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THE SUPREME COURT AND THE CONSTITUTIONAL RIGHTS OF STUDENTS: THE BURGER YEARS: 1969 - 1986

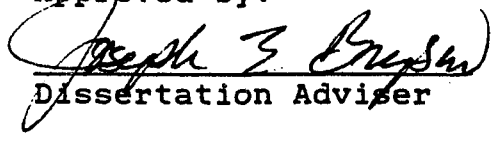
by

Robert Edward Beck

A Dissertation Submitted to
the Faculty of the Graduate School at
The University of North Carolina at Greensboro
in Partial Fulfillment
of the Requirements for the Degree
Doctor of Education

Greensboro
1987

Approved by:



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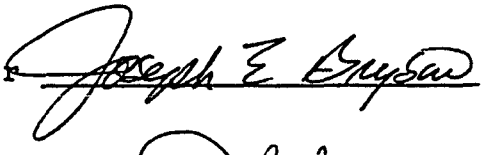
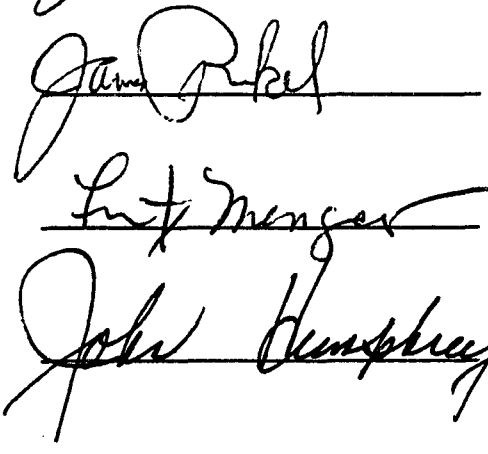
Dissertation Adviser 

Committee Members 

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March 30, 1987
Date of Final Oral Examination

BECK, ROBERT EDWARD. The Supreme Court and the Constitutional Rights of Students: The Burger Years: 1969 - 1986. (1987) Directed by: Dr. Joseph E. Bryson. Pp. 167.

This study has as its purpose a review and analysis of United States Supreme Court decisions rendered by the Burger Court which address the constitutional rights of American school students. Five major issues are addressed: (1) right to due process, (2) right to free speech, (3) right to religious freedom, (4) right to be protected from illegal searches and seizures, and (5) the right to receive information and ideas.

Based on an analysis of the cases which came before the Burger Court for interpretation, the following general conclusions can be made concerning the constitutional rights of students:

(1) Generally, the Court favored the authority of school administrators to maintain control over the public schools in the United States.

(2) The Court often expresses reluctance to become entangled in the daily school operation in which school boards, and school administrators are vested with authority.

(3) The Court will become involved if a student is denied his constitutional right to due process.

(4) In the area of students' rights, the Tinker case remains the staunch precedent on which many major educational issues are resolved.

(5) The Burger Court is committed to the concept of "separation of church and state."

(6) In New Jersey v. T.L.O., the Burger Court maintains that a less exacting "reasonable suspicion" standard is more applicable in the school setting concerning the issue of search and seizure.

(7) In the 1982 Pico case, the Court noted that the First Amendment limits a board's discretion to remove books from school libraries.

ACKNOWLEDGEMENTS

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. Fritz Mengert; Dr. John Humphrey; and Dr. James Runkel.

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CHAPTER I

INTRODUCTION

On May 27, 1986, Chief Justice Warren Burger submitted his resignation to President Ronald Reagan, who subsequently nominated Associate Justice William H. Rehnquist to become the nation's sixteenth chief justice. On September 17, 1986, the United States Senate confirmed Rehnquist's nomination by a vote of 65 - 33, bringing to a close a tumultuous period in the Court's history.[1] Chief Justice Burger served seventeen years as chief justice, longer than any other chief justice in the twentieth century.

If, as historical wisdom suggests, presidents frequently nominate Supreme Court justices who are fabricated from their own political ideology, clearly presidential nominees can signal a new direction in the Supreme Court.[2] President Richard Nixon inherited a

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[1] School Law News, "Rehnquist and Scalia Confirmed by Senate," Vol. 14, No. 20 (Oct. 2, 1986), p. 6.

[2] Joseph Bryson, "Current Trends in Education Law", Sports and the Courts: Physical Education and Sports Law Quarterly, June 6-10, 1983, p. 47.

"liberal Court" - the liberal Warren Court.[3] He promised the American public to nominate Supreme Court justices adhering to his own conservative political ideology.[4] President Nixon's conservative ideology is encapsulated in the following:

> ...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.[5]

On June 23, 1969, Chief Justice Earl Warren retired and was replaced by Warren E. Burger. Following an accusation by President Nixon of nonprofessional conduct for a Supreme Court justice, Associate Justice Abe Fortas also retired and was replaced by Associate Justice Harry Blackmun on June 9, 1970. The retirement

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[3]H.C. Hudgins, Jr., The Warren Court and the Public Schools, (The Interstate Printers and Publishers, Inc., Danville, Illinois) 1970.

[4]Bryson, supra note #2.

[5]Henry J. Abraham, Justices and Presidents, (The Oxford Press, New York) 1974, p. 4.

of Associate Justices Hugo L. Black and John M. Harlan in 1971 provided President Nixon with an opportunity to appoint Lewis S. Powell and William Rehnquist to the Court. Although appointed by President Nixon for their conservative values, Justices Powell and Blackmun are considered to act as "centrists," or swing voters, who shift from liberal to conservative positions on the varying issues before the Court.[6]

Justices Burger, Rehnquist, Powell, and Blackmun were appointed by President Nixon in an attempt to counteract the liberal excesses of the Warren Court.[7] President Nixon visualized a judicial revolution characterized by a redefinition of the Warren Court decisions. This revolution failed to materialize when the dominant "centrist" justices upheld the Warren Court's decisions concerning court-ordered busing, affirmative-action plans, and criminal law reforms.[8]

> The story of the Burger Court...whatever else it might be, is not a tale of a conservative counter-revolution, at least not one of epic proportions or obvious import. If there have been historically significant

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[6]Abraham, supra note #5, p. 4.

[7]Vincent Blasi, The Burger Court: The Counter Revolution That Wasn't, (Yale University Press, New Haven and London) 1983, p. vii.

[8]Ibid.

> shifts of premises or institutional dynamics, the movement has been subtle, complicated, not easily perceptible.[9]

President Reagan continued the realignment of the Burger Court with the nomination and subsequent confirmation of Associate Justice Sandra Day O'Connor who replaced Justice Potter Stewart. The recent retirement of Chief Justice Warren Burger and the subsequent nomination of Associate Justice William Rehnquist to become chief justice is indicative of President Reagan's intent to fill the Court with justices of his own political conservative philosophy. Justice Rehnquist's record on the federal bench easily qualifies him as the most conservative member of the present United States Supreme Court.[10] The Burger Court emerged from this background of presidential politics.

The Purpose of the Study

The primary purpose of this study is to examine and to analyze judicial decisions rendered by the Burger Court which address the constitutional rights of American school students. An additional purpose of this study is the development of practical legal guide-

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[9] Ibid.

[10] Facts on File: World News Digest with Index, "Burger Resigns as Chief Justice, Rehnquist Elevated," Vol. 46, No. 2378 (June 20, 1986), p. 445.

lines for educational decision makers. These guidelines will enable school administrators to better address such issues as the appropriate organization and governance of the educational process within public schools without infringing upon the basic constitutional rights of students.

Methodology

This study utilizes the United States Supreme Court Reports as the primary source of Court decisions for the period under study. Secondary sources include books, journal articles, and dissertations. The cases are grouped under the following major headings: (1) the right to due process (Amendment XIV), (2) the right to free speech (Amendment I), (3) the right to religious freedom (Amendment I), (4) the right to be protected from illegal searches and seizures (Amendment IV), and (5) the right to receive information and ideas (Amendment I).

Questions to be Answered

Listed below are four key questions which this study will answer:

1. What major educational issues concerning the violation of constitutional rights to public school students have been adjudicated during the Burger years, 1969-1986?

2. Which of these issues are likely to result in further litigation in the courts?
3. What are the acceptable criteria for maintaining order in the public schools, based on established legal precedents?
4. Can any specific trends be determined from the analysis of the cases rendered by the Burger Court from 1969-1986?

Coverage and Organization of Issues Involved

This study is divided into four components. Chapter Two reviews the literature which relates to the history of decisions made by the United States Supreme Court concerning student rights and the effect of student rights on the administration of public schools.

Chapter Three includes an analysis of the major legal issues relating to the constitutional rights of public school students between 1969 and 1986, termed the "Burger years". These rights of students are provided for primarily in the First, Fourth, and Fourteenth Amendments of the United States Constitution. The Amendments are implemented into the following individual freedoms: (1) the right to due process (Amendment XIV), (2) the right to free speech (Amendment I), (3) the right to religious freedom (Amendment I), (4)

the right to be protected from illegal searches and seizures (Amendment IV), and (5) the right to receive information and ideas (Amendment I).

Chapter Four contains a general listing and discussion of major cases relating to the constitutional rights of students. The first category of cases includes those United States Supreme Court landmark decisions relating to the right to due process. Other categories of cases selected for review include cases related to: the right to free speech, the right to religious freedom, the right to be protected from illegal searches and seizures, and the right to receive information and ideas. Facts of the cases, decisions of the courts, and discussions of the cases are presented for each category.

The final chapter of the study contains a review and summary of the information obtained from the review of related literature and from the analysis of selected court cases. The questions posed in the introductory part of the study are reviewed and answered in the final chapter. In conclusion, recommendations for formulation of legally acceptable policies concerning the constitutional rights of students are made.

Scope and Limitations

This study is limited to decisions rendered by the United States Supreme Court from October, 1969 to May, 1986. The Court decisions studied are limited to those which have had a significant impact upon the constitutional rights of students focusing on: (1) the right to due process, (2) the right to free speech, (3) the right to religious freedom, (4) the right to be protected from illegal searches and seizures, and (5) the right to receive information and ideas.

Definition of Terms

Action. To bring legal action against another for the protection of a right or the redress of a wrong.[11]

Amicus curiae. (Latin for "friend of the court") not a party to the party directly involved.[12]

Appellant. The party who takes an appeal from one court to another.[13]

Appellee. The party against whom an appeal is

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[11] Black's Law Dictionary, (West Publishing Company, St. Paul, Minnesota) 1979.

[12] Ibid.

[13] Ibid.

taken.[14]

Concurring opinion. An opinion written by a judge who agrees with the majority of the court concerning the decision in a case, but has different reasons for arriving at that decision.[15]

Conservatism. A set of political, economic, religious, educational, and other social beliefs characterized by emphasis on the status quo and social stability, religion and morality, liberty and freedom, the natural inequality of men, the uncertainty of progress, and the weakness of human reason.[16]

Court. Where the word Court is capitalized, it denotes the United States Supreme Court.[17]

Defendant. The party against whom relief or recovery is sought in a court action. [18]

Dissenting opinion. The opinion in which a judge announces his dissent from the conclusions held by the

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[14] Ibid.

[15] Ibid.

[16] Fred N. Kerlinger, Liberalism and Conservatism: The Nature and Structure of Social Attitudes, (Lawrence Erlbaum Associates, Hillsdale, New Jersey) 1984, pp. 15-17.

[17] Black's Law Dictionary, supra note #11.

[18] Ibid.

majority of the court.[19]

Due process. The exercise of the powers of government in such a way as to protect individual rights.[20]

En banc. ("as a whole") All federal judges in one circuit sitting as a court.[21]

Enjoin. To order a defendant in equity to do or not to do a particular thing by writ of injunction.[22]

Expulsion. At the prerogative of the superintendent or school board, the exclusion of a student from school on a permanent basis.[23]

Injunction. A judicial order requiring a party to take or refrain from some specified action.[24]

In loco parentis. (Latin: in place of the parent) Being charged with some of the rights, duties and responsibilities of the parent.[25]

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[19] Ibid.

[20] Ibid.

[21] Ibid.

[22] Ibid.

[23] Ibid.

[24] Ibid.

[25] Ibid.

In re. (Latin: concerning)[26]

Liberalism. A set of political, economic, religious, educational, and other social beliefs that emphasize freedom of the individual, constitutional participatory government and democracy, the rule of law, free negotiation, discussion and tolerance of different views, constructive social progress and change, egalitarianism and the rights of minorities, secular rationality and rational approaches to social problems, and positive government action to remedy social deficiencies and to improve human welfare.[27]

Litigation. The act or process of carrying on a lawsuit.[28]

Penumbra. Marginal or unclear.[29]

Plaintiff. A person who, in a personal action, seeks a remedy for an injury to his rights.[30]

Precedent. A judicial decision, or a form of proceeding, or course of action, that serves as a rule for

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[26] Ibid.

[27] Kerlinger, supra note #16

[28] Black's Law Dictionary, supra note #11.

[29] Ibid.

[30] Ibid.

future determinations in similar or analogous cases; an authority to be followed in courts of justice.[31]

Quasi. As, as of, as it were, relating to or having the character of.[32]

Remand. To send a case back to the same court out of which it came, for the purpose of having some action on it there.[33]

Rights. Commonly used in a quasi-legal or moral sense to identify "something to which one has a just claim."[34]

School disruption. Any event which significantly interrupts the education of students.[35]

Suspension. At the prerogative of the principal, the exclusion of a student from school, usually for a short period, until the student conforms to the rules or regulations.[36]

Writ of certiorari. (Latin: "to be informed of something") An order from a higher court to a lower

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[31] Ibid.

[32] Ibid.

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Ibid.

court requesting that the entire record of a case be sent up for review by the higher court.[37]

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[37] Ibid.

CHAPTER II

REVIEW OF THE LITERATURE

Overview

Throughout the history of the United States, the Supreme Court has shaped and reflected the moral attitudes and beliefs of the American people. As America has undergone distinct changes in philosophies and moral standards, the Supreme Court has echoed these changes in rendering legal decisions. This chapter focuses on the Supreme Court decisions which are related to student rights. The purpose of this chapter is to give the uninformed reader a background of the judicial climate which the Burger Court faced from 1969 - 1986.

Many of the decisions rendered between 1788 and 1969 were instrumental in shaping the modern American educational system. The review of judicial decisions will begin with the ratification of the United States Constitution on June 21, 1788 and will culminate with the appointment of Warren E. Burger as Chief Justice of the Supreme Court in 1969.

The first ten amendments to the Constitution, or the Bill of Rights, are the chief source of American constitutional rights. The first ten amendments to the Constitution were all enacted by December 15, 1791,

during Washington's Administration and were intended to ensure freedoms and rights to American citizens.[1] The constitutional amendments which focus on students' rights are: Amendment I, Amendment IV, and Amendment XIV.

The First Amendment, adopted in 1791, states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."[2] The wording of the First Amendment leaves the individual states free to enact laws which violate the intent of the amendment.[3] According to the late E. C. Bolmeier, Professor of School Law at Duke University:

> The First Amendment restrained only the federal government in dealing with human rights. This left the states almost completely free to infringe the most basic human rights in any way their governments might choose. Not until the Fourteenth Amendment was adopted in 1868 did it become possible for the federal courts and Congress to restrict state action governing human life.[4]

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[1]Mary Ann Harrell and Burnett Anderson, Equal Justice Under the Law, (The National Geographic Society Press, Washington, D.C.), 1986, pp. 1-14.

[2]United States Constitution. Amendment I.

[3]E.C. Bolmeier, Landmark Supreme Court Decisions on Public School Issues, (The Michie Company, Charlottesville, Virginia) 1973, pp. 6-7.

[4]Ibid.

The Fourteenth Amendment corrects this oversight and extends the prohibition of enacting laws which deprive a person of right to life, liberty, or property, without due process of law, - liberties which are assured by the First Amendment.[5]

Articles One and Four of the Constitution also contain important provisions ensuring certain basic rights. The Constitution assures citizens protection from governmental tyranny and despotism. The Constitution does not, however, translate these promises of basic rights into practice. The framers of the Constitution left the interpretation of the laws to the United States Supreme Court which is the final authority.[6] James Madison argues in the Federalist Paper No. 78 that:

> The courts were designed to be an intermediate body between the people and the legislature..., to keep the latter within the limits assigned to their authority. The interpretation of the law is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as

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[5] Ibid.

[6] Frank R. Kemerer and Kenneth L. Deutsch, Constitutional Rights and Student Life, (West Publishing company, St. Paul, Minn.), 1979, pp. 25-29.

well as the meaning of any particular act proceeding from the legislative body.[7]

Judicial Issues in Education: 1803 - 1969.

Marbury v. Madison,[8] a case heard by the Court in 1803, solidified the Court's authority to judicial review. Chief Justice John Marshall who wrote for the Court stated that "the Constitution is the supreme law of the land--'the paramount law'--and judges take an oath to support and defend the Constitution."[9] Article III of the Constitution requires the judiciary to interpret the law. Justice Marshall went on to write that it is the responsibility of a judge to declare null and void a law which he finds in conflict with the Constitution.[10]

In 1868, the Fourteenth Amendment to the United States Constitution was adopted. The statute reads:

> 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.

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[7] The Federalist, (Modern Library, New York) 1937, p. 506.

[8] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[9] Kemerer, supra note #6.

[10] Ibid.

