appellants v. W. C. Owen et al, 423 U. S. 907 (1975).

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The New York Supplement, est. 1888. Reports fully decisions of the Supreme Court and lower Courts of record in New York State.

The Northeastern Reporter, est. 1885. Reports completely decisions of Courts of last resort of New York, Massachusetts, Ohio, Illinois and Indiana and the intermediate Appellate Court of Indiana.

The Pacific Reporter, est. 1883. Reports fully decisions of Courts of last resort in California, Colorado, Idaho, Oregon, Montana, Nevada, New Mexico, Kansas, Arizona, Utah, Washington and Wyoming.

The California Reporter, est. 1961. Reports completely cases decided in the Supreme Court, District Courts of Appeal Appellate Department and Superior Court.

The Southeastern Reporter, est. 1887. Reports completely decisions of Courts of last resort in Georgia, South Carolina, North Carolina, Virginia and West Virginia.

The Southern Reporter, est 1886. Reports completely decisions of the Courts of last resort in Alabama, Florida, Louisiana and Mississippi.

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Pasadena City Board of Education v. Spangler, 427 U.S. 424, 96 Sup. Ct. 2697, 49 L. Ed. 2d. 599 (1976).

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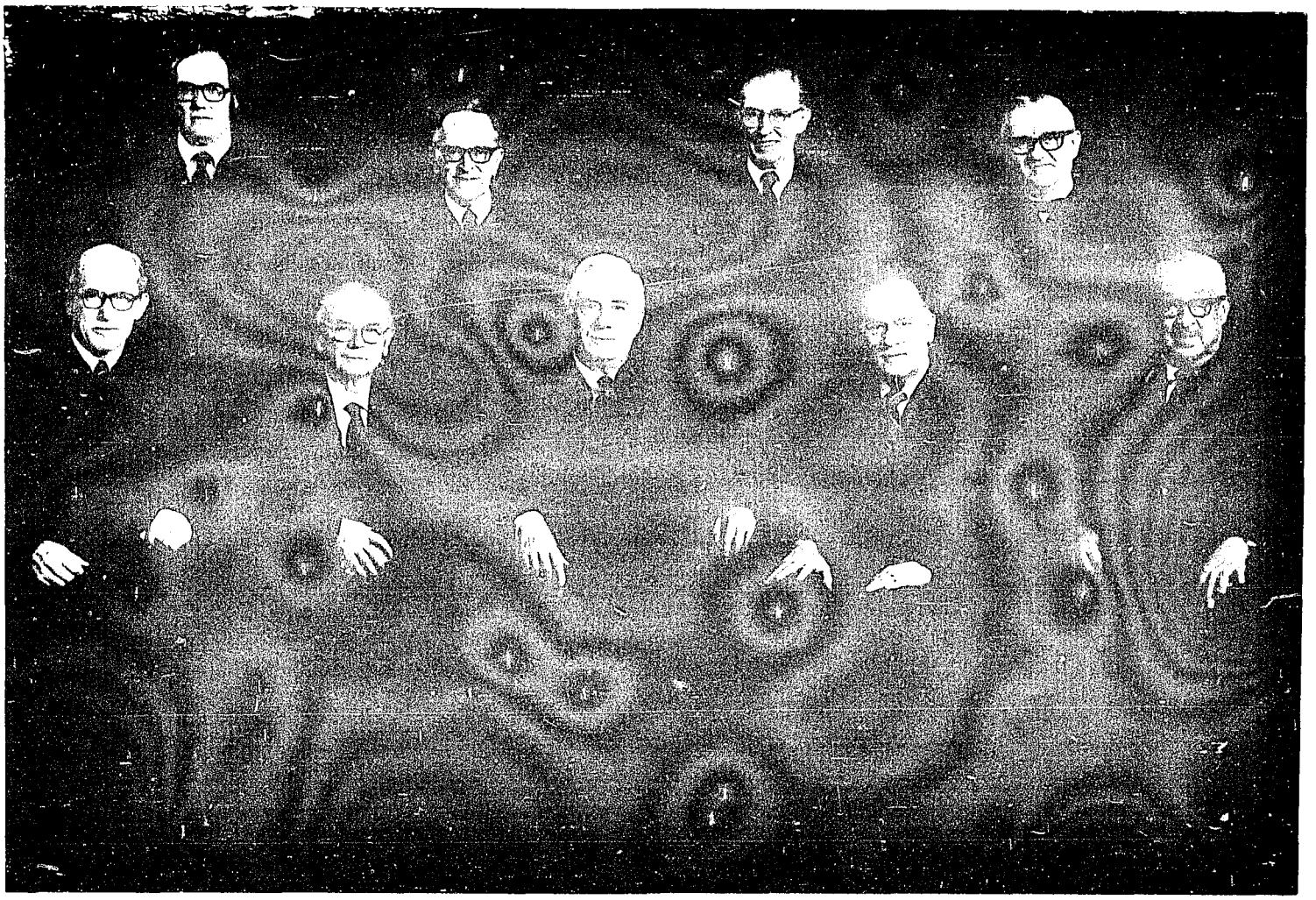

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