> 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.[11]

The United States Congress enacted the Civil Rights Law of 1871 in an attempt "to enforce the provisions of the Fourteenth Amendment to the Constitution and for other purposes."[12] Section 1 of this Act, now codified as 42 U.S.C. Section 1983, speaks directly to the violations of constitutional rights.[13]

The Civil Rights Act of 1875 was enacted by the United States Congress in an effort to prevent discrimination in public places. The Civil Rights Act of 1875 prohibited racial discrimination in inns, public conveyances, and places of amusement. Federal courts were given exclusive jurisdiction over cases deriving from this statute. Black citizens soon began to sue in federal courts for violations of their civil rights. Cases appeared before the Supreme Court protesting the

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[11]United States Constitution. Amendment XIV.

[12]Cong. Globe, 42d Cong. 1st Sess., p. 522.

[13]E. Wayne Trogden, The Civil Rights Law of 1871 and Its Effect on Teacher Dismissal, (Unpublished Ed.D. dissertation, University of North Carolina - Greensboro, N.C. 1980)

exclusion of Blacks from a hotel dining room in Topeka, Kansas, an opera house in New York, the dress circle of a San Francisco theater, and the ladies' car on a train. In 1883, the Court ruled 8-1 that the act was unconstitutional, stating that the Fourteenth Amendment gave Congress power over state action.[14]

In 1896, the Fourteenth Amendment faced a significant challenge. In the case of Plessy v. Ferguson,[15] the Fourteenth Amendment was used for the first time in a desegregation case. This case centered around a Louisiana state law enacted in 1890. This law required two or more passenger cars on each train so that equal but separate accommodations could be provided for the black and white races. Plessy, a Black of one-eighth Negro ancestry, refused to leave a passenger car designated for whites only. When he was arrested, he challenged the Louisiana law claiming it was a violation of the Fourteenth Amendment.[16]

The Supreme Court upheld the Louisiana law in an 8-1 decision. The opinion of the Court reads in part:

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[14]Civil Rights Cases, 109 U.S. 3 (1883)

[15]Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

[16]Bolmeier, supra note #3, pp. 89-90.

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with the badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it...The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition...Legislation is powerless to eradicate racial instincts...If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.[17]

The decision was not unanimous. Associate Justice Harlan wrote the Court's dissenting opinion:

> ...in the view of the Constitution, in the eye of the law, there is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens...We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.[18]

In upholding the Louisiana state law, the Supreme Court established the doctrine of "separate but equal" for American public schools; a doctrine held until the

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[17] Plessy v. Ferguson, supra note #15.

[18] Ibid.

1954 decision of Brown v. Board of Education of Topeka, Kansas.[19]

The Plessy v. Ferguson[20] decision created an environment for many states that had no legislative mandate to legislate separate but equal educational systems for black children. Moreover, states with legislative enactments separating children on the basis of race were more secure in pupil assignments. Five decades passed before a significant challenge to the decision was brought before the Court.

In 1923, the Fourteenth Amendment again faced a critical challenge. Following World War I, the state of Nebraska enacted a piece of legislation prohibiting any course taught in Nebraska schools from being taught in any language other than the English language. The same legislative act prohibited the teaching of a foreign language as a course in itself until a student had completed the eighth grade. The legislation was challenged before the United States Supreme Court in 1923 in the case known as Meyer v. Nebraska.[21] Robert T.

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[19]Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483, 74 S. Ct. 686 (1954).

[20]Plessy v. Ferguson, supra note #15.

[21]Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625 (1923).

Meyer, a teacher in a non-public school, was convicted in a Nebraska court of teaching reading in the German language to a ten-year-old student. The Nebraska Supreme Court upheld the state's right to prohibit teaching of a foreign language contending that it was an issue of public safety and general welfare.[22]

When the case reached the Supreme Court, the decision of the Nebraska State Supreme Court was reversed in a 7-2 vote. The argument that such a regulation fell within the proper police powers of the state was rejected by the Court. Associate Justice McReynolds wrote the majority opinion with Chief Justice Taft and Associate Justices McKenna, Van Devanter, Brandeis, Butler, and Sanford concurring in the opinion. Justices Holmes and Sutherland dissented.[23]

Associate Justice McReynolds wrote in part:

> Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Theretofore it has been

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[22]E. Edmund Reutter, Jr., The Supreme Court's Impact on Public Education, (Phi Delta Kappa and National Organization on Legal Problems in Education), 1982, pp. 6-7.

[23]Ibid.

> commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.[24]

Two years after the Meyer decision, another question of significant importance was brought before the Court. The 1925 Pierce v. the Society of Sisters (Oregon)[25] case raised the question, "Can a state adopt a statute which requires a child to attend a public school?" The question before the Court was reduced to: "Has the state, through its legislative functions, the power, under the guise of police regulation, to deprive parochial and private school organizations of the liberty and right to carry on their schools for teaching in the grammar grades?" This case, which emerged from a legislative act enacted by the Oregon General Assembly, maintained that:

> Any parent, guardian, or other person in the state of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse

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[24] Meyer v. Nebraska, supra note #21.

[25] Pierce v. Society of Sisters (Ore.), 268 U.S. 510, 45 S. Ct. 571 (1925).

> to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense...26

The Society of Sisters (The Society of the Holy Names of Jesus and Mary) and the Hill Military Academy brought suit in Federal District Court in March, 1924 seeking to have the act declared null and void. The Society of Sisters claimed that the act denied them constitutional rights under the Fourteenth Amendment because it deprived them of life, liberty, property, and equal protection of the law. When the District Court found in favor of the Society of Sisters, and the state appealed to the United States Supreme Court. In 1925, the Court rendered its decision upholding the decision of the lower court. The Court's concluding remarks were:

> Under the doctrine of Meyer v. Nebraska, 262, U.S.390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The

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[26]Bolmeier, supra note #3, pp. 19-20.

> 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.[27]

The United States Supreme Court developed the "child benefit" theory in the 1930 case, Cochran v. Louisiana State Board of Education[28], the first test of the constitutionality of using tax funds in support of education. The issue involved a 1928 Louisiana law which provided free school books to all Louisiana school children. A group of citizens brought suit claiming that the statute was a violation of specified provisions of the state Constitution and also the Fourteenth Amendment of the United States Constitution. Specifically, they charged that taxation for purchasing school books constituted a taking of public property for private purposes.[29]

Upon failure to convince the state courts to issue

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[27] Pierce v. Society of Sisters (Ore.), supra note #25.

[28] Cochran v. Louisiana State Board of Education, 281 U.S. 370, 50 S. Ct. 335, 74 L. Ed. 1157 (1930).

[29] Ibid.

an injunction against enforcement of the law, a citizens group appealed to the United States Supreme Court. The Court, in a unanimous decision, ruled that schools were not beneficiaries of the provisions of the law. "The school children and the state alone are the beneficiaries."[30] Chief Justice Hughes wrote the majority opinion for the Court maintaining:

> The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made.[31]

The Court has since ruled on three separate occasions that the lending of textbooks by the state to non-public schools is constitutional.[32]

In the 1940 case of Minersville School District v. Gobitis,[33] the Court upheld, in an 8-1 decision, the constitutionality of a school district regulation which

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[30] Ibid.

[31] Ibid.

[32] H.C. Hudgins, Jr., and Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions, (The Michie Company, Charlottesville, Virginia) 1985, p. 368.

[33] Minersville School District v. Gobitis (Pa.), 310 U.S. 586, 60 S. Ct. 1010 (1940).

required all children to participate in the daily flag-ceremony. The issue centered around the First Amendment's Free Exercise Clause. The Gobitis family belonged to the Jehovah's Witnesses religious sect whose religious doctrine teaches that such gestures of respect for the flag violate the Biblical Scriptures. On May 3, 1937, the Gobitis family filed suit in United States Federal District Court requesting an injunction against the enforcement of the regulation. The suit was followed by several years of bitter arguments. On March 4, 1940, the United States Supreme Court issued a writ of certiorari.[34]

Justice Frankfurter wrote the majority opinion for the Court stating in part:

> A grave responsibility confronts this Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority. But when the liberty invoked is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test. Of such a nature is the present controversy...
>
> The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the

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[34]Reutter, supra note #22, pp. 48-49.

> educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties...[35]

In the 1943 West Virginia State Board of Education v. Barnette[36] case, the Court again heard arguments involving the Jehovah's Witnesses. The issue was similar to the issue before the Court in the Gobitis case, a state regulation that school children had to salute the American flag. The State Board of Education had adopted a regulation that the salute to the flag become 'a regular part of the program of activities in the public schools,' that all teachers and pupils "shall be required to participate in the salute honoring the nation represented by the flag; provided, however, that refusal to salute the flag be regarded as an act of insubordination, and shall be dealt with accordingly." On June 14, 1943, in a 6 - 3 decision, the United States Supreme Court upheld the lower court's ruling that the regulation was a violation of the First Amendment rights of the Jehovah's Witnesses, effectively reversing the decision of the Court in the

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[35] Minersville School District v. Gobitis (Pa.), supra note #33.

[36] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, (1943).

Minersville case.[37] Justice Jackson wrote the majority opinion stating:

> National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement...Struggles to coerce uniformity of sentiment in support of comes end thought essential to their time and country have been waged by many good as well as evil men...
>
> If there is any fixed star in our constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exemption, they do not now occur to us.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[38]

In the 1947 Everson v. Board of Education[39] case, a New Jersey statute providing for the free transportation of school children to and from parochial schools was brought before the United States Supreme Court. In

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[37] Ibid.

[38] Ibid.

[39] Everson v. Board of Education (N.J.), 330 U.S. 1, 67 S. Ct. 504 (1947).

a 5-4 decision, the Court sustained the right of local school authorities to provide free transportation for pupils attending parochial schools in accordance with the New Jersey law.[40] In delivering the majority opinion for the Court, Justice Black maintained:

> The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.[41]

The question of release time for the purpose of religious instruction came before the Court in the 1948 case, McCollum v. Board of Education,[42] and again in the 1952 case, Zorach v. Clauson.[43] In 1948, the Court struck down as unconstitutional an Illinois statute which provided release time for public school students to receive religious instruction on a voluntary basis. Students who chose not to participate were required to go to another part of the building to continue their

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[40] Ibid.

[41] Ibid.

[42] McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461 (1948).

[43] Zorach v. Clauson, 343 U.S. 306, 72 S. Ct. 679 (1952).

secular studies. The Court maintained that the practice was a violation of the First Amendment of the United States Constitution on the basis that it was an impermissible advancement of religion.[44] Four years later, the Court upheld a New York statute allowing public school students the opportunity to leave school early in order to receive religious instruction off-campus.[45]

On May 17, 1954, the United States Supreme Court in a unanimous decision, rendered one of the most significant decisions of the twentieth century--Brown v. Board of Education of Topeka, Kansas.[46] In essence, the Court ruled that separate-but-equal educational systems for blacks and whites are unconstitutional and that the existence of such laws is a violation of the equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution. Chief Justice Earl Warren wrote the unanimous decision for the court. Justice Warren maintained:

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[44]McCollum v. Board of Education, supra note #42.

[45]Zorach v. Clauson, supra note #43.

[46]Brown v. Board of Education, supra note #19.

> ...We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal education opportunities? We believe that it does.
>
> ...Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law, therefore, has a tendency to (retard) the educational and mental development of educational and mental development of negro (sic) children and to deprive them of some of the benefits they would receive in a racially integrated school system. Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.
>
> We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[47]

In 1962, the New York State Board of Regents adopted for school use the following prayer, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers, and our

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[47] Ibid.

Country." Upon adoption of the prayer as a regular part of the school day by the New Hyde Park school district, the parents of ten students brought suit in state court contending that the required prayer was a violation of the First Amendment rights of their children. The case was appealed to the Court of Appeals of New York State where it was held not to be in violation of the First Amendment. The children's parents then appealed to the United States Supreme Court in the case known as Engel v. Vitale[48], the first religion case to be heard by the Warren Court. On June 25, 1962, the United States Supreme Court, in a 6-1 opinion (Justices Frankfurter and White did not participate.) held that to require a student to recite a state-composed prayer is a violation of the Establishment Clause of the First Amendment.[49]

Associate Justice Black wrote the majority opinion stating in part:

> We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with

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[48]Engel v. Vitale, (N.Y.), 370 U. S. 421, 82 S. Ct. 1261 (1962).

[49]Ibid.

> the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious...
>
> ... Neither the fact that the prayers may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment... The Establishment Clause... does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not... But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.[50]

In 1963, the Court considered a similar question from the state of Pennsylvania. The question in the case of Abington School District v. Schempp(Pa.)[51] was, "Can a state require that Bible verses or the Lord's prayer be recited in the public schools even if provisions are made to excuse from participating those stu-

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[50] Ibid.

[51] Abington School District v. Schempp (Pa.), 374 U.S. 203, 83 S. Ct. 1560 (1963).

dents whose parents object?" The issue centered around a Pennsylvania law which required that at least ten Bible verses be read daily at the opening of the school day. The Schempp family belonged to the Unitarian faith. They sued claiming that the requirement was a violation of the First Amendment and, hence, a violation of the the Fourteenth Amendment.[52]

When a United States Federal District Court ruled in favor of the Schempps, the State of Pennsylvania appealed to the United States Supreme Court. On June 17, 1963, in an 8-1 decision, the Supreme Court upheld the decision of the lower court. Justice Clark wrote the majority opinion for the Court stating in part:

> In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment clause, as applied to the States through the Fourteenth Amendment.
>
> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to

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[52] Ibid.

> aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule is clearly and concisely stated in the words of the First Amendment.[53]

In 1967, the United States Supreme Court rendered the decision known as In re Gault.[54] In essence, the Gault decision renders a juvenile the same constitutional rights as an adult criminal. The decision requires that a juvenile must be given: notice of the charges; right to counsel; right to confrontation and cross-examination of the witnesses; privilege against self-incrimination; right to a transcript of the proceeding; and right to appellate review. This decision was further defined in 1975 by the Burger Court in the case of Goss v. Lopez which will be discussed in detail in the next chapter.[55]

In 1969, the United States Supreme Court rendered its most far-reaching decision in a century in the area of student rights. The Court affirmed the constitu-

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[53] Ibid

[54] In re Gault, 387 U.S. 1, 40 OO(2d) 378, 18 L.Ed.(2d) 527, 827 S. Ct. 1428 (1967).

[55] Goss v. Lopez, 95 S. Ct. 729 (Ohio 1975).

tional right of freedom of speech for students, in a 7-2 decision in the case of Tinker v. Des Moines Independent Community School District.[56]

At the height of the Vietnam War, a group of students in the Des Moines school district wore black arm bands to protest United States involvement in the war. The school administration had anticipated such an activity and, in response, had adopted a policy to deal with the possibility of such an activity occurring. The policy called for the principal of the school to ask the students involved to remove the armbands. Refusal to abide by the principal's directive would result in suspension from school. The school administration feared that wearing such armbands might cause a confrontation between the students and friends of a former student who had been killed in Vietnam. Students at another high school in the same area had threatened to wear armbands of another color if the black armbands were allowed.[57]

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[56]Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

[57]Robert T. Baker, E. C. Bolmeier, and Walter L. Hatzel, School in the Legal Structure, (The W.H. Anderson Company, Cincinnatti, Ohio), 1972, 269-272.

The remainder of the story is history. The students wore armbands and were subsequently suspended. A suit was filed in the United States District Court by the students' parents where it was dismissed. Thus, the school administrators' action was upheld. On appeal, the Court of Appeals for the Eighth Circuit affirmed the decision, and the case was then appealed to the United States Supreme Court.[58]

The Court concluded that the wearing of the armbands was closely akin to "pure speech," which is guaranteed by the First Amendment. Justice Fortas said in his opinion for the Court:

> In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate...It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.[59]

Fortas went on to say that school and state authorities have the power to define and control pupil conduct as long as it is consistent with fundamental constitutional safeguards. "State-operated schools may

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[58]Ibid., p. 271.

[59]Tinker v. Des Moines, supra note #56.

not be enclaves of governmental totalitarianism." School officials do not possess absolute authority over their students. Fortas wrote that schools must show "material and substantial disruption" before free expression can be prohibited.[60]

The decision still stands, even though the Burger Court has chipped away at its original language in cases such as Goss v. Lopez,[61] and New Jersey v. T.L.O.,[62] and, most recently, in the case of Bethel School District v. Fraser.[63] These cases will be discussed in detail in the next chapter.

Summary

An analysis of Supreme Court decisions and legislative enactments from 1803 to 1969 reveal that the Court and the Congress are committed to the constitutional rights of students. The interpretation of these rights is subject to change. For example, the Court

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[60]Hudgins, supra note #32, p. 207.

[61]Goss v. Lopez, supra note #55.

[62]New Jersey v. T.L.O., 105 S. Ct., 83 L. Ed. 2d 720 (1985).

[63]Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159 (1986).

reversed the 1896 Plessy v. Ferguson decision which established the "separate but equal" concept in the 1954 Brown decision. In the 1943 West Virginia State Board of Education v. Barnette case, the Court reversed its 1940 Gobitis decision by ruling that a state may not require students to participate in daily flag ceremonies.

The Court has been consistent in maintaining a separation between secular and sectarian education as exemplified in the following cases: McCollum v. Board of Education, Zorach v. Clauson, Abington School District v. Schemmp, and Engel v. Vitale. Within this period of time, another case that should be noted is the 1969 Tinker case. In this case, the Court ruled that students do not "shed their constitutional rights at the school house gate." Many educational scholars believe that the Tinker case established the foundation for future litigation in the arena for students' rights.

The evolution of the American system of public education is complex. It is shaped by and reflects the distinct religious and political characteristics of America. The United States Supreme Court has played a pivotal role in the development of the American sys-

tem of public education since its inception. In the following chapter, the role that the Burger Court played in the continuing evolutionary process of public schools is reviewed and analyzed.

CHAPTER III

THE SUPREME COURT AND THE CONSTITUTIONAL RIGHTS OF STUDENTS: THE BURGER YEARS: 1969 - 1986

Controversy concerning the constitutional rights of students is complex in nature, enmeshed in prevailing political and societal change. Decisions by the United States Supreme Court and lesser federal courts along with state courts influence the development of the constitutional rights of students. Many United States Supreme Court decisions relate directly or indirectly to the constitutional rights of students.

Federal courts do not deal directly with educational concerns of public schools because the United States Constitution does not specifically mention education.[1] Futhermore, federal jurists in rendering decisions have lamented that courts do not wish to become involved in day-to-day operations or administrative practices of public schools.[2] Because public schools are governed by school boards, courts rarely

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[1]John C. Hogan, The Schools, the Courts, and the Public Interest (Lexington Books, Lexington, Massachusetts) 1974, p. 6.

[2]Epperson v. Arkansas, 393 U. S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968).

substitute judicial judgment for that of representatives chosen by the people.

There are, however, two principal issues through which federal courts obtain jurisdictions in litigation involving public education: (1) alleged violation of constitutionally protected rights, privileges, or immunities of an individual; and (2) validity questions of state or federal statutes under the United States Constitution.[3]

These two major issues have led to judicial involvement in controversies concerning the constitutional rights of students. The constitutional rights of students fall into five major categories: (1) the right to due process; (2) the right to free speech; (3) the right to religious freedom; (4) the right to freedom from illegal searches and seizures; and (5) the right to receive information and ideas. This chapter will review Supreme Court decisions, rendered by the Burger Court from 1969 to 1986, which deal with the constitutional rights of students in the above mentioned categories.

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[3]Hogan, supra note #1.

Right to Due Process (Amendment XIV)

Four major United States Supreme Court decisions greatly expanded the constitutional rights of students. Two of those decisions were rendered by the liberal Warren Court, and two were rendered by the more conservative Burger Court. The first important students' rights decision was rendered in 1967 by the Warren Court. The 1967 In re Gault[4] decision granted to minors the same due process rights as those of adults in criminal procedures. The 1969 Tinker[5] decision defined First Amendment rights for school children and has played an important role in every student rights case since it was rendered by the Court. In 1975, the Burger Court rendered two important student rights decisions: Goss v. Lopez[6] and Wood v. Strickland.[7] Both decisions were a result of a 5-4 vote by the jus-

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[4] In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[5] Tinker v. Des Moines Independent School District, 393 U. S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731, (1969).

[6] Goss v. Lopez, 95 S. Ct. 729, (Ohio, 1975).

[7] Wood v. Strickland, 95 S. Ct. 992 (Ark. 1975).

tices.[8] These two decisions "probably represented the apex of the emphasis on individual rights in education."[9]

The Goss[10] decision gave students the right to receive minimal due process when suspended from school for short periods of time. Due process is guaranteed by the Fourteenth Amendment. The Court stated:

> Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.[11]

Mr. Justice White wrote the majority opinion for the Court stating in part:

> We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process

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[8]E. C. Bolmeier, Legality of Student Disciplinary Practices, (The Michie Company, Charlottesville, Virginia), 1976, p. 135.

[9]Thomas N. Jones, and Darel P. Semler, ed., School Law Update, 1985, "Who Runs the Schools: Judges or Educators?," (National Organization on Legal Problems of Education, Topeka, Kansas), 1985, p. 3.

[10]Goss v. Lopez, supra note #6.

[11]Ibid.

> Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school...
>
> We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspension or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedure will be required.[12]

In the 1975 Wood v. Strickland[13] decision, the United States Supreme Court, in a 5-4 vote, ruled that school board members, as individuals, are not immune from liability for compensating damages under the Civil Rights Act of 1871 which states in part:

> Every person who under cover of any statute, ordinance, regulation, custom, or usage of any State, subjects or causes to be subjected any citizen of the U.S.....to deprivation of any rights, privileges and immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper pro-

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[12] Ibid.

[13] Wood v. Strickland, supra note #7.

ceedings for redress.[14]

Under Section 1983 of the 1871 Civil Rights Acts, individuals who allege a denial of due process may bring action for declaratory and injunctive relief against the school board and administrators involved. Plaintiffs may also bring action for financial damages against individuals who made the decision.[15] The Court insisted that school board members could be held liable for acts which violate a student's constitutional rights.[16] The Court established a standard for "good faith" immunity by stating:

> The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional 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. To be entitled to a special exemption from the categorical remedial language of 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of super-

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[14]The Civil Rights Act of 1871, 42 U.S.C. p1983 (1970).

[15]Robert E. Phay, "Individual Liability of School Board Members and School Administrators," School Law Bulletin, No. 4 at 3 (Oct. 1973).

[16]Wood v. Strickland, supra note #7.

> vising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic unquestioned constitutional rights of his charges.[17]

In 1978, the case of Carey v. Piphus[18] came before the Court. In an 8 - 0 decision, (excluding Justice Blackmun) the Court ruled suspended students whose due process rights are violated in elementary and secondary schools would be entitled only to nominal damages. Justice Powell rendered the opinion of the Court in which Justices Burger, Brennan, Stewart, White, Rehnquist, and Stevens joined. The District Court held that both students had been suspended without procedural due process, but declined to award damages because "the record is completely devoid of any evidence which could even form the basis of a speculative inference measuring the extent of their injuries. Plaintiffs' claims for damages therefore fail for complete lack of proof."[19]

On appeal, the Court of Appeals reversed and re-

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[17] Ibid.

[18] Carey v. Piphus, 435 U. S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d. 252 (1978).

[19] Ibid.

manded holding that the District Court had erred in not granting declaratory and injunctive relief. The Court ruled:

> ...even if the District Court found on remand that respondents' suspensions were justified, they would be entitled to recover substantial nonpunitive damages simply because they had been denied procedural due process.[20]

On appeal to the United States Supreme Court, the decision of the Court of Appeals was reversed. In his opinion, Justice Powell stated:

> Because the right to procedural due process is absolute in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages, not to exceed one dollar, from petitioners.[21]

Until 1978, school boards and school systems, as governmental entities, were considered immune from Section 1983 suits because they were not 'persons' who

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[20] Ibid.

[21] Ibid.

could be sued under the law.[22] This theory emerged from the 1961 case cited as Monroe v. Pape.[23] In 1978, the United States Supreme Court nullified that theory in the case of Monell v. New York City Department of Social Services.[24] The Court ruled that governing boards are not immune from liability and can be sued as persons under Section 1983.[25]

As a result of the Monell[26] decision, the question arose whether a local school board, as a governmental entity, might be entitled to some sort of qualified immunity based on its good faith or that of its employees. The question was answered by the United States Supreme Court in 1980 in the case of Owen v. City of Independence, Missouri.[27] The Court ruled that local

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[22]Richard Swartz, of the Raleigh law firm of Tharrington, Smith, and Hargrove, from an unpublished paper entitled, " Potential Liability of Principals for Violations of Legal Rights."

[23]Monroe v. Pape, 365 U. S. 167, 81 S. Ct. 473 (1961).

[24]Monell v. New York City Department of Social Services, 436 U. S. 658, 98 S. Ct. 2018 (1978).

[25]Ibid.

[26]Ibid.

[27]Owen v. City of Independence, Mo., 445 U. S. 622, 100 S. Ct. 1398, (1980).

governments and their boards, as governmental entities, are not entitled to any type of immunity, whatsoever, in Section 1983 cases. The Court ruled that local boards are strictly liable for violations of rights guaranteed by the Constitution, even though their individual board members and employees may be entitled to qualified good faith immunity from personal liability as stated in the Wood[28] decision.[29]

Another 1980 United States Supreme Court decision greatly expanded an individual's ability to sue and collect damages under Section 1983. In the case of Maine v. Thiboutot,[30] the Court ruled that suit may be brought for the violation of any right guaranteed by any law under Section 1983. Previously, a suit could only be filed for constitutional violations or for violations regarding civil rights. Another stipulation of the Maine[31] case is that attorneys' fees may be as-

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[28]Wood v. Strickland, supra note #7.

[29]Edmund Reutter Jr., The Supreme Court's Impact on Public Education, (Phi Delta Kappa and the National Organization on Legal Problems of Education, Topeka, Kansas) 1982, 158 - 163.

[30]Maine v. Thiboutot, 448 U. S. 1, 100 S. Ct. 2502 (1980).

[31]Ibid.

sessed to the losing party.[32] This stipulation was carried one step further in another 1980 case, Maher v. Gagne.[33] The Court ruled that attorneys' fees may be awarded even if the case were settled out of court.[34]

Another recent decision by the high Court has made it potentially easier to prove a Section 1983 claim against school officials. In Gomez v. Toledo,[35] the Supreme Court ruled that a person bringing suit has no obligation (as had been implied in the Wood[36] decision) to plead or prove that officials acted in bad faith. The qualified good faith immunity of school officials was not affected by the Gomez[37] decision. The decision shifts the burden of proof to the defendant rather than the plaintiff.[38]

The Burger Court signaled in 1978 that it was un-

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[32]Reutter, supra note #29.

[33]Maher v. Gagne, 448 U. S. 122, 100 S. Ct. 2570 (1980).

[34]Ibid.

[35]Gomez v. Toledo, 446 U. S. 635 (1980).

[36]Wood v. Strickland, supra note #7.

[37]Gomez v. Toledo, supra note #35.

[38]Swartz, supra note #22.

willing to identify new areas of student rights in the case of Ingraham v. Wright.[39] This case answered two questions which are of significance to all educational administrators: (1) Are students entitled to a due process hearing prior to the administration of corporal punishment?, and (2) Is corporal punishment a violation of the Eighth Amendment's ban on cruel and unusual punishment? The Court ruled that students are not entitled to a due process hearing prior to the administration of corporal punishment. Also, the Court ruled that corporal punishment is not a violation of the Eighth Amendment's ban on cruel and unusual punishment.[40]

Horowitz v. University of Missouri,[41] another 1978 case, gave further indication that the Burger Court was reluctant to identify new areas of student rights. While this case did not involve public school students, the decision, nevertheless, carries serious implications for students in public schools. The Court ruled

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[39] Ingraham v. Wright, 430 U. S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711, 1977.

[40] Ibid.

[41] Horwitz v. University of Missouri, 435 U. S. 78, (1978).

that students are not entitled to a due process hearing prior to academic dismissal.[42] Both cases, Ingraham[43] and Horowitz,[44] give a strong indication that the Burger Court was unwilling to expand the due process rights of students beyond the narrow disciplinary penalties outlined in Goss v. Lopez.[45]

Right to Free Speech (Amendment I)

On December 15, 1791, the Constitution of the United States was amended by the adoption of the First Amendment which reads:

> 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 the right of people peaceably to assemble, and to petition the government for a redress of grievances.[46]

> Throughout the early history of public education in this nation, students usually played a submissive role within their schools. With few exceptions, the general

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[42] Ibid.

[43] Ingraham v. Wright, supra note #39.

[44] Horwitz v. University of Missouri, supra note #41.

[45] Goss v. Lopez, supra note #6.

[46] United States Constitution. Amendment I.

> rule was that students did not express themselves in ways deemed 'unacceptable' by their administrators or teachers. Typically, students dressed in particular ways prescribed by a school dress code, spoke out in class only when encouraged to do so by their teachers, and usually abstained from placing any items in school publications which had not received prior approval of the school administration or their faculty sponsor.[47]

Needless to say, the role of the student has changed dramatically in recent years. The courts have interpreted the term "freedom of speech" to be a many-faceted term which includes: students speaking out on campus, students' dress, hairstyles, and symbolic expressions such as the wearing of armbands, buttons, badges hairstyles. The First Amendment also addresses free press, assembly, and redress for grievances.[48] "Like every other public institution, the schools are occupied by people whose duties and liberties are in conflict."[49] Thus, the courts are called upon to settle these conflicts.

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[47]H. C. Hudgins, Jr., and Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions, (The Michie Company, Charlottesville, Virginia), 1985, p. 319.

[48]Ibid., p. 321.

[49]Willian W. Justice, Phi Delta Kappan, "Teaching the Bill of Rights," October 1986, p. 155.

According to Thomas J. Flygare, an attorney with the New Hampshire law firm of Sheehan, Phinney, Bass, and Green and a contributing editor to the Phi Delta Kappan, the case of Tinker v. Des Moines Independent School District [50] ushered in the students' rights movement of the 1970's.[51] In terms of students' rights, the Burger Court had to deal with the Tinker[52] case, a legacy of the Warren Court. As stated in Chapter II of this study, Associate Justice Abe Fortas wrote the majority opinion stating in part that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate." Justice Fortas continued by stating that schools must show "material and substantial disruption" before free expression can be prohibited.[53]

In 1978, the Supreme Court refused to review a lower court's decision in the case of Trachtman v.

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[50] Tinker v. Des Moines, supra note #5.

[51] Thomas J. Flygare, Phi Delta Kappan, "Is Tinker Dead?," October 1986, p. 165.

[52] Tinker v. Des Moines, supra note #5.

[53] Ibid.

Anker.[54] This case involved a survey of sexual attitudes which was to be distributed to high school students. The results were to be published in the school newspaper. The Court ruled that school officials need only show a reasonable basis to justify restraints on secondary school publications distributed on school property. Reason to believe that "harmful consequences might result to students" is reason enough to prevent a student publication from being distributed.[55]

The last students' rights decision rendered by the Burger Court was Bethel School District v. Fraser.[56] The case began on April 26, 1983, when Mathew Fraser, a senior at Bethel High School, Pierce County, Washington, delivered a brief speech nominating another student for a seat on the student council. The speech contained a series of sexual metaphors which were clearly recognized by the students present during assembly. Many students demonstrated understanding of the metaphors by "simulating various kinds of behavior

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[54] Trachtman v. Anker, Supreme Court review denied, 435 U. S. 925 (1978).

[55] Ibid.

[56] Bethel School District v. Fraser, 478 U. S.------(1986).

in a graphic manner."[57] Subsequently, five teachers in the school complained to the assistant principal about the speech and suggested that some disciplinary action was in order. Following a discussion of the matter between Fraser and the assistant principal, Fraser was suspended from school for a period of three days for violating a school rule prohibiting the use of obscene, profane, or suggestive language.[58] In addition, Fraser's name was removed from a list of candidates for graduation speaker at the school's graduation exercise.[59]

Fraser began the judicial process by seeking review of this disciplinary action through the school district's grievance procedures, but a hearing officer determined that the speech given by Fraser was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance...." The examiner concluded that the speech embodied terms within the ordinary meaning of the word "obscene" as

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[57] A Legal Memorandum, "U.S. Supreme Court Reviews Student Freedom of Speech," September 1986, p. 1.

[58] Ibid., p2.

[59] Ibid., p.3.

used in the school's rule and declared the school's disciplinary action correct.[60] Fraser then appealed to the United States District Court for the Western District of Washington. The court ruled that Fraser's First Amendment constitutional rights were violated because the school rule was too vague and broad, and the approved speakers list for graduation ceremonies was not included in the school discipline code.[61] On appeal to the Ninth Circuit Court of Appeals, the decision was affirmed, citing the case of Tinker v. Des Moines.[62] The court stated that it saw no difference between Fraser's speech and the wearing of black armbands in the Tinker case.[63]

The school system appealed to the United States Supreme Court, and on July 7, 1986, on a vote of 7-2, the Court reversed the decision of the lower courts. Chief Justice Warren Burger wrote the majority opinion stating in part:

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[60] Ibid.

[61] Ibid.

[62] Ibid.

[63] Ibid.

> ...that public education must prepare pupils for citizenship in the Republic...it must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.[64]

For the first time, the Court attempted to spell out the limitations of free speech for public school students. Justice Burger continued his litany by stating in part:

> We affirmed that the constitutional rights of students in public school are not automatically co-extensive with the rights of adults in other settings... The holdings of the Fraser decision are, as always, limited to the specific issues before the Court. Even these make clear, however, that whatever the First Amendment rights of public school students may be, they do not include the unfettered use of language which the school district or its administrators believe to be 'offensively lewd and indecent' even if it is not disruptive of the educational process."[65]

Justice Burger referred to Justice Black's dissenting opinion in the Tinker [66] case in rendering his opinion. Justice Black, in his dissenting opinion in

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[64] Bethel School District v. Fraser, supra note #56.

[65] Ibid.

[66] Tinker v. Des Moines, supra note #5.

the Tinker case stated:

> I wish, therefore....to disclaim any purpose....to hold that the federal Constitution compels the teachers, parents and elected school officials to surrender control of the American public school system to public school students.[67]

In 1972, the Burger Court denied a writ of certiorari in the case of Karr v. Schmidt[68] effectively upholding the decision of the Fifth Circuit Court of Appeals in a case concerning length of hair. The court asserted that a school board has a legitimate concern and an undeniable interest in "teaching hygiene, instilling discipline, asserting authority, and compelling uniformity."[69] In 1982, the Fifth Circuit again upheld the authority of a school board to regulate hairstyles in the case of Domico v. Rapides Parish School Board[70] citing its 1972 decision (Karr[71]) which was effectively upheld when the United States Supreme

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[67] Ibid.

[68] Karr v. Schmidt, 460 F. 2d 609 (5th Cir.), cert. denied, 409 U.S. 989 (1982).

[69] Ibid.

[70] Domico v. Rapides Parish School Board, 675 F. 2d 100 (5th Cir. 1982).

[71] Karr v. Schmidt, supra note #68.

Court denied a writ of certiorari. "In general, punitive action against students for violating a hair style regulation is unconstitutional unless positive proof is given to show that it is: (1) disruptive[72], (2) unsanitary[73], or (3) dangerous[74]."[75]

More than a hundred cases regarding hairstyles have been litigated since 1965 when the first case to reach a court of record was decided.[76] "The great majority of the cases are recent and, for the most part, stem from the holding of the Supreme Court of the United States in Tinker."[77] It can be concluded that school boards do have the constitutional authority to regulate length of hair as long as the regulations are

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[72]Dawson v. Hillsborough County, Fla. School Board, 322 F. Supp. 286 (Fla. 1971).

[73]Turley v. Adel Community School District, 322 F. Supp. 402 (Iowa, 1971).

[74]Lanbert v. Marushi, 322 F. Supp. 326 (W. Va. 1971).

[75]Bolmeier, supra note #8, p. 25.

[76]Ibid.

[77]Pound v. Holladay, 322 F. Supp. 1000 (Miss., 1971).

not arbitrary or capricious.[78]

Right to Religious Freedom (Amendment I)

The question of student rights in a religious context is complex. The central issues in the religious arena are: (1) Can American public school children be required to participate in legislatively mandated religious activities? and (2) Do American public school students have a constitutional right to receive an education in the school of their choice (either public, private, or parochial) and receive financial assistance from the state? This section of the study will review and analyze United States Supreme Court decisions which addressed these central issues.

The decisions rendered by the Warren Court in the cases of Engel v. Vitale[79] and Abington School District v. Schempp[80] did not bring to a close the litigation over religious matters in the public schools. Well-

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[78]H.C. Hudgins, Jr., and Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions, (The Michie Company, Charlottesville, Virginia) 1985, p. 324.

[79]Engel v. Vitale, (N.Y.), 370 U. S. 421, 82 S. Ct. 1261 (1962).

[80]Abington School District v. Schempp (Pa.), 374 U. S. 203, 83 S. Ct. 1560 (1963).

organized groups, dissatisfied with public schools and with excessive governmental control, are influencing citizens to crusade to "clean up" material presented to students. These groups focus criticism on books and other materials which present ideas they oppose in the areas of religion, politics, and morality.[81]

The Warren Court's decisions in the cases of Engel v. Vitale[82] and Abington School District v. Schempp[83] were a prelude to the development of the tripart test which was developed by the Burger Court in the 1971 decision of Lemon v. Kurtzman.[84] The tripart test asks three questions: (1) Does the act have a secular legislative purpose?, (2) Does the primary effect of the act either advance or inhibit religion?, and (3) Does the act excessively entangle government and religion?[85]

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[81]Joseph Bryson and Elizabeth Detty, Censorship of Public School Library and Instructional Material, (The Michie Company, Charlottesville, Virginia), 1982, pp. 1-7.

[82]Engel v. Vitale, supra note #79.

[83]Abington School District v. Schempp, supra note #80.

[84]Lemon v. Kurtzman, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, 404 U.S. 876 (1971).

[85]Hudgins, supra note #78.

The tripart test remains the Court's primary judicial First Amendment religious establishment standard.[86]

According to Vincent Blasi of Yale University, "The Burger Court's addiction to uneasy, middle-of-the-road doctrines is nowhere more apparent than in the series of judgments regarding the highly emotional issue of public assistance to religious schools."[87] In 1973, three cases of a religious nature, destined to become landmark decisions, came before the Court; Sloan v. Lemon,[88] the Committee for Public Education and Religious Liberty v. Nyquist (P.E.A.R.L.),[89] and Levitt v. P.E.A.R.L.[90] Immediately following the Lemon v. Kurtzman[91] decision (Lemon I), the Pennsylvania le-

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[86]Joseph Bryson, "The Supreme Court and Social Change," from a speech delivered at the Guilford College School Law Conderence, June 20, 1984.

[87]Vincent Blasi, The Burger Court: The Counter-Revolution That Wasn't, (Yale University Press, New Haven and London), 1983, p. 214.

[88]Sloan v. Lemon, 413 U. S. 825, 93 S. Ct. 2982 37 L. Ed. 2d 151 (1973).

[89]Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U. S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973).

[90]Levitt v. P.E.A.R.L., 413 U. S. 472, 93 S. Ct. 2814, 37 L. Ed. 2d 736 (1973).

[91]Lemon v. Kurtzman, supra note #84.

gislature attempted to bypass the Court's directive by passing into law the Parent Reimbursement Act. This law granted tuition reimbursements to parents of children attending private and parochial schools. The Court found this act unconstitutional in the case of Sloan v. Lemon(Lemon II).[92] A similar legislative act in New York state was found unconstitutional by the Court in the case of the Committee for Public Education and Religious Liberty v. Nyquist[93]. In Levitt[94], the Court ruled that New York State's reimbursement to nonpublic schools for costs involved in testing, maintaining records, and compiling reports constituted an impermissible aid to religion.[95] These legislative acts,in open defiance of Supreme Court decisions, were intended to funnel funds into religious schools. These specific statutes were eventually declared unconstitutional by the courts.[96]

The religious issue, in historical retrospect,

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[92]Sloan v. Lemon, supra note #88.

[93]P.E.A.R.L., supra note #89.

[94]Levitt v. P.E.A.R.L., supra note #90.

[95]Ibid.

[96]Bryson, supra note #86.

reached a constitutional plateau in the 1975 Meek v. Pittenger case.[97] The circumstances of the Meek decision were construed to be devastating to political and religious leaders who sought legislative enactments supporting public funds for religious schools. The Court appeared to truncate almost every conceivable possibility of "auxiliary services." The historical record indicates that that appearance was deceiving. In a 6-3 decision, the Court ruled as constitutional the policy of the state's lending textbooks to students in private and parochial schools. However, by an identical 6-3 vote, the same Court ruled that the "direct loan of instructional materials and equipment has the unconstitutional effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act."[98]

In 1977, the Court signaled a new direction in the case of Wolman v. Walter.[99] The Court addressed six kinds of services in its decision. The Court held as

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[97] Meek v. Pittenger, 421 U.S. 602 (1975).

[98] Ibid.

[99] Wolman v. Walter, 433 U. S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977).

constitutional the practice of states providing textbooks to private and parochial schools (5-4), the financing of therapeutic, remedial, and guidance services for private and parochial schools (8-1), the financing of diagnostic services in speech and hearing (7-2), and the financing of standardized tests and test scoring in private and parochial schools (5-4). The Court held as unconstitutional the practice of the state providing field trips (5-4) and audio-visual equipment (6-3) to private and parochial schools.[100]

In 1980, the Court reversed Levitt[101] in a case known as Regan[102] with the Court voting 5-4. In 1983, the Supreme Court rendered its most far-reaching decision in a decade in the 5-4 decision of Mueller v. Allen.[103] The Court, in effect, reversed more than a decade of decisions concerning tax credits, parental reimbursements and parental tax deductions. The

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[100] Ibid.

[101] Levitt v. P.E.A.R.L., supra note #90.

[102] Committee v. Regan, 444 U. S. 646 (1980).

[103] Mueller v. Allen, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983).

Mueller[104] decision concerned a Minnesota legislative act which allowed parents to deduct expenses incurred by attendance of their children to all elementary and secondary schools. The inclusion of the word all in the act allowed it to stand constitutionally. The Mueller[105] decision may be the single most important Supreme Court decision affecting public education since the Brown[106] decision of 1953. This decision greatly expanded the constitutional right of all children to seek an education in the school system of their choice, whteher public, private, or parochial and to receive financial reimbursement from the state.[107]

Two 1985 decisions answered the question concerning the right of private school students to receive instruction from state-paid teachers. Both decisions, Grand Rapids v. Ball[108] (5-4) and Aguilar v. Felton,[109]

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[104] Ibid.

[105] Ibid.

[106] Brown v. Board of Education (Kan.), 347 U. S. 483, 74 S. Ct. 686 (1954).

[107] Bryson, supra note #86.

[108] Grand Rapids School District v. Ball, 105 S. Ct. 3216 (1985).

[109] Aguilar v. Felton, 105 S. Ct. 3232 (1985).

(8-1) invalidated programs in Michigan and New York that were designed to provide supplementary educational services to children attending private religious schools.[110] The Court ruled that state-paid teachers teaching in private parochial schools was a violation of the Establishment Clause of the Constitution of the United States and created an unacceptable level of entanglement between church and state.[111] These decisions indicate that the wall between church and state is still intact.

> In sum, our country will continue to struggle with the elemental tension between a religiously devout but diverse people and a secular government. Barring a celestial miracle, the truth is not likely to be found, even by those who now so earnestly debate the issues.[112]

Right to Freedom From Illegal Search and Seizure (Amendment IV)

In recent years, the question of illegal search and seizure of students in public schools has become an

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[110] Deskbook Encyclopedia of American School Law, (Data Research, Inc., Rosemont, Minnesota), 1986, pp. 206-207.

[111] School Law Update, 1985, (National Organization of Legal Problems of Education, Topeka, Kansas), 1985, p. 204.

[112] Ibid.

issue in the normal operation of American public schools. A key issue for all students is whether the fruits of a search can be introduced into a criminal or juvenile court proceeding. A typical situation might involve an unannounced search in which an illegal substance is found. The school administrator would then turn over the evidence to either criminal investigators or juvenile authorities. Subsequently, the juvenile is charged. In court, he and his parents are likely to argue that his Fourth Amendment rights were violated.[113]

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[114]

On January 15, 1985, the Burger Court rendered a landmark decision in the area of search and seizure in the nation's public schools. In the case of New Jersey

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[113]Frank R. Kemerer, and Kenneth L. Deutsch, Constitutional Rights and Student Life, (West Publishing Company, St. Paul, Minnesota), 1979, p. 636.

[114]United States Constitution. Amendment IV.

v. T.L.O.[115] the Court ruled that school administrators are not bound by the traditional probable cause standards required of law enforcement officers in criminal proceedings. The Court ruled that a less exacting "reasonable suspicion" standard is more appropriate for the school setting.[116] Justice Byron White wrote the opinion for the 6 - 3 majority. He stated in part:

> ...school officials need not obtain a warrant before searching a student who is under their authority. Moreover, school officials need not be held subject to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a determination of whether the search was justified at its inception and whether, as conducted, it was reasonably related in scope to the circumstances that justified the interference in the first place. Under ordinary circumstances the search of a student by a school official will be justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or

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[115] New Jersey v. T.L.O., 105 S. Ct. 733, 83 L. Ed. 2d 19 (1985).

[116] Ibid.

the rules of the school.[117]

Right to Receive Information and Ideas (Amendment I)

The 1973 Miller[118] decision led to an increase in censorship litigation on the local level. The United States Supreme Court declined to establish a national standard on what constitutes obscenity. State laws based on "community standards" were given guidelines by the Supreme Court in judging, as obscene, materials under consideration. The opinion stated: "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts."[119]

The landmark Tinker[120] case established a precedent which has been followed in case law since 1969. The Tinker decision stated:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that eith-

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[117] Ibid.

[118] Miller v. California, 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

[119] Ibid.

[120] Tinker v. Des Moines, supra note #5.

> er students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.[121]

School boards are empowered through state statutes to prescribe curricula. Authority to select textbooks, library books, and other instructional materials is derived from the same source.[122] It logically follows that school personnel do not have unreviewable privileges to select library and instructional materials. The authority to approve or disapprove such action is within the scope of school boards.[123] However, there are constitutional limitations on the discretion of school boards to review and remove books and materials from school libraries.

Selection and censorship are distinguishable. Selection is a process whereby specific materials are chosen from all available materials, limited only by educational considerations, budget, and space. Censorship, on the other hand, permanently limits access to

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[121] Ibid.

[122] E.C. Bolmeier, School in The Legal Structure, (The W.H. Anderson Company, Cincinnati, Ohio), 1973, p.100.

[123] Julia Turnquist Bradley, "Censoring the School Library: Do Students Have the Right to Read", Connecticut Law Review, (Spring, 1978): 757.

books and materials based on the value or prejudice of an individual or group.[124] An article in the Connecticut Law Review states:

> A case in which a school board seeks to censor library books provides the court with an ideal opportunity to apply principles of academic freedom to secondary schools, without judicially mandating a particular theory of educational purpose and without altering the traditional structure of American education.[125]

Recent decisions illustrate that courts have divided opinions censorship by school boards. Although courts generally uphold school boards in the day-to-day administration of schools, recent case law has established a trend toward upholding academic freedom for teachers and the right to receive information by students.[126]

Justice Oliver Wendell Holmes identified the library as "a marketplace of ideas" as early as 1919.[127] Recent Supreme Court decisions support the constitu-

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[124] Ibid.

[125] Ibid.

[126] Bryson, supra note #81, p. 85.

[127] Abrams v. United States, 250 U. S. 616, 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919).

tional right to receive information. In the 1967 Keyishian decision, the Court stated:

> ...an education system best serves democracy when it teaches through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues rather than through any kind of authoritative selection.[128]

The Burger Court addressed the issue of censorship in public schools in the 1976 case cited as Minarcini v. Strongsville City School District.[129] The Court upheld the ruling of the Sixth Circuit Court of Appeals when it refused to review the case. The Sixth Circuit ruled neither the state nor the school board is required to establish libraries in schools. Once established a library becomes a privilege that cannot be withdrawn because of political or social tastes of the school board. The court further ruled that library books can be removed only for constitutionally allowable reasons.[130] To do otherwise is a violation of a student's

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[128]Keyishian v. Board of Regents, 385 U. S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

[129]Minarcini v. Strongsville City School District, 384 F. Supp. 698 (N.D. Ohio 1974, aff'd in part, rev'd in part, 541 F. 2d 577 (6th Cir. 1976).

[130]Ibid.

First Amendment rights to receive information.[131]

The most recent case heard by the Burger Court concerning censorship was Board of Education, Island Trees Union Free School District No. 26 v. Pico.[132] The Court noted that the First Amendment limits a board's discretion to remove books from school libraries. While local boards have broad discretion in the management of school affairs, that discretion must be exercised in a manner compatible with the First Amendment. The rights of students must be considered. While this must be done in light of special characteristics of the school environment, the special characteristics of the school library make that environment especially appropriate for the recognition of First Amendment rights. The court ruled that the board might rightfully claim absolute discretion in curriculum matters. That discretion, with its regime of voluntary inquiry, cannot extend beyond the compulsory environment of the classroom.[133]

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[131] Ibid.

[132] Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U. S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d435 (1982).

[133] Ibid.

Summary

Five major issues have been addressed in this chapter concerning the constitutional rights of public secondary and elementary students. They are: (1) the right to due process, (2) the right to free speech, (3) the right to religious freedom, (4) the right to freedom from illegal search and seizure, and (5) the right to receive information and ideas. Based on an analysis of the cases which came before the Burger Court for interpretation, the Court most often favored the authority of school administrators to maintain control over the public schools in the United States. The Court often expresses reluctance to become entangled in the daily school operation in which school boards and school administrators are vested with authority. However, it is clear that the Court will become involved if a student is denied his constitutional right to due process. The Tinker[134] case remains the staunch precedent on which many major educational decisions have been based since 1968.

Clearly, the Burger Court was committed to the concept of "separation of church and state." The tri-

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[134]Tinker v. Des Moines, supra note #5.

part test, developed by the Court in 1971, remains the Court's primary judicial First Amendment religious establishment standard.[135] However, the 1983 Mueller[136] decision resulted in the emergence of a conflicting judicial philosophy from the Burger Court. This decision, in effect, reversed more than a decade of decisions concerning tax credits, parental reimbursements and parental tax deductions.

The Burger Court also clarified that public school students are not entitled to the same constitutional considerations as adults. In New Jersey v. T.L.O.[137], a search and seizure case, the Burger Court ruled that a less exacting "reasonable suspicion" standard is more appropriate for the school setting.[138]

The Burger Court set the standard for the removal of books from school libraries in the Pico[139] case in 1982. The Court noted that the First Amendment limits

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[135] Sloan v. Lemon, supra note #88.

[136] Mueller v. Allen, supra note #103.

[137] New Jersey v. T.L.O., supra note #115.

[138] Ibid.

[139] Board of Education v. Pico, supra note #132.

a board's discretion to remove books from school libraries. Removal of books from a school library must not be predicated on personal, political, or religious ideologies.

Thus, the Burger Court leaves the American judicial scene with conflicting judicial philosophies. One is a philosophy which gives school administrators great leeway in administering the nation's public schools; the other is a philosophy that recognizes the basic right of students to the protection of the United States Constitution.

CHAPTER IV

ANALYSIS AND REVIEW OF UNITED STATES SUPREME COURT DECISIONS 1969 -1986

This chapter presents an analysis and review of United States Supreme Court decisions rendered by the Burger Court from 1969 to 1986. An overview of each category in Chapters One and Three is presented. These categories are: (1) right to due process, (2) right to free speech, (3) right to religious freedom, (4) right to freedom from illegal searches and seizures, and (5) right to receive information and ideas. An overview and discussion of each case is presented beginning with a review of the facts subsequent to each case. Categories and cases are listed below:

1. **Right to Due Process:**

   Goss v. Lopez (1975).
   Wood v. Strickland (1975).
   Carey v. Piphus (1978).
   Ingraham v. Wright (1977).

2. **Right to Free Speech:**

   Bethel School District v. Fraser (1986).

3. **Right to Religious Freedom:**

   Lemon v. Kurtzman (1971).
   Lemon v. Kurtzman (1973).
   P.E.A.R.L. v. Nyquist (1975).
   Levitt v. P.E.A.R.L. (1975).
   Meek v. Pittenger (1975).

Wolman v. Walter (1977).
P.E.A.R.L. v. Regan (1980).
Mueller v. Allen (1983).
Grand Rapids School District v. Ball (1985).
Aguilar v. Felton (1985).
Wallace v. Jeffree (1985).

4. **Right to Freedom from Illegal Searches and Seizures:**

New Jersey v. T.L.O. (1985).

5. **Right to Receive Information and Ideas**

Minarcini v. Strongsville City School District (1976).
Board of Education, Island Trees Union Free School District No.26 v. Pico (1982).

Only decisions from the United States Supreme Court are reviewed which influence the constitutional rights of students. These decisions are important because they establish significant llegal precedents in education.

Right to Due Process (Amendment XIV)

The right to due process is protected by Amendment XIV of the United States Constitution. Goss v. Lopez, Wood v. Strickland, Carey v. Piphus, and Ingraham v. Wright, the four cases presented in this category, are significant because these cases support the right to due process for public elementary and secondary students. These cases emphasize that the state's interest in education and the welfare of children must be bal-

anced against the constitutional rights of students. Furthermore, these cases clearly establish that students are entitled to the protection of the Constitution of the United States.

Goss v. Lopez

419 U.S. 565,
95 S. Ct. 729
42 L. Ed. 2d 725 (1975)

Facts

This case came on an appeal lodged by school administrators of the Columbus, Ohio Public School System. The appeal concerned a decision by the federal district and circuit court of appeals regarding due process of law as it relates to the suspension of students. The lower courts ruled that appellees, who were high school students in the Columbus School system, had been denied their constitutional rights to due process following a suspension from high school. The facts of the case reveals that students were not given a hearing prior to the suspensions or within a reason-

able time thereafter.[1]

The school administrators appealed the lower court decisions based on the contention that there is not any constitutional right to an education at public expense, and, therefore, students suspended from school were not protected by the due process clause. They contended that even if the right to a public education were protected by the due process clause, it could only be considered when an individual is subjected to a severe detriment or grievous loss. In this instance, the school officials contended that the ten-day suspension was neither severe nor grievous.[2]

Decision

The United States Supreme Court held, in a 5 - 4 decision, that education was a property right protected by the United States Constitution. Chief Justice Burger, along with Justices Powell, Blackmun, and Rehnquist dissented. In delivering the opinion of the Court, Justice White stated:

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[1] Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 725 (1975).

[2] Ibid.

> Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred.[3]

The Court outlined the type of process that is due to students who are threatened with suspension. The Court was very careful not to get involved with debating the merits of suspension or the right of the school officials to suspend students. The Court did state that the school must provide an informal hearing procedure for any student who is threatened with suspension in order that he might have an opportunity to explain his version of the facts.

Discussion

This decision confirmes that once a state establishes a public school system; students may not be excluded from the system without being afforded the right to due process. This right is provided by the Due Process Clause of the Constitution in Amendment I. Even a

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[3] Ibid.

short term suspension cannot be imposed on a student without providing him a minimum due process hearing.

Wood v. Strickland

416 U. S. 935,
95 S. Ct. 1932,
40 L. Ed. 2d 285 (1974)

Facts

What originated as a "prank" developed into the case of Wood v. Strickland.[4] Two sixteen-year-old girls "spiked" the punch at a school function at the urging of fellow classmates. The punch was served without anyone's noticing the caper. Nevertheless, the girls were suspended from school for violating a school regulation. As a result of the disciplinary action, the girls sought judicial relief from a district court.

The District Court supported the school board on the grounds that the board was "immune from damage suits absent proof of malice in the sense of ill will

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[4]Wood v. Strickland, 416 U. S. 935, 94 S. Ct. 1932, 40 L. Ed. 2d 285 (1974).

toward respondents."[5] The girls appealed to the Eighth Circuit Court of Appeals. The Eight Circuit Court of Appeals ruled that the facts showed a violation of substantive due process.

Decision

On appeal to the United States Supreme Court, the Court ruled 5 - 4 that the girls had not been afforded due process of law and that school board members, as individuals, are not immune from liability for compensating damages under the Civil Rights Act of 1871. Justice White wrote the majority opinion for the Court. He was joined in the majority by Justices Douglas, Brennan, Stewart, and Marshall. Justice White wrote in part:

> Absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or other wise inexcusable deprivations....
>
> A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his ac-

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[5] Ibid.

> tion cannot reasonably be characterized as being in good faith.[6]

Discussion

Wood v. Strickland establishes legal precedent for school board members and school administrators, who make and enforce rules and regulations leading to statutory or constitutional violations, to be held liable for monetary damages under Section 1983 of the Civil Rights Act of 1871. School officials may, however, possess "good faith" immunity. In establishing a standard for "good faith" immunity, The Court stated:

> The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional 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. To be entitled to a special exemption from the categorical remedial language of Section 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students , must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic unquestioned con-

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[6] Ibid.

stitutional rights of his charges.[7]

Carey v. Piphus

435 U. S. 237,
98 S. Ct. 1042,
55 L. Ed. 2d 252 (1978)

Facts

Respondent Jarius Piphus brought suit against the principal of the Chicago Vocational High School because of an incident that occurred during the 1973-74 school year. On January 23, 1974, faculty members observed Piphus and another student standing on the periphery of the school campus. The faculty members thought the boys were passing a marijuana cigarette back and forth between each other. When approached, by the faculty members, the two boys disposed of the cigarette. One of the faculty members testified that the odor of marijuana was still in the air when he got near the boys. He also observed that Piphus passed a pack of cigarette papers to the other boy.

As a result of the incident, both students received a twenty-day suspension for the possession of drugs. The students argued that they had not been smoking

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[7] Ibid.

marijuana, but the suspension was still imposed. Upon receiving notice that her son had been suspended, the mother met with the principal to discuss the reasons for the suspension. Subsequently, the mother filed suit on behalf of her son under Section 1983 of the Civil Rights Act of 1871.

The District Court held that both students had been suspended without procedural due process, but declined to award damages because:

> ...the record is completely devoid of any evidence which could even form the basis of a speculative inference measuring the extent of their injuries. Plaintiffs' claims for damages therefore fail for complete lack of proof.[8]

On appeal, the Court of Appeals reversed and remanded the decision holding that the District Court had erred in not granting declaratory and injunctive relief, and found that:

> ...even if the District Court found on remand that respondents' suspensions were justified, they would be entitled to recover substantial nonpunitive damages simply because they had been denied procedural due process.[9]

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[8] Carey v. Piphus, 435 U. S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978).

[9] Ibid.

Decision

On appeal to the United States Supreme Court, the Court narrowed the question to whether or not "damages should be presumed to flow from every deprivation of procedural due process."[10] The question facing the Court was, "Is the defendant entitled to recover substantial nonpunitive damages or only nominal damages?"[11] The Court never questioned the assertion of the lower court that the procedural due process rights of the defendant were denied.

Justice Powell rendered the opinion of the Court in which Justices Burger, Brennan, Stewart, White, Rehnquist, and Stevens joined. Justice Marshall concurred with the decision and Justice Blackmun took no part in the consideration or decision of the case. The Court held that damages should be awarded only to compensate actual injury, or in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights. The Court ruled that the students were entitled to recover only nominal damages which the

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[10] Ibid.

[11] Ibid.

Court set at $1.00.12

Discussion

The respondent's argument is twofold: (1) that substantial damages should be granted under Section 1983 for the deprivation of a constitutional right, whether or not any injury was caused, and (2) that every deprivation of constitutional rights, in this case procedural due process, may be presumed to induce some injury. The petitioners argued that "unless the respondents prove that they actually were injured by the deprivation of procedural due process, they are entitled at most to nominal damages."13

Justice Powell wrote in part:

> ...that although mental and emotional distress caused by the denial of procedural due process itself is compensable under Section 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused...It remains true to principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights...

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[12] Ibid.

[13] Ibid.

> Because the right to procedural due process is absolute in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. We therefore hold that, if pensions were justified, respondents nevertheless will be entitled to recover nominal damages, not to exceed one dollar, from petitioners.[14]

Ingraham v. Wright

430 U. S. 651,
97 S. Ct. 1401,
51 L. Ed. 2d 711.

Facts

This case involved two junior high school students, who challenged the paddling they had received at Drew Junior High School in Dade County, Florida. The parents of the boys filed suit on behalf of the boys. James Ingraham and Roosevelt Andrews received a paddling from school principal, Willie J. Wright. The paddling Ingraham received was severe enough to produce a bruise which required medical attention and absenteeism. Andrews was paddled numerous times for minor infractions during the year. One punishment rendered his

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[14] Ibid.

arm useless for a week. Sixteen Drew Junior High School students testified that the paddlings received by Ingraham and Andrews were not unusual at the school.[15]

The petitioners challenged the punishment and the statutory authorization for using it as cruel and unusual punishment under the provisions of the Eighth Amendment. The Eighth Amendment is applied to the states through the Fourteenth Amendment of the United States Constitution. The punishment was also challenged as a violation of procedural due process.[16]

A panel of the Fifth Circuit Court of Appeals reversed the opinion of a lower district court finding:

> ...the severity of the paddlings at Drew was 'excessive' in a constitutional sense....and generally violated the Eighth Amendment requirement that punishment not be greatly disproportionate to the offenses charged.[17]

However, upon a rehearing before the full panel of

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[15]Frank R. Kemerer, and Kenneth L. Deutsch, Constitutional Rights and Student Life: Value Conflict in Law and Education, Cases and Materials, (West Publishing Company, St. Paul, Minnesota), 1979, pp. 376-377.

[16]Ibid.

[17]E. C. Bolmeier, Legality of Student Disciplinary Practices, (The Michie Company, Charlottesville, Virginia), 1976, pp. 82-83.

judges of the Fifth Circuit, the lower court's decision was affirmed.

Decision

On appeal to the United States Supreme Court, the Court affirmed the decision of the lower court and held that "the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools."[18] The Court further held:

> ...that the due process clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law.[19]

Discussion

Even though the Court has ruled that teachers have the right to administer corporal punishment, local boards of education or administrative rules can seriously limit its use. Corporal punishment is forbidden in the states of New Jersey and Massachusetts by sta-

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[18] Ingraham v. Wright, 430 U. S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711.

[19] Ibid.

tute; in Maryland by policy of the State Board of Education, and Pennsylvania unless approved by the local board.[20]

Right to Free Speech (Amendment I)

The question of free expression has concerned educators ever since the Warren Court rendered their far-reaching decision in the 1969 Tinker[21] case. The Tinker[22] case established the basis on which student expression must be judged. Many school administrators felt that the opinions of the lower courts were being interpreted too broadly, "especially in cases where, unlike Tinker[23], no kind of political speech was involved."[24] School attorneys often advised against taking disciplinary action against students who committed acts that were contrary to the school administrators'

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[20] H.C. Hudgins, Jr., and Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions, (The Michie Company, Charlottesville, Virginia) 1985, p. 291.

[21] Tinker v. Des Moines Independent School District, 393 U. S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731, (1969).

[22] Ibid.

[23] Ibid.

[24] A Legal Memorandum, "U.S. Supreme Court Reviews Student Freedom of Speech," September 1986, p. 1.

concept of good conduct. These acts usually did not involve the "transmission of ideas," but "merely the desire to elicit a laugh or a smile from other students, as in the case of T-shirts bearing words or phrases of a humorous, but often sexual, nature."[25]

School administrators were often reluctant to impose disciplinary measures on these students because of the language used in the Tinker[26] case concerning material and substantial disruption. This reluctance was based on a 1971 United States Supreme Court decision cited as Cohen v. California.[27]

> Indeed, as demonstrated by the Cohen case, even the most offensive four-letter words do not, in themselves, meet the standard of obscenity in the absence of a sexual meaning or reference.[28]

It was against this backdrop that the Burger Court rendered its landmark decision in the area of free expression in public schools.

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[25] Ibid.

[26] Tinker v. Des Moines, supra note #21.

[27] Cohen v. California, 403 U. S. 15 (1971).

[28] A Legal Memorandum, supra note #24.

Bethel School District v. Fraser

478 U. S._____ (1986).

Facts

This case originated when Mathew Fraser, a senior at Bethel High School, Pierce County, Washington, spoke in a student assembly on behalf of another student, campaigning for an office on the student council. Fraser's speech took the form of an "extended sexual metaphor." The students attending the assembly indicated that they recognized the intent of the message by graphically simulating the various types of behavior referred to metaphorically by Fraser. Fraser was aware of the possibility that his speech may have violated school rules after consulting with three teachers for their opinion of the speech prior to its delivery. Two of the teachers indicated to Fraser that the speech was inappropriate and should not be delivered to the student body.[29]

Fraser was suspended from school by the assistant

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[29] Ibid.

principal and informed that he was in violation of school rules forbidding the use of obscene language or gestures. In addition, Fraser's name was removed from a list of candidates who were to deliver a commencement speech at the school's graduation ceremonies.

Fraser filed suit in the United States District Court for the Western District of Washington. Upon review of the case the District Court ruled that Fraser's First Amendment rights had been violated. The court also ruled that the removal of Fraser's name from the list of commencement speakers was a violation of his Fourteenth Amendment right to due process because there was not any written rule pertaining to this action in the school's disciplinary code. In addition, the court ruled that the school's rule against the use of obscene language was unconstitutionally vague.[30]

On appeal to the Ninth United States Circuit Court of Appeals, the decision of the lower court was affirmed. The court compared Fraser's speech with the wearing of the black armband by Mary Beth Tinker and refused to distinguish between the two events. The court also rejected the school system's claim that it had an

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[30] Bethel School District v. Fraser, 478 U. S. ____ (1986).

interest in protecting an "essentially captive audience of minors from lewd and indecent language, even in a school-sponsored setting."[31]

Decision

On appeal to the United States Supreme Court, the decision of the lower courts was reversed by a vote of 7 - 2. Justices Marshall and Stevens dissented. Chief Justice Burger rendered the opinion for the Court. He stated in part:

> ...public education must prepare pupils for citizenship in the Republic...it must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation...
>
> The First Amendment guarantees wide freedom in matters of adult public discourse. ... It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, that the same latitude must be permitted to children in a public school.
>
> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the con-

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[31] A Legal Memorandum, supra note #24.

stitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." Justice Black, dissenting in Tinker made a point that is especially relevant in this case:

> I wish, therefore,....to disclaim any purpose....to hold that the federal Constitution compels the teachers, parents and elected school officials to surrender control of the American public school system to public school students.[32]

Discussion

The Fraser[33] decision has far reaching implications. For the second time in two years, the Court ruled that a student's constitutional rights are not "coextensive" with those of adults. The Court has stated that it believes the proper function of the public school system is to teach certain fundamental values. This decision, along with the T.L.O.[34] decision, indicates that the Court may be taking a new look at the application of the Constitution to public school students.

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[32] Bethel v. Fraser, supra note #30.

[33] Ibid.

[34] New Jersey v. T.L.O., 105 S. Ct. 733, 83 L. Ed. 2d 19 (1985).

> It is possible, for example, that the language of the Fraser[35] decision might support greater control of curricular materials used in the classroom, retention of books in the school library, or the content of student-prepared school publications, all issues which have been the subject of litigation in the past two decades.[36]

Right to Religious Freedom
(Amendment I)

The decade of the seventies brought an intensive pace in church-state legislation and resulting litigious activities. The emotional involvement of some state legislatures, religious leaders and lay citizens encapsulating the New Right Religious Fundamentalist and right-wing political groups, was unprecedented in American history. There was often open defiance of Supreme Court decisions by some state legislatures promulgating statues which clearly violated constitutional permissiveness. These state legislative acts continued to run into the judicial idealogical juggernaut Lemon I[37] tripart test.

The Burger Court rendered numerous decisions concerning church-state relations. However, the landmark

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[35] Bethel v. Fraser, supra note #30.

[36] A Legal Memorandum, supra note #24, pp. 5-6.

[37] Lemon v. Kurtzman, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, (1971).

case is the Lemon v. Kurtzman[38] case of 1971. Other cases, i.e. P.E.A.R.L. and Levitt, even though considered to be landmark cases in their own right, were decided on the basis of the decision rendered in the Lemon I[39] case. I have chosen several cases to discuss in this area because of their precedent-setting impact on the judicial process. While each case is important in its own right, attention should be given to the Lemon I[40] case because it established a foundation for the development of the succeeding cases. Also, focus should be given to Mueller v. Allen;[41] because of its potential to open the doors for a dual educational system in the United States.

Lemon v. Kurtzman

403 U. S. 602,
91 S. Ct. 2105,
29 L. Ed. 2d 745,
404 U. S. 876 (1971)

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[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] Mueller v. Allen, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983).

Facts

Lemon v. Kurtzman[42] was combined with a companion case DiCenso v. Earley.[43] Legislative acts in Pennsylvania and Rhode Island were at issue. This legislation provided for non-public school teachers to receive salary supplements from state coffers. In both states, private or parochial schools had to meet specific guidelines in order to qualify for the state funds. In the state of Pennsylvania, a Federal District Court ruled that the Act violated neither the Establishment Clause nor the Free Exercise Clause. In the state of Rhode Island, a Federal District Court ruled that the Act violated the Establishment Clause because of excessive entanglement between church and state. Both decisions were appealed to the United States Supreme Court where they were combined for consideration.

Decision

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[42] Lemon v. Kurtzman, supra note #37.

[43] DiCenso v. Earley, 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d. 745, (1971).

The United States Supreme Court judged both legislative acts as unconstitutional by a 7-1 and an 8-1 vote, respectively. Chief Justice Burger wrote the opinion for the Court. He stated in part:

> A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment....Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[44]

Chief Justice Burger explains what the Court means by the term entanglement in the following passage:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purpose of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.[45]

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[44] Lemon v. Kurtzman, supra note #37.

[45] Ibid.

Discussion

The Lemon I case establishes the basis for a great deal of litigation throughout the decade of the seventies. The tripart test is used repeatedly to determine the constitutionality of various issues before the courts. The almost-unanimous decision in this case deteriorated to several 5-4 splits in ensuing cases which came before the Court.

Lemon v. Kurtzman,

411 U.S. 192 (1973).

Facts

As a result of the decision in the Lemon I case, suit was brought before the Court concerning the payment of services rendered prior to the date when the legislative action was declared unconstitutional in Lemon I.

Decision

On April 2, 1973, the Supreme Court in a 5 - 3 decision (Justice Marshall did not participate.), sustained the concept of payment to religious elementary and secondary schools for services rendered prior to the date when the legislative enactment was declared

unconstitutional.[46]

Discussion

Justice Burger, writing the Court opinion, insisted there was no bad faith on behalf of state officials and sectarian schools in payment for expenses incurred prior to the Court's decision.

Committee for Public Education and Religious Liberty v. Nyquist.

93 S. Ct. 2955 (1973)

Facts

The Nyquist case developed on appeal from the Federal District Court, Southern District, New York. The central issue was New York legislative activities establishing three financial grant programs for private and religious elementary and secondary schools. The three programs were: (1) Section I provides monetary grants to "qualifying" (a qualifying school is a non-public school serving low income families) private and religious non-public schools for "maintenance" and for "repair" of school facilities and equipment, thereby insuring student's health, safety and welfare. The

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[46]Lemon v. Kurtzman, 411 U.S. 192 (1973).

legislative formula provided $30 per pupil ($40 if the school facilities were 25 years old) on an annual basis. (2) Section II developed a tuition reimbursement plan, ($50 per pupil for elementary schools and $100 for secondary schools -- no grant to exceed 50% of actual tuition) for parents whose children attended private or religious schools with annual incomes of less than $5,000. (3) Sections III, IV, and V provided tax relief for parents unable to qualify under Section II. Specifically, this section allowed parents to deduct a fixed amount from adjusted gross income for each child attending non-public schools.

The New York Legislature maintained that the statute was: (1) secular, neutral, and non-ideological; (2) necessary for providing alternative education systems for a pluralistic society; (3) necessary because a sharp decline in non-public schools would create an educational holocaust caused by swelling enrollments and affecting quality of public education.

Decision

On June 25, 1975, the Court ruled the statute unconstitutional in a 6 - 3 decision. Justice Powell writing for the Court maintained that "it simply cannot

be denied that this action has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools." Justice Powell argued that the statute was a clear violation of the "Establishment Clause."[47]

Discussion

The state presses two basic arguments: (1) tuition reimbursement to parents was constitutionally permissible; (2) the plan made possible "low income parents" exercising their First Amendment rights for religious education for their children. Regardless of legislative human consideration and constitutional explanations, Justice Powell maintained, "The state has taken a step which can only be regarded as one 'advancing' religion."[48]

Levitt v. Committee for Public Education and Religious Liberty.

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[47] Committee for Public Education and jReligious Liberty v. Nyquist, 93 S. Ct. 2955 (1973).

[48] Ibid.

93 S.Ct. 2914 (1973).

The Levitt case developed on appeal from the Federal District Court, Southern District, New York where a three judge panel ruled as unconstitutional a New York statute. The statute appropriated $28 million dollars for reimbursement to non-public schools for "mandated services," specifically:

> ...for expenses of services for examinations and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examination, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law.[49]

Decision

On June 25, 1973, the Court sustained the lower court's ruling by deciding that the act was a violation of the "Establishment Clause" in an 8 - 1 decision (Justice White dissented). Justice Burger wrote the majority opinion maintaining:

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[49] Levitt v. Committee for Public Education and Religious Liberty, 93 S. Ct. 2819 (1973).

> ...we are left with no choice under Nyquist but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separate from the sectarian activities.50

Discussion

Justice Burger rejects appellates' arguments that the statute was within the spirit and limits of Everson and Allen, and that "mandated services" should have state assistance. Justice Burger implies that: (1) bus rides and textbooks were substantially different when compared with teacher tests, which were "an integrated part of the teaching process,"[51] and (2) a state may mandate lighting and sanitary facilities with no compulsion for financial assistance. Continuing, Justice Burger says "lump sum payments under Chapter 138 violate the establishment clause."[52]

Sloan v. Lemon.

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[50] Ibid.

[51] Ibid.

[52] Ibid.

43 S. Ct. 2982 (1973)

Facts

Immediately following the Lemon I decision, the Pennsylvania legislature attempted to bypass the Courts directive by passing into law the Parent Reimbursement Act which granted parents of children attending private and parochial schools tuition reimbursements. The case came on appeal from the Federal District Court, Eastern District where the Pennsylvania statute was declared unconstitutional by a three-judge panel. The statute provided partial payment ($75 for elementary school children and $150 for secondary school children) to parents whose children attended non-public schools. The statute was funded from the state "cigarette tax" and was administered by a five-member "Pennsylvania Parent Assistance Authority."

The statute provided no "administrative" or "accountable" features in curriculum development, personnel and instruction policies for non-public schools.

Decision

Justice Powell, writing the majority opinion (6 - 3, Justices Burger, White, and Rehnquist dissenting) pointed specifically to the Supreme Court Decision in Lemon I. The constitutional issue, said Justice Powell, is:

> Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian school, or as a reward for having done so, at bottom, its intended consequence is to preserve and support religious-oriented institutions.[53]

The Pennsylvania statute, Justice Powell maintained, is "financial support of religion," thereby, unconstitutional.[54]

Discussion

Pennsylvania's Legislature cloaks the statute in general secular splendor such as : (1) non-public school children reduce cost of public schools; (2) there is a severe hardship on parents of non-public school children; and (3) if Pennsylvania's 500,000 non-public school children were to be "dumped" in the

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[53] Sloan v. Lemon, 43 S. Ct. 2982 (1973)

[54] Ibid.

public schools, annual operating costs would be extreme. Pennsylvania's Legislature acknowledges that parents of non-public school children provide a vital educational service to the state and prevent "an otherwise intolerable public burden."[55]

Parents of secular (non-religion), non-public school children asked the Supreme Court to make a distinction between secular and sectarian schools and to declare Pennsylvania's enactment constitutional concerning private secular schools. Justice Powell insisted that there was no distinction - secular and sectarian are distinctions without a difference insofar as Pennsylvania's statute is concerned.[56]

Meek v. Pittenger.

421 U.S. 602 (1975).

Facts

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[55] Ibid.

[56] Ibid.

The Meek case came on appeal from the Federal District Court for the Eastern District of Pennsylvania. At issue was Pennsylvania's legislative efforts to aid religious and private schools. In 1972, the Pennsylvania Legislature established Acts 194 and 195. Act 194 was a general "ausiliary service" statute providing counseling, testing, psychological services, and speech and hearing therapy. Moreover, Act 194 provided teachers and other related services to exceptional children, which included remedial students, and educationally-disadvantaged students. Finally, Act 194 provided for "secular" services currently enjoyed by all public school children.

Act 195 declared that textbooks, instructional materials (such as periodicals, photographs, maps, charts, sound recordings, films, printed or published materials), and instructional equipment (such as projection equipment, recording equipment, and laboratory equipment) be loaned to sectarian and private schools.

The district court, always consistent in church-state decisions, denied relief.

Decision

With Justice Potter Stewart writing for the Court, the United States Supreme Court affirmed in part ("textbook" provision of Act 195) and reversed as "establishment," Act 194 and remaining parts of Act 195. With the exception of the textbook provision, Justice Stewart maintained, "it would simply ignore reality to attempt to separate secular education functions from the predominantly religious role."[57]

Discussion

The 6 - 3 decisions in both Acts do not include the same line-up of Justices. For example, Justices Stewart, Blackmun, Powell, Douglas, Brennan, and Marshall were in the majority in declaring Acts 194 and 195 unconstitutional as "establishment of religion." Obviously, Justices Burger, Rehnquist and White were in the minority on the same issue. However, the "textbook provision" found Justices Burger, White, Rehnquist, Stewart, Blackmun and Powell in the majority, with Justices Douglas, Brennan, and Marshall dissenting.[58]

Circumstances concerning the Meek decision are

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[57] Meek v. Pittenger, 421 U.S. 602 (1975).

[58] Ibid.

construed as devastating to political and religious leaders who seek legislative enactments that support public funds for religious schools. The Court appears to truncate almost every conceivable possibility of "auxiliary services." Yet, that appearance is deceiving, as the historical record indicates.

Wolman v. Walters

97 S. Ct. 2593
433 U.S. 229 (1977)

Facts

This case, decided on June 24, 1977, arrived on appeal from the Federal District Court for the Southern District of Ohio. At issue was the constitutionality of Ohio Rev. Code 3317.06 (Supp. 1976) and all the provisions thereof authorizing financial aid to sectarian schools. The statute specifically authorized: (1) the purchase of secular textbooks that were used in public schools and approved by the school superintendent for loan to pupils or parents on request made to the

non-public school;[59] (2) provisions for speech and hearing diagnostic services, diagnostic psychological services (personnel being local school board employees) and physicians' services with all treatment administered at the discretion of the sectarian school;[60] (3) provisions for specialized therapeutic, guidance, and remedial services by employees of local school boards and/or State Department of Health, administered in public schools, public centers, or in secular mobile units located off sectarian school premises;[61] (4) provisions for the purchase and loan to pupils or parents of instructional material and equipment (same materials used in public schools) that are "incapable of diversion to religious use;[62] and (5) provisions for transportation for field trips identical to public schools.[63]

The federal district court approved the constitutionality of textbooks; standardized testing and scoring services; and diagnostic, therapeutic, and remedial

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[59] Wolman v. Walter, 97 S. Ct. 2613, 433 U.S. 263 (1977)

[60] Ibid.

[61] Ibid.

[62] Ibid.

[63] Ibid.

services. Provisions for instructional materials, equipment, and field trips were ruled as unconstitutional.

Decision

On June 24, 1977, the United States Supreme Court ruled on each of the issues with a separate vote. The Court ruled as constitutional (1) textbooks for religious elementary and secondary schools (5-4), (2) testing and scoring as administered in religious elementary and secondary schools (5-4), (3) diagnostic services in religious elementary and secondary schools (8-1), (4) therapeutic services, i.e. psychological, speech, and hearing services in religious elementary and secondary schools (7-2), and (5) therapeutic services i.e. guidance and counseling services in religious elementary and secondary schools.[64]

The following provisions were found unconstitutional: (1) instructional materials and equipment for religious elementary and secondary schools, and (2) field trips for religious elementary and secondary

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[64] Ibid.

schools.[65]

Discussion

The Wolman decision is a major landmark case. In reality, the Ohio statute is complex and the Court's Justices line up on many sides of the issues. Wolman's decision signals a new direction. Certainly, the clear position as outlined in Lemon I, Nyquist, Levitt, Lemon III, and Meek, gives way to a new interpretation in Wolman by the Court.

Committee for Public Education and Religious Liberty et el. v. Regan

100 S. Ct. 840
444 U.S. 644 (1980).

Facts

This case was a legislative response to the Supreme Court's Levitt[66] decision in 1973 which struck

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[65] Ibid.

[66] Levitt v. P.E.A.R.L., supra #49.

down a New York statute appropriating public money to private and religious schools for state-mandated testing and reporting services. The new statute sought to remove the flawed, unconstitutional provision. Thus, the new statute did not provide any general reimbursement for preparation, administration, or grading of teacher-prepared tests. The new statute provided only for actual cost in providing secular services including: school enrollment and attendance data and administration of state-prepared examinations. Moreover, the statute provided for auditing payments and verifying services.

Decision

The Seventh Federal District Court in New York initially declared the statute unconstitutional, and the United States Supreme Court, on appeal, remanded the case based on the Wolman decision. On remand, the District Court, held the statute constitutional.[67]

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[67]Committee for Public Education and Religious Liberty et el. v. Regan, 100 S. Ct. 849 (1980).

Discussion

The Court, with Justice Byron White writing the majority (5-4) opinion, insisted that the statute arrangement did not violate the First Amendment Establishment Clause. The central issue was whether or not lump sum payments, as provided by New York statute, could be made to private and religious elementary and secondary schools without violating the First Amendment advancement clause and excessive government entanglement provision of the Court's tripartite test. The answer was that New York may do so.

Mueller et al. v. Allen et al.

13 S. Ct. 3062,
77 L. Ed. 2d 721 (1983).

Facts

Mueller v. Allen[68] may be the most important religious school decision since the Court undertook the responsibility for deciding religious issues in the

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[68] Mueller v. Allen, supra note #41.

public schools in 1925.[69] The case originated from a Minnesota state statute which allows state taxpayers, in computing their state income tax, to deduct expenses incurred in providing "tuition, textbooks and transportation" for their children attending an elementary or secondary school. A group of Minnesota taxpayers brought suit in Federal District Court against the Minnesota Commissioner of Revenue and those parents who had taken the tax deduction for expenses incurred while sending their children to parochial schools. The petitioners charged that the statute violated the Establishment Clause of the First Amendment by providing financial assistance to religious institutions. The District Court ruled for the respondents "holding that the statute is neutral on its face and in it application and does not have a primary effect of either advancing or inhibiting religion."[70] The Court of Appeals affirmed the decision of the District Court.

Decision

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[69] Pierce v. Society of Sisters, 268 U. S. 510, 45 S Ct. 571 (1925).

[70] Mueller v. Allen, supra note #41.

On appeal to the United States Supreme Court, the decision of the lower courts was affirmed by a vote of 5 - 4. Joining in the majority opinion were Chief Justice Burger and Associate Justices Rehnquist, White, Powell, and O'Connor. Associate Justice Marshall filed a dissenting opinion in which Brennan, Blackmun, and Stevens joined.[71] Justice Rehnquist wrote the majority opinion for the Court maintaining that a "state's decision to defray the cost of educational expenses incurred by parents - regardless of the type of schools their children attend - evidences a purpose that is both secular and understandable.[72]

Justice Marshall filed a vehement dissenting opinion with which Justices Brennan, Blackmun, and Stevens joined. Justice Marshall stated in part:

> The Establishment Clause of the First Amendment prohibits a State from subsidizing religious education, whether it does so directly or indirectly....The majority today does not question the continuing vitality of this Court's decision in Nyquist. That decision established that a State may not support

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[71] Ibid.

[72] Ibid.

> religious education either through direct grants to parochial schools or through financial aid to parents of parochial school students....Nyquist also established that financial aid to parents of students attending parochial schools is no more permissible if it is provided in the form of a tax credit than if provided in the form of cash payments....The Minnesota tax statute violates the Establishment Clause for precisely the same reason as the statute struck down in Nyquist: it has a direct and immediate effect of advancing religion.73

Discussion

The Mueller[74] decision can open the door for other states to adopt similar legislative acts. Such legislative acts have the potential to drain, from the public schools, students of middle-class parents. Without the tax deductions allowed by such acts, many of these parents will not be financially able to send their children to private or parochial schools.

This decision caused many to fear that the wall between church and state had fallen. However, the fear vanished in two 1985 Court decisions: Grand Rapids v. Ball[75] and Aguilar v. Felton[76]. These decisions once

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[73] Ibid.

[74] Ibid.

[75] Grand Rapids v. Ball, 105 S. Ct. 3216.

[76] Aguilar v. Felton, 105 S. Ct. 3232.

again struck down Michigan and New York laws as unconstitutional. These laws are designed to provide supplementary educational services to children attending private religious schools.[77] Thus, the question of governmental aid to private and religious schools is still not settled.

Grand Rapids v.Ball

105 S. Ct. 3216 (1985)

Facts

This case came out of the Sixth Circuit Court of Appeals. At issue was a Grand Rapids, Michigan school board policy. This policy provided shared time and community education program classes to religious elementary and secondary schools in religious school buildings. The policy was declared unconstitutional by the Sixth Circuit Court of Appeals. The school board policy included provisions: (1) to pay the religious

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[77] Deskbook Encyclopedia of American School Law, (Data Research, Inc., Rosemont, Minnesota), 1986, pp. 206 - 207.

schools $6.00 per elementary school room per week and $10.00 per secondary school room per week, (2) for the removal of religious symbols such as crucifixes or artifacts (Religious symbols or artifacts abounding in adjoining corridors, surrounding rooms and connecting buildings were not removed), (3) for the posting of signs designating a specific room as a public school classroom, and (4) for the accommodation of the non-public school calendar.[78]

Decision

The Supreme Court, in a 5-4 decision, struck down the shared-time program as unconstitutional. Justice Brennan, writing for the Court, concluded that both the Community Education and Shared-Time programs have the primary effect of religious advancement in three ways: (1) state-paid teachers working in a pervasively religious environment "may subtly or overtly indoctrinate...students in particular religious tenets;"[79] (2) the symbolic union of church and state--public-funded

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[78] Grand Rapids v. Ball, supra note #75.

[79] Ibid.

instruction within a religious school--"threatens to convey a message of state support for religion to students and to the general public;"[80] and (3) the publicly funded programs "in effect subsidize the religious functions of a parochial school...."[81]

Discussion

Justice Brennan acknowledges that the majority of the teachers in the community education program are employed by the religious schools. Even though the Grand Rapids School Board employed all teachers in the shared-time program, "a significant portion" were previously employed in the religious schools.[82] To further complicate the constitutional question, teachers were expected to serve their religious schools "zealously" while employed by the religious schools, but to jetison religious activities when the secular classes began. Moreover, teachers were expected to perform

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[80] Ibid.

[81] Ibid.

[82] Ibid.

the split sectarian-secular activities with the same students and in the same school rooms.[83]

Aguilar v. Felton

105 S. Ct. 3232 (1985)

Facts

This case was an appeal from the Second Circuit Court of Appeals which addressed the issue of federal funds that were received under Title I of the 1965 Elementary and Secondary Education Act. The funds were to pay salaries of public employees who taught in religious elementary and secondary schools. The 1965 Elementary and Secondary Education Act Title I authorized the Secretary of Education to provide financial assistance to school districts (including private schools) throughout the United States, and to provide assistance to low socio-economic children. The Title I program

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[83] Ibid.

was intended to supplement existing programs, not to create new ones.

Early in 1966, the New York City School Board initiated Title I programs. Classes were taught on the premises of parochial schools with the majority of the children enrolled (82%) in Roman Catholic schools.[84] The Title I programs in religious schools were supervised by the School Board's Bureau of Nonpublic Schools. All professional personnel were directed to avoid religious activities and the use of religious materials in their classrooms. Moreover, they were encouraged to keep contact with religious school personnel to a minimum. Also, religious school administrators "...are required to clear the classrooms used by the public school personnel of all religious symbols."[85]

Decision

Justice Brennan, writing the Court's majority opinion (the Court split 5-4 with Justices Powell, Stevens,

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[84] Aguilar v. Felton, supra note #76.

[85] Ibid.

Marshall, and Blackmun joining Justice Brennan to make the majority), insisted that the New York School Board policy using Title I federal funds for public school teachers to teach in parochial school was unconstitutional as First Amendment establishment.[86] Justice Brennan insisted the established monitoring activities resulted in "...excessive entanglement of church and state."[87]

Discussion

The issues in this case are strikingly similar to those in the Ball case. The Court has consistently held as unconstitutional the expenditure of public tax dollars in secular schools.

Wallace v. Jeffree

105 S. Ct. 2479 (1985).

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[86] Ibid.

[87] Ibid.

Facts

This case came on appeal from Alabama through the District Court, Southern District, where it was dismissed. The Eleventh Circuit Court of Appeals reversed the decision of the District Court in part and remanded the case back to the lower court. The Court of Appeals also denied a rehearing en banc. The case was then appealed to the United States Supreme Court.

In 1981, the Alabama General Assembly enacted legislation authorizing a one-minute period of silence "for meditation or voluntary prayer" in all public schools. There were three parts to the Act: (1) Statute 16-1-20 simply prescribed a child in school had a right to meditate in silence. The federal district court discovered no constitutional flaws with this section. (2) Statute 16-1-20.1 authorizes a period of silence for "meditation or voluntary prayer," and (3) Statute 16-1-20.2 authorized teachers to lead willing students in the following prayer:

> Almighty God, You alone are God. We acknowledge You as the Creator and Supreme Judge of the World. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes

> and in the classrooms of our schools in the name of our Lord. Amen.[88]

Decision

Justice John Paul Stevens, writing the Court's majority opinion (the Court split 6-3 with Justices Burger, White, and Rehnquist dissenting), insists that the Alabama legislative enactment authorizing in public schools a moment of silence for "...meditation or voluntary prayer was an endorsement of religion..." was unconstitutional as religious establishment.[89]

Discussion

The Court has ruled as unconstitutional one of the last vestiges of hope set forth by the religious establishment in America. The Burger Court has struck down every attempt to place any form of prayer into the public schools of America. The wall that separates church and state is certainly intact at the end of the Burger era.

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[88] Wallace v. Jeffree, 105 S. Ct. 2479 (1985).

[89] Ibid.

Right to Freedom from Illegal Searches and Seizures (Amendment IV)

Parents of school children have sought to expand the constitutional rights of their children to be co-extensive with those of adults since the In re Gault[90] decision of 1967. The 1969 Tinker[91] decision appeared to have done just that. However, two recent Supreme Court decisions appear to have halted this contention: New Jersey v. T.L.O.[92] and Bethel School District v. Fraser.[93] The Court cited the dissenting opinion in the Tinker case in stating that the rights of public school students are not necessarily coextensive with those of adults.[94]

The Burger Court had the opportunity to deal with the question of search and seizure and the rights associated with search and seizure in 1985 in the case cit-

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[90] In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[91] Tinker v. Des Moines, supra note #21.

[92] New Jersey v. T.L.O., supra note #34.

[93] Bethel v. Fraser, supra note #30.

[94] Tinker v. Des Moines, supra note #21.

ed as New Jersey v. T.L.O..[95]

New Jersey v. T.L.O.

105 S. Ct. 733,

83 L. Ed. 2d 19 (1985)

Facts

A high school teacher suspected T.L.O., a fourteen year old student, of smoking in the school restroom with a friend. The teacher reported the two students to the assistant principal. T.L.O. denied that she had been smoking. Her friend admitted that she had in fact been smoking. The assistant principal asked to see T.L.O.'s purse and found a pack of cigarettes in it. While removing the cigarettes from her purse, the assistant principal noticed a pack of rolling papers. Assuming that the rolling papers were used for smoking marijuana, he continued to search the purse and found marijuana, a pipe, a large amount of money in one-dol-

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[95]New Jersey v. T.L.O., supra note #34.

lar bills, an index card listing names of people who owed her money, and two letters that implicated her in drug dealing.[96]

The school administration then summoned T.L.O.'s parents and the local police. T.L.O. then admitted that she was guilty of selling and using marijuana. She was successfully prosecuted on a delinquency charge. On appeal to the New Jersey Supreme Court, the conviction was overturned on the basis that the search was unreasonable and that the evidence of the search should have been barred from the trial under the exclusionary rule.[97]

Decision

On appeal to the United States Supreme Court, the Court ruled that the Fourth Amendment's prohibition of unreasonable searches and seizures applies to searches conducted by school officials. The Court further ruled that:

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[96] Ibid.

[97] Ibid.

> The accommodation of privacy interests of school children with substantial need of teachers and administrators for freedom to maintain order in schools does not require strict adherence to requirement that searches be based on probable cause to believe that subject of search has violated or is violating the law; rather, legality of search of student should depend simply on reasonableness, under all the circumstances of the search.[98]

Justice White rendered the opinion for the Court stating in part:

> Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems...Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of school children, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action...Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-

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[98] Ibid.

> teacher relationship...We hold today that school officials need not obtain a warrant before searching a student who is under their authority.[99]
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> ...Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction...This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of school children.[100]

Discussion

The Court, in essence, establishes a two-pronged test of reasonableness in student searches. The school authority must first be convinced that a search of the student will result in the discovery of evidence that the student has violated the law or a school rule. Second, the search must be prompted by the circumstances that led to the search in the first place. In the case of T.L.O., the fact that the assistant principal first found cigarettes and then rolling papers reasonably convinced him to continue the search. This

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[99] Ibid.

[100] Ibid.

decision does not give school administrators the authority to conduct random searches of students.

Right to Receive Information and Ideas (Amendment I)

Extension of constitutional rights to public school students has not been an organized professional movement but has resulted chiefly from case law. The important case of Tinker[101] has been the principal legal influence in establishing a student's right to receive information and ideas. Two important United States Supreme Court decisions which illustrate the legal issues involved in this area are: Minarcini v. Strongsville City School District,[102] and Board of Education, Island Trees Union Free School District No. 26 v. Pico (1982).[103]

Minarcini v. Strongsville City School District

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[101] Tinker v. Des Moines, supra note #21.

[102] Minarcini v. Strongsville City School District, 384 F. Supp. 698, (N.D. Ohio 1974), aff'd in part, rev'd in part, 541 F. 2d 577 (6th Cir. 1976).

[103] Board of Education, Island Tree Union Free School District No. 26 v. Pico, 457 U. S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982).

384 F. Supp. 698 (N.D. Ohio 1974), aff'd in part, rev'd in part, 541 F. 2d 577 (6th Cir. 1976)

Facts

The parents of five students in a high school in Strongsville, Ohio brought action, on behalf of their children, against the Strongsville City School District, the school board, and the superintendent. The central issue was that the school board refused to accept the faculty's recommendation to purchase particular novels for use in the English curriculum, and, removed particular books from the school library. The petitioners claimed constitutional violations by the school district.

The District Court, with Justice Kanpansky writing the opinion, found no constitutional violation. On appeal, the Sixth Circuit Court of Appeals, with Justice Edwards writing the opinion, separated the complaint into two issues: (1) the selection and removal of textbooks, and (2) the removal of library books. The Circuit Court affirmed the District Court's decision upholding the school board's authority to select and remove textbooks. However, Justice Edwards maintained that neither the state nor school board is required to

establish libraries in schools. Once established, a library becomes a privilege that cannot be withdrawn because of political or social tastes of the school board. Justice Edwards further insisted that library books can be removed only for constitutionally allowable reasons. Finally, Justice Edwards determined that the removal of certain library books violated students' First Amendment rights to receive information. He stated: "...the removal of books from a school library is a much more serious burden upon freedom of classroom discussion than the action found unconstitutional in Tinker."[104]

Decision

On appeal to the United States Supreme Court, the Court refused to review the case and affirmed the decision of the lower court. The Circuit Court upheld the school board's authority to select and remove textbooks, while maintaining that library books cannot be removed based on political or social tastes of the board.

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[104] Minarcini v. Strongsville, supra note # 102.

Discussion

A significant factor about this decision is the unquestionable extension of First Amendment rights to school children. The decision rejected the indoctrination concept of education in which schools exist in loco parentis. Instead, Justice Edwards supports students' rights within the philosophical context that the school is a "marketplace of ideas." Justice Edwards asserts that the removal of library books violates the constitutional right of students to know and receive information. Yet, in a contrasting response, Justice Edwards contends that school board action does not significantly hamper teachers' expression.

Board of Education, Island Tree Union Free School District No. 26 v. Pico

457 U. S. 853,
102 S. Ct. 2799
73 L. Ed. 2d 435 (1982).

Facts

School board members attended a conference sponsored by the People of New York United - supposedly a conservative organization composed of parents concerned about the organization and governance of education. A part of the conference focused on the control of textbooks and library books which resulted in a list of books considered to be objectionable. The school board returned home, and, in time, some members began to examine the high school library card catalog to determine which of the objectionable books were in the high school library. In early November, 1975, two school board members, while attending a "Winter School Night," asked the custodian to let them into the school library. While looking through the card catalog searching for books on the list, they were surprised by the school principal. The board members explained their reason for being there and then left the library.[105]

At the end of the February, 1976 school board meeting, the high school principals were asked to remain. A lengthy discussion of the books which appeared on the list of objectionable books prepared by the People of New York United followed. The high school prin-

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[105] Pico v. Board of Education, supra note #103.

cipals and junior high principals were asked to remove the objectionable books from the library shelves. The superintendent objected, and the school board rejected the superintendent's protests. They later agreed to appoint a book review committee. Three months later, this committee recommended that all the books be returned to the libraries. The school board rejected the committee's recommendations with only two exceptions.[106]

A class-action suit was filed in the United States Federal District Court where Judge George C. Pratt dismissed the complaint and ruled in favor of the school board. The petitioners appealed to the Second Circuit Court of Appeals. The Court of Appeals ruled in favor of the petitioners. Justice Sifton wrote the opinion for the Court of Appeals and stated that the case was a violation of the First Amendment because:

> (1) the children's welfare and education were never the real issues for book removal; (2) the school board's reasons for book removal were "confusion" and "incoherence"; (3) school board's informal and dilatory manner and method of procedure; (4) the ex post facto appointment of a book review committee and then ignoring the committee's recommendations; (5) strong professional opposition; and (6) "substantive irregularities....of

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[106] Ibid.

> reviewing works by such generally recognized authors as Swift, the late Richard Wright, and Bernard Malamud, whose book, The Fixer, was, indeed, an assigned high school reading text.[107]

Decision

On appeal to the United States Supreme Court, the decision of the Court of Appeals was affirmed by a 5 - 4 vote. Justices Brennan, Marshall, Stevens, Blackmun, and White joined in the majority opinion. Justice Brennan wrote the majority opinion for the Court, stating in part:

> We hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[108]

Discussion

The issue of censorship is not yet resolved. The 5 -4 vote in this case informs educators that the judiciary has had significant trouble in establishing a legal precedent on which school officials may depend. Chief Justice Burger, with whom Justices Powell,

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[107] Ibid.

[108] Ibid.

Rehnquist, and O'Connor joined, wrote the dissenting opinion in this case. He stated that "the federal courts will be the judge of whether the motivation for book removal was 'valid' or reasonable."[109] Chief Justice Burger insisted that school boards, not federal judges, should make decisions concerning library book selection.[110]

Summary

The primary Amendments which affect students' rights are the First, Fourth, and Fourteenth Amendments of the United States Constitution. The First Amendment assures the student the right to free speech; the right to religious practice; and the right to receive information and ideas. The Fourth Amendment assures that students will be protected from illegal searches and seizures. Finally, the Fourteenth Amendment, protects the right to due process.

These five categories of student's rights are discussed accordingly: due process, free speech, religious freedom, protection from illegal searches and seizures, and receiving information and ideas. The individual

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[109]Ibid.

[110]Ibid.

cases which relate to the Due Process Clause (Amendment XIV) are Goss v. Lopez, Wood v. Strickland, Carey v. Piphus, and Ingraham v. Wright. The case which reflects the concept of Free Speech (Amendment I) is Bethel School District v. Fraser. Cases pertinent to the right to religious freedom are: Lemon v. Kurtzman (1971), Lemon v. Kurtzman (1973), P.E.A.R.L. v. Nyquist, Levitt v. P.E.A.R.L., Meek v. Pittenger, Wolman v. Walter, P.E.A.R.L. v. Regan, Mueller v. Allen, Grand Rapids School District v. Ball, Aguilar v. Felton, and Wallace v. Jeffree. In the case of New Jersey v. T.L.O., the right to be protected from illegal searches and seizures is elucidated according to Amendment IV. Finally, the right to receive information and ideas (Amendment I) is exemplified with the following cases: Minarcini v. strongsville City School District, and Board of Education, Island Tree Union Free School District No. 26 v. Pico.

From 1969 until 1986 during the administration of the Burger Court, many landmark decisions were made which have affected the legal rights of students. An analysis of the Burger decisions indicates: (1) that the Court stands staunchly behind a students' right to due process, (2) that the Court will place limits on a

students' right to free speech, (3) that the wall between church and state is formidable, (4) that the Court recognizes the schools' need to conduct student searches without the legality of criminal law, (5) that the Court recognizes a students' right to receive information and ideas. In sum, the Burger Court is sensitive to the constitutional rights of students, but also sensitive to the need for school administrators to maintain control over their schools.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Since 1896, when the United States Supreme Court decided the case of Plessy v. Ferguson, the issue of the constitutional rights of students has been a continuing concern of legal scholars, educational administrators, and the general public. Based on research presented in this study, it is apparent that the constitutional rights of students is a continuing concern.

Constitutional issues are brought to the attention of the courts by a variety of individuals and organizations including: students, parents, teachers, librarians, principals, superintendents, the American Civil Liberties Union, and school boards. All constitutional questions may not be settled to the satisfaction of the complainant, the community, or the school board. When the appeals process of the school board is exhausted, resolution may require litigation.

The question of constitutional rights may involve issues such as the right to due process, the right to free speech, the right to religious freedom, the right to be protected from illegal searches and seizures, and the right to receive information and ideas. In order to make sound educational and legal decisions, school

officials should have access to appropriate information concerning both the educational and legal issues related to these constitutional questions. The comprehensive summaries of potentially litigious educational issues provided by this research may assist school officials in making sound educational decisions concerning a constitutional question.

Summary

The introductory material in Chapter One identifies the historical fact that the question of the constitutional rights of students began in 1898. However, public schools are involved in more litigation concerning the constitutional rights of students since 1967 than ever before in the history of American public education. Parents' dissatisfaction with the way schools handle disciplinary matters concerning their children is central to the question of a students' constitutional rights. Students' constitutional rights have not emerged from well-organized groups, but from individual cases involving only a few students at a time.

As a guide to the educational and legal research, several questions are formulated and listed in Chapter One of this study. While the review of the literature provides answers to some of these questions, most of

the answers are contained in Chapters Three and Four. The responses to these questions comprise the major portion of legal guidelines that school administrators and other educational decision makers can refer to when making decisions related to the constitutional rights of public school students.

The first question in Chapter One is: What major educational issues concerning the violation of constitutional rights of public school students have been adjudicated during the Burger years, 1969-1986? The major educational issues are:

A. the conflict between the claim by educators that schools operate in loco parentis and the claim by students and parents that students are entitled to due process.

B. the conflict between students and school administrators concerning the right to free speech.

C. the conflict between the separation of church and state.

D. the conflict between students and school administrators concerning the students' right to privacy as opposed to the schools' right to maintain order.

E. the conflict between the "indoctrination" theory of education, fostering the transmission of traditional values and community mores, as opposed to the contemporary educational view of the school as a marketplace of ideas.

The second question in Chapter One is: Which of these issues are likely to result in further litigation in the courts? The Burger Court appears to have conclusively established that students are entitled to the right to minimum due process in every disciplinary action which results in suspension or expulsion. Additionally, the Burger Court closed the doors on the question of free speech and the question of search and seizure when it ruled in two cases that the constitutional rights of students are not necessarily coextensive with those of adults. However, the conflict between church and state and the question of the school as a marketplace of ideas are still open to further litigation. Several of the Burger Court decisions in these two areas were 5-4 decisions. As a result, future courts will have an opportunity to rule on these issues.

The third question in Chapter One is: What are the acceptable criteria for maintaining order in the public

schools, based on the established legal precedents? A review of landmark Supreme Court decisions rendered between 1969 and 1986 provides school administrators with specific guidelines for maintaining order in their schools. Schools may apply sanctions against a student in almost any disciplinary case if the student has been given the right of due process. School boards and school administrators do not have immunity from liability, other than "good faith immunity," if they violate the constitutional rights of students. School administrators do not have to tolerate offensive language from students. Also, school administrators are not held to the same standard as a police officer when conducting a search of a student. A school official must only be able to confirm reasonable suspicion to justify a search of a student.

The fourth question in Chapter One is: Can any specific trends be determined from the analysis of the court cases rendered by the Burger Court from 1969-1986? An analysis of selected Supreme Court decisions rendered by the Burger Court indicates that no significant shift of premises is easily perceptible even though the rights of students are ruled not to be co-extensive with those of adults. Many of the Burger

Court's decisions are 5-4 decisions and are open still to further interpretation.

CONCLUSIONS

Based on an analysis of the cases which came before the Burger Court for interpretation, the following general conclusions can be made concerning the constitutional rights of students:

(1) Generally, the Court favored the authority of school administrators to maintain control over the public schools in the United States.

(2) The Court often expresses reluctance to become entangled in the daily school operation in which school boards, and school administrators are vested with authority.

(3) The Court will become involved if a student is denied his constitutional right to due process.

(4) In the area of students' rights, the Tinker case remains the staunch precedent on which many major educational issues are resolved.

(5) The Burger Court is committed to the concept of "separation of church and state."

(6) The tripart test developed by the Court in 1971 remains the Court's primary judicial First Amendment religious establishment standard.

(7) The 1983 Mueller decision results in the emergence of a conflicting judicial philosophy from the Burger Court. This decision, in effect, reverses more than a decade of decisions concerning tax credits, parental reimbursements, and parental tax deductions.

(8) The Burger Court makes it clear that public school students are not entitled to the same constitutional considerations as adults in the matter of search and seizure. In New Jersey v. T.L.O., the Burger Court maintains that a less exacting "reasonable suspicion" standard is more applicable in the school setting.

(9) The Burger Court set the standard for removing books from school libraries in the 1982 Pico case. In this case, the Court noted that the First Amendment limits a board's discretion to remove books from school libraries.

(10) The Burger Court leaves the American judicial scene with two conflicting judicial philosophies. One is a philosophy which gives school administrators great leeway in administering the nation's public schools; the other is a philosophy that recognizes the basic right of students to the protection of the United States Constitution.

Practical Legal Guidelines

If a school board or individual school administrator becomes involved in a constitutional controversy, a conscientious attempt should be made to resolve the problem through school board policy and action. If such procedure is unsuccessful, a high probability exists that litigation will be initiated either by an individual student, a group of students, teachers, parents, or concerned citizens. Courts will not usually accept cases unless local appeal procedures are exhausted.

If a complainant can establish that the school board and/or administrators arbitrarily deprived him of a constitutional right, he may be able to receive financial remuneration under the Civil Rights Act of 1871 (G.S. 1983).

No school board policy or guidelines will guarantee in perpetuity the absence of litigation by individuals or groups who maintain that their rights have been violated. However, school boards and school administrators can reduce the probability of having school practices litigated by formulating, implementing, and explicitly following a set of guidelines governing the administration of their individual schools based on established legal precedent. It is, however,

the recommendation of this writer that every school administrator and school board member obtain a sufficient amount of liability insurance coverage in order to function in an atmosphere that is free of the fear of litigation.

Every school should have available to its students and the parents of its students a comprehensive student handbook outlining possible sanctions for specific disciplinary offenses. Students should always be given an opportunity to state their side of the story prior to exclusion from school for any reason. These two procedures will guarantee substantial and procedural due process to the student. School administrators and teachers should not be afraid to maintain control of their classrooms and schools, but they should take steps to insure students of their constitutional rights.

In addition, every school district should also adopt a set of written guidelines to govern the administration of their curriculum and media materials. The school board should be prepared to handle complaints from citizens groups by adopting a set of guidelines concerning selection and withdrawal of school library and instructional materials based on established legal precedent.

School districts should adopt written policies concerning student searches. School administrators should be aware that random searches and strip searches violate the constitutional rights of students and often lead to litigation and financial liability. Individual searches of students and their possessions are allowable if the search is based on reasonable suspicion as outlined by the Court.

Students are guaranteed the right to free speech so long as the exercise thereof does not substantially and materially disrupt the school. Students should not have disciplinary sanctions levied against them for expressing an unpopular political opinion. However, the right to free speech does not allow students to offend of fellow students and teachers with obscene language under the guise of free speech.

In recent years, school boards, under pressure from outside groups, have adopted a variety of policies which have been interpreted by the Court to advance religion and entangle church and state. School boards should educate themselves in the law which governs such policies. Board members should be made aware that such policies have been consistently struck down as unconstitutional.

Recommendations for Further Study

Numerous issues came before the Burger Court besides those discussed in this dissertation. Future study should include an analysis of the constitutional rights of handicapped students. The Education For All Handicapped Children Act of 1975 and the Rehabilitation Act of 1973 could serve as the basis of such a study. Issues that could be addressed include: state and local responsibilities under the EAHCA, mainstreaming, related services, financial liability, payment of expenses, length of school year, and identification and evaluation of the handicapped.

BIBLIOGRAPHY

Abraham, Henry J., Justices and Presidents. New York, New York: The Oxford Press, 1974.

Alexander, Karen, Corns, Ray, and McCain, Walter, Public School Law: Cases and Materials. St. Paul, Minnesota: West Publishing Company, 1969.

Baker, Robert T., Bolmeier, E.C., and Hatzel, Walter L., School in the Legal Structure. Cincinnati, Ohio: The W.H. Anderson Company, 1972.

Baker, Robert T., Bolmeier, E.C., and Hatzel, Walter L., Students' Legal Rights and Responsibilities. Cincinnati, Ohio: The W.H. Anderson Company, 1973.

Black's Law Dictionary. St. Paul, Minnesota: West Publishing Co., 1979.

Blasi, Vincent, The Burger Court: The Counter Revolution That Wasn't. New Haven, Connecticut: Yale University Press, 1983.

Bolmeier, E. C., Landmark Supreme Court Decisions on Public School Issues. Charlottesville, Virginia: The Michie Company, 1973.

Bolmeier, E.C., Legality of Student Disciplinary Practices. Charlottesville, Virginia: The Michie Company, 1976.

Bolmeier, E.C., School in the Legal Structure. Cincinnatti, Ohio: The W.H. Anderson Company, 1973.

Bradley, Julia Turnquist, "Censoring the School Library: Do Students Have the Right to Read?" The Connecticut Law Review, 1978.

Bryson, Joseph, "Current Trends in Education Law", Sports and the Courts: Physical Education and Sports Law Quarterly, June 6-10, 1983.

Bryson, Joseph, "The Supreme Court and Social Change." from a speech delivered at the Guilford College School Law Conference, June 20, 1984.

Buckner, Kermit S., An Analysis of the Impact of Chief Justice Warren Burger on Supreme Court Decisions Affecting Public Education, (Unpublished Ed.D. dissertation, University of North Carolina, Greensboro, N.C., 1980).

"Burger Resigns as Chief Justice; Rehnquist Elevated," Facts on File: World News Digest with Index, Vol. 46, No. 2378, June 20, 1986.

Cremin, Lawrence A., The Transformation of the School. New York, New York: Vintage Books, 1964.

Cressman, George R., and Benda, Harold W., Public Education in America. New York, New York: Appleton-Century-Crofts, 1966.

Cushman, Robert F., Cases in Civil Liberties. New York, New York: Appleton-Century-Croft, 1968.

Deacon, George Robert, The Burger Court and the Public Schools. (Unpublished Ed.D. dissertation, University of North Carolina, Greensboro, N.C., 1978)

Deskbook Encyclopedia of American School Law, Rosemont, Minnesota: Data Research, Inc., 1986.

Detty, Elizabeth, and Bryson, Joseph, Censorship of Public School Library and Instructional Material. Charlottesville, Virginia: The Michie Company, 1982.

Flygare, Thomas J., Phi Delta Kappan, "Is Tinker Dead?" October, 1986.

First Amendment to the United States Constitution.

Fourteenth Amendment to the United States Constitution.

Fourth Amendment to the United States Constitution.

Graebner, Norman A., Fite, Gilbert C., and White, Philip W., A History of the United States.New York, New York: McGraw Hill Book Company, 1970.

Harrell, Mary Ann, and Anderson, Burnett, Equal Justice Under the Law. Washington, D.C: The National Geographic Society Press, 1986.

Hogan, John C., The Schools, the Courts, and the Public Interests. Lexington, Massachusetts: Lexington Books, 1974.

Hudgins, Jr., H.C., and Vacca, Richard S., Law and Education: Contempory Issues and Court Decisions. Charlottesville, Virginia: The Michie Company, 1985.

Jones, Thomas N., and Semler, Darel P., School Law Update, 1985, "Who Runs the Schools: Judges or Educators?". Topeka, Kansas, National Organization on Legal Problems of Education, 1985.

Justice, William W., Phi Delta Kappan, "Teaching the Bill of Rights." October, 1986.

Kemerer, Frank R., and Kenneth L. Deutsch, Constitutional Rights and Student Life, St. Paul, Minnesota: West Publishing Company, 1979.

Kerlinger, Fred N., Liberalism and Conservatism: The Nature and Structure of Social Attitudes. Hillsdale, New Jersey: Lawrence Erlbaum Associates, 1984.

Laudicina, Robert A., and Joseph L. Tramutola, A Legal Overview of the New Student. Springfield, Illinois: Charles C. Thomas Publisher, 1976.

Morrison, Samuel E., The Growth of the American Republic. New York, New York: Oxford Press, 1969.

Nolte, Chester M.,How To Survive in Teaching: The Legal Dimension, Chicago, Illinois, Teach 'Em, Inc., 1978.

Phay, Robert. E., "Individual Liability of School Board Members and School Administrators," School Law Bulletin, No. 4, Oct. 1973.

"Rehnquist and Scalia Confirmed by Senate," School Law News, Vol. 14, No.20, Oct. 2, 1986.

Reutter, Jr., E. Edmund, The Supreme Court's Impact on Public Education. Phi Delta Kappa and National Organization on Legal Problems in Education, 1982.

Swartz, Richard, "Potential Liability of Principals for Violations of Legal Rights:" (Unpublished legal brief of the Raleigh law firm of Tharrington, Smith, and Hargrove).

The Civil Rights Act of 1871.

The Federalist. New York, New York: Modern Library, 1937.

Trogden, E. Wayne, The Civil Rights Law of 1871 and Its Effect on Teacher Dismissal: (Unpublished Ed.D. dissertation, University of North Carolina, Greensboro, N.C., 1980)

"U.S. Supreme Court Reviews Student Freedom of Speech," A Legal Memorandum, Sept., 1986.

Wilds, Elmer H., and Lottich, Kenneth V., The Foundations of Modern Education, New York, New York: Holt, Rhinehart, and Winston, Inc., 1961.

CASES

Abington School District v. Schempp (Pa.), 374 U.S. 203, 83 S. Ct. 1560 (1963).

Abrams v. United States, 250 U.S. 616, 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919).

Aguilar v. Felton, 105 S. Ct. 3232 (1985).

Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159 (1986).

Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982).

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d. 252 (1978).

Civil Rights Cases, 109 U.S. 3 (1883).

Cochran v. Louisiana State Board of Education, 281 U.S. 370, 50 S. Ct. 335, 74 L. Ed. 1157 (1930).

Cohen v. California, 403 U.S. 15 (1971).

Committee for Pub. Educ. and Religious Liberty v. Nyquist, (P.E.A.R.L.), 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973).

Committee v. Regan, 444 U.S. 646 (1980).

Dawson v. Hillsborough County, Fla. School Board, 322 F. Supp. 286 (Fla. 1971).

DiCenso v. Earley, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d. 745 (1971).

Domico v. Rapides Parish School Board, 675 F. 2d 100 (5th Cir.) 1982.

Engel v. Vitale, (N.Y.), 370 U.S. 421, 82 S. Ct. 1261 (1962).

Everson v. Board of Education (N.J.), 330 U.S. 1, 67 S. Ct. 504 (1947).

Gomez v. Toledo, 446 U.S. 635 (1980).

Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

Grand Rapids School District v. Ball, 105 S. Ct. 3216 (1985).

Healey v. James, 408 U.S. 169, 189 (1972).

Hendrick Hudson Board of Education v. Rowley, 48 U.S. 176 (1982).

Horwitz v. University of Missouri, 435 U.S. 78, (1978).

Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

Karr v. Schmidt, 460 F. 2d 609 (5th Cir.), cert. denied, 409 U.S. 989 (1982).

Keyishian v. Board of Regents, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

Lanbert v. Marushi, 322 F. Supp. 326 (W. Va. 1971).

Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745, 404 U.S. 876 (1971).

Levitt v. P.E.A.R.L., 413 U.S. 472, 93 S. Ct. 2814, 37 L. Ed. 2d 736 (1973).

McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461 (1948).

McLaurin v. Oklahoma State Regents, 339 U.S. 637, 70 S. Ct. 139, 94 L. Ed. 1149 (1950).

Maher v. Gagner, 448 U.S. 122, 100 S. Ct. 2570 (1980).

Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502 (1980).

Meek v. Pittenger, 421 U.S. 602 (1975).

Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625 (1923).

Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

Minarcini v. Strongsville City School District, 384 F. Supp. 698 (N.D. Ohio 1974, aff'd in part, rev'd in part, 541 F. 2d 577 (6th Cir. 1976).

Minersville School District v. Gobitis (Pa.), 310 U. S. 586, 60 S. Ct. 1010 (1940).

Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018 (1978).

Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473 (1961).

Mueller v. Allen, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983).

New Jersey v. T.L.O., 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

Owen v. City of Independence, Mo., 445 U.S. 622, 100 S. Ct. 1398 (1980).

Pierce v. Society of Sisters (Ore.), 268 U.S. 510, 45 S. Ct. 571 (1925).

Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

Plyler v. Doe, 458 U.S. 1131, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).

Pound v. Holladay, 322 F. Supp. 1000 (Miss., 1971).

Sloan v. Lemon, 413 U.S. 825, 93 S. Ct. 2982, 37 L. Ed. 2d 151 (1973).

Sweatt v. Painter, 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 115 (1950).

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

Trachtman v. Anker, Supreme Court review denied, 435 U.S. 925 (1978).

Turley v. Adel Community School District, 322 F. Supp. 402 (Iowa, 1971).

Wallace v. Jeffree, 105 S. Ct. 2479 (1985).

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943).

Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

Wolman v. Walter, 433 U.S. 229, 97 S. Ct. 2593, 53 L. Ed. 2d 714 (1977).

Wood v. Strickland. 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975).

Zorach v. Clauson, 343 U.S. 306, 72 S. Ct. 679 (1952